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OF THE  
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WASHINGTON, D.C. 20544

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**To:** The Honorable David F. Levi, Chair  
Standing Committee on Rules of Practice and Procedure

**From:** The Honorable Susan C. Bucklew  
Advisory Committee on Federal Rules of Criminal Procedure

**Subject:** Report of the Advisory Committee on Criminal Rules

**Date:** December 8, 2005

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## **I. Introduction**

The Advisory Committee on the Federal Rules of Criminal Procedure met on October 24-25 in Santa Rosa, California, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are an attachment to this Report.

At that meeting, the Advisory Committee approved a package of proposed amendments to Rules 1, 12.1, 17, 18, 32, as well as new Rule 43.1, which implement the Crime Victims Rights Act. Part II of this report summarizes the Committee's consideration of these rules, which it recommends be published for public comment. Part III of this report briefly summarizes two information items, the Committee's continuing work on draft amendments to Rules 16 and 29.

## **II. Action Items—Recommendations to Publish Amendments to the Rules**

The following amendments are part of a package of proposals to implement the Crime Victims Rights Act (CVRA), codified as 18 U.S.C. § 3771. Although the Advisory Committee had earlier proposed an amendment to Rule 32 to enhance victims' rights, the enactment of the CVRA prompted the Committee to withdraw its earlier proposal and develop a more comprehensive package of rules.

The proposed amendments reflect two basic concerns by the committee. First, the CVRA reflects a careful Congressional balance between the rights of defendants, the discretion afforded the prosecution, and the new rights afforded to victims. Given that careful balance, the Committee sought to incorporate, but not go beyond, the rights created by the statute. For the same reason, the Committee adopted the statutory language whenever possible. Second the committee believed it would be easier for victims and their advocates (as well as judges, prosecutors and defense counsel) to identify the new provisions regarding victims if they were placed in a single rule. Therefore where possible the committee placed many of the new provisions in a single rule (new rule 43.1) rather than scattering them throughout the rules.

The proposed amendments implementing the CVRA are attached to this report as Appendix A. The Advisory Committee recommends that these rules be published for public comment.

**1. ACTION ITEM—Rule 1. Scope; Definitions; Proposed Amendment Defining “Victim”**

This amendment incorporates the definition of the term “crime victim” found in the Crime Victims Rights Act, codified as 18 U.S.C. § 3771(e). The statutory definition, which is incorporated by reference, provides that a victim is “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia,” and also specifies the legal representatives who may act on behalf of victims who are under the age of 18, incompetent, or deceased. Finally, since the Act provides (18 U.S.C. § 3771(d)(1)), that “[a] person accused of the crime may not obtain any form of relief under this chapter,” the final sentence of the proposed rule makes it clear that a person accused of an offense is not a “victim” for purposes of the Rules of Criminal Procedure. Although it considered restating the statutory definition in the text of the rule, the Advisory Committee felt that it would be preferable to follow the precedent of subdivisions (b)(3), (5), (7), (8), and (10), which incorporate various statutory definitions by reference. With this format, no amendment to the Criminal Rules will be required if Congress amends the statutory definition of the term victim.

*Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 1(b)(11) be published for public comment.*

**2. ACTION ITEM—Rule 12.1. Notice of Alibi Defense; Proposed Amendment Regarding Victim’s Address and Telephone Number.**

This amendment implements the victims’ rights under the Crime Victims Rights Act to be reasonably protected from the accused, and to be treated with respect for the victim’s dignity and privacy. See 18 U.S.C. § 3771(a)(1) & (8). The amended rule provides that a victim’s address and

telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

*Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12.1 be published for public comment.*

### **3. ACTION ITEM—Rule 17. Subpoena; Proposed Amendment Regarding Personal or Confidential Information About Victim.**

This amendment implements the provision in the Crime Victims Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their “dignity and privacy.” The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the existence of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The amendment also provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive. The amendment seeks to protect the interests of the victim without unfair prejudice to the defense. It permits the defense to seek judicial approval of a subpoena ex parte, because requiring the defendant to make and support the request in an adversarial setting may force premature disclosure of defense strategy to the government.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

*Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 17 be published for public comment.*

**4. ACTION ITEM—Rule 18. Place of Trial; Proposed Amendment Requiring Court to Consider Convenience of Victims.**

This amendment requires the court to consider the convenience of victims – as well as the convenience of the defendant and witnesses – in setting the place for trial within the district. It is intended to implement the victim’s “right to be treated with fairness” under the Crime Victims Rights Act, codified at 18 U.S.C. § 3771(8). If the convenience of non-party witnesses is to be considered, the convenience of victims who will not testify should also be considered.

*Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 18 be published for public comment.*

**5. ACTION ITEM—Rule 32. Sentencing and Judgment; Proposed Amendment Deleting Definition of Victim, Amending Scope of Presentence Investigation and Report, and Providing for Victim’s Opportunity to Be Heard at Sentencing.**

Several amendments to Rule 32 are proposed to implement various aspects of the Crime Victims Rights Act.

First, Rule 32(a) is amended by deleting the definitions of “victim” and “[c]rime of violence or sexual abuse.” These definitions were included in Rule 32 because the rule currently provides that victims of these crimes may be present and speak at sentencing. These provisions have been superseded by the CVRA. As noted above, a companion amendment to Rule 1 incorporates the CVRA’s broader definition of victim. The amendment would delete all of the text in Rule 32(a). The Committee proposes reserving Rule 32(a), rather than renumbering all of the subdivisions of this complex rule.

Second, the Committee proposes amending Rule 32(c)(1) to make it clear that the presentence investigation should include information pertinent to restitution whenever the law permits the court to order restitution, not merely when it requires restitution. This amendment implements the victim’s statutory right under the Crime Victims Rights Act to “full and timely restitution as provided by law.” *See* 18 U.S.C. § 3771(a)(6).

Third, the Committee recommends amending Rule 32(d)(2)(B). The amendment employs the term “victim,” which is now defined in Rule 1, and also makes it clear that victim impact information should be treated in the same way as other information contained in the presentence report. It deletes language requiring victim impact information to be “verified” and “stated in a

nonargumentative style” because that language does not appear in the other subdivisions of Rule 32(d)(2).

Fourth, amended Rule 32(i)(4)(B) deletes language which refers only to victims of crimes of violence or sexual abuse. As noted above, the CVRA defines the term “crime victim” without limiting it to certain crimes, and provides that crime victims, so defined, have a right to be reasonably heard at all public court proceedings regarding sentencing. In light of the proposed amendment to Rule 1(b), incorporating the CVRA’s definition of victim, the language in this subdivision is no longer needed.

Subdivision (i)(4)(B) has also been amended to incorporate the statutory language of the CVRA, which provides that victims have the right “to be reasonably heard” in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4).

*Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 32 be published for public comment.*

**6. ACTION ITEM—Rule 43.1. Victim’s Rights. Proposed New Rule Providing for Notice to Victims, Attendance at Proceedings, the Victim’s Right to Be Heard; Enforcement of Victim’s Rights; and Limitations on Relief.**

This rule implements several provisions of the Crime Victims Rights Act, codified as 18 U.S.C. § 3771, in judicial proceedings in the federal courts. It contains provisions regarding the notice to victims regarding judicial proceedings, the victim’s attendance at these proceedings, and the victim’s right to be heard, as well as provisions governing the enforcement of victims’ rights, including who may assert these rights and where they may be asserted. The proposed rule also incorporates the statutory provisions limiting relief.

Subdivision (a)(1) implements 18 U.S.C. § 3771(a)(2), which provides that a victim has a “right to reasonable, accurate, and timely notice of any public court proceedings. . . .” Although the CVRA does not explicitly state who should provide this notice, 18 U.S.C. § 3771(c)(1) requires all officers and employees of federal agencies engaged in the detection, investigation, and prosecution of crime to “make their best efforts” to see that crime victims are accorded the rights in subdivision (a). The enactment of these provisions supplemented an existing statutory requirement that federal departments and agencies engaged in the detection, investigation, and prosecution of crime identify victims at the earliest possible time and inform those victims of various rights, including the right to notice of the status of the investigation, the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial proceedings. *See* 42 U.S.C. § 10607(b) & (c)(3)(A)-(D).

The proposed amendment requires “the government” to use its best efforts to notify victims of public court proceedings. The Committee was advised that the Department of Justice and the Administrative Office of the U.S. Courts are working together to design procedures for notification.

Subdivision (a)(2) implements 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim’s testimony would be materially altered by attending and hearing other testimony at the proceeding, and 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim. It closely tracks the statutory language.

Subdivision (a)(3) implements 18 U.S.C. § 3771(a)(4), which provides that a victim has the “right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing....” It tracks the statutory language.

Subdivision (b) incorporates the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). The statute provides that the victim and the attorney for the government may assert the rights provided for under the Crime Victims Rights Act, and that those rights are to be asserted in the district where the defendant is being prosecuted. Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

Finally, the statute and the implementing rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771 (d)(3), and – in the case of a plea – the defendant did not plead guilty to the highest offense charged.

*Recommendation–The Advisory Committee recommends that proposed Rule 43.1 be published for public comment.*

### **III. Information Items**

At its October 2005 meeting, the committee discussed at length two proposed rules that it anticipates will be brought to the Standing Committee’s meeting in June 2006.

- 1. Information Item–Consideration of an Amendment to Rule 29, Concerning Deferral of Rulings on Motions for Judgment of Acquittal.**

The question of an amendment that would permit the Department of Justice to appeal erroneous judgments of acquittal has been under consideration since 2003. Although the Advisory Committee at one point concluded that there had not been a sufficient showing of the need for an amendment, the Department of Justice developed additional information supporting an amendment, which it presented to the Standing Committee in January 2005. The Standing Committee then referred the matter back to the Advisory Committee. Working from a draft prepared by a Subcommittee, the Advisory Committee devoted a substantial portion of its October 2005 meeting to discussion of the wording of a proposed amendment. After making several changes, the Advisory Committee referred the draft back to the Subcommittee for additional work on the waiver provisions, which it wished to simplify. The Advisory Committee requested that the Subcommittee present a final draft at the Committee's April 2006 meeting, so that a proposed rule may be presented to the Standing Committee in June of 2006. The Subcommittee has met by conference call, continuing to refine the draft amendment and accompanying committee note.

The Subcommittee's current draft is attached as an information item.

**2. Information Item—Consideration of an Amendment to Rule 16, Concerning Disclosure of Exculpatory and Impeachment Information.**

This amendment also has a lengthy history. It has been under consideration since 2003, when the Advisory Committee received a proposal from the American College of Trial Lawyers to require the government to disclose exculpatory and impeaching evidence 14 days before trial. Two Subcommittees have considered the issue. The Department of Justice has opposed the amendment. At its April 2005 meeting, the Committee voted in favor of amending Rule 16, but referred the matter back to the subcommittee to address several of the Justice Department's concerns. At its October 2005 meeting, the Committee devoted a substantial part of its agenda to discussion of the most recent Subcommittee draft, and it made several changes in the language of the proposed rule. It then referred the proposal back to the Subcommittee for final refinement of the language, with the intention of taking final action on the proposal at its meeting in April 2006. That timetable would permit the Advisory Committee to bring a proposed rule to the Standing Committee at its June 2006 meeting.







**APPENDIX A**

**DRAFT AMENDMENTS**

**TO IMPLEMENT**

**THE CRIME VICTIMS' RIGHTS**

**ACT**





victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

The Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(1), also provides that "[a] person accused of the crime may not obtain any form of relief under this chapter." Accordingly, the final sentence of the rule makes it clear that a person accused of an offense is not a "victim" for purposes of the Rules of Criminal Procedure. This provision would apply, for example, if the accused in a fraud case claims that he too was misled, and should also be regarded as a victim of the fraudulent scheme.

**Rule 12.1. Notice of an Alibi Defense.**

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\* \* \* \* \*

2

**(b) Disclosing Government Witnesses.**

3

**(1) Disclosure.**

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**(A) *In general.*** If the defendant serves a Rule

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12.1(a)(2) notice, an attorney for the

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government must disclose in writing to

7

the defendant or the defendant's attorney:



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25 alleged offense and the defendant  
26 establishes a need for the victim's address  
27 and telephone number, the court may:

28 (i) order the government to provide the  
29 information in writing to the defendant or  
30 the defendant's attorney; or

31 (ii) fashion a reasonable procedure that allows  
32 the preparation of the defense and also  
33 protects the victim's interests.

34 (2) *Time to Disclose.* Unless the court directs  
35 otherwise, an attorney for the government must  
36 give its Rule 12.1(b)(1) disclosure within 10 days  
37 after the defendant serves notice of an intended  
38 alibi defense under Rule 12.1(a)(2), but no later  
39 than 10 days before trial.

40 (c) **Continuing Duty to Disclose.**





**COMMITTEE NOTE**

**Subdivisions (b) and (c).** The amendment implements the victims' rights under the Crime Victims' Rights Act to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests. For example, the court might authorize the defendant and his counsel to meet with the victim in a manner and place designated by the court, rather than giving the defendant the name and address of a victim who fears retaliation if the defendant learns where he or she lives.

In the case of victims who will testify concerning an alibi claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (c).

**Rule 17. Subpoena**

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**(c) Producing Documents and Objects**

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\* \* \* \* \*



concerns because a third party may not assert the victim's interests, and the victim may be unaware of the existence of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The amendment also provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

The amendment seeks to protect the interests of the victim without unfair prejudice to the defense. It permits the defense to seek judicial approval of a subpoena *ex parte*, because requiring the defendant to make and support the request in an adversarial setting may force premature disclosure of defense strategy to the government. The court may approve or reject the subpoena *ex parte*, or it may provide notice to the victim, who may then move to quash. In exercising its discretion, the court should consider the relevance of the subpoenaed material to the defense, whether giving notice would prejudice the defense, and the degree to which the subpoenaed material implicates the privacy and dignity interests of the victim.

#### **Rule 18. Place of Prosecution and Trial**

- 1 Unless a statute or these rules permit otherwise, the
- 2 government must prosecute an offense in a district where the

3 offense was committed. The court must set the place of trial  
4 within the district with due regard for the convenience of the  
5 defendant, any victim, and the witnesses, and the prompt  
6 administration of justice.

### COMMITTEE NOTE

By requiring the court to consider the convenience of victims – as well as the defendant and witnesses – in setting the place for trial within the district, this amendment implements the victim’s “right to be treated with fairness” under the Crime Victims’ Rights Act, codified at 18 U.S.C. § 3771(8). If the convenience of non-party witnesses is to be considered, the convenience of victims who will not testify should also be considered.

#### Rule 32. Sentencing and Judgment

1 (a) ~~[Reserved.] Definitions.~~ The following definitions  
2 apply under this rule:  
3 (1) ~~“Crime of violence or sexual abuse” means:~~  
4 (A) ~~a crime that involves the use, attempted~~  
5 ~~use, or threatened use of physical force~~  
6 ~~against another’s person or property, or~~

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7 (B) ~~a crime under 18 U.S.C. §§ 2241–2248 or~~  
8 ~~§§ 2251–2257.~~

9 (2) ~~“Victim” means an individual against whom the~~  
10 ~~defendant committed an offense for which the~~  
11 ~~court will impose sentence.~~

12 \* \* \* \* \*

13 **(c) Presentence Investigation.**

14 **(1) *Required Investigation.***

15 \* \* \* \* \*

16 (B) *Restitution.* If the law **requires** permits  
17 restitution, the probation officer must  
18 conduct an investigation and submit a  
19 report that contains sufficient information  
20 for the court to order restitution.

21 \* \* \* \* \*

22 **(d) Presentence Report.**

23 \* \* \* \* \*

24           **(2) *Additional Information.*** The presentence report

25                           must also contain the following information:

26           (A) the defendant's history and characteristics,  
27                           including:

28                           (i) any prior criminal record;

29                           (ii) the defendant's financial condition;

30                           and

31                           (iii) any circumstances affecting the  
32                           defendant's behavior that may be  
33                           helpful in imposing sentence or in  
34                           correctional treatment;

35           (B) ~~verified information, stated in a~~  
36                           ~~nonargumentative style,~~ that assesses the  
37                           any financial, social, psychological, and  
38                           medical impact on any victim individual  
39                           ~~against whom the offense has been~~  
40                           committed;

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42

**(i) Sentencing.**

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\* \* \* \* \*

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**(4) *Opportunity to Speak.***

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(A) *By a Party.* Before imposing sentence, the

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court must:

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(i) provide the defendant's attorney an

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opportunity to speak on the defendant's

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benefit;

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(ii) address the defendant personally in order

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to permit the defendant to speak or present

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any information to mitigate the sentence;

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and

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(iii) provide an attorney for the government

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an opportunity to speak equivalent to

56

that of the defendant's attorney.

57 (B) *By a Victim.* Before imposing sentence, the  
58 court must address any victim of a the crime  
59 ~~of violence or sexual abuse~~ who is present at  
60 sentencing and must permit the victim to be  
61 reasonably heard  ~~speak or submit any~~  
62  ~~information about the sentence. Whether or~~  
63  ~~not the victim is present, a victim's right to~~  
64  ~~address the court may be exercised by the~~  
65  ~~following persons if present:~~  
66 (i)  ~~a parent or legal guardian, if the victim~~  
67  ~~is younger than 18 years or is~~  
68  ~~incompetent; or~~  
69 (ii)  ~~one or more family members or relatives~~  
70  ~~the court designates, if the victim is~~  
71  ~~deceased or incapacitated.~~

72 \* \* \* \* \*



**COMMITTEE NOTE**

**Subdivision (a).** The Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(e), adopted a new definition of the term "crime victim." The new statutory definition has been incorporated in an amendment to Rule 1, which supersedes the provisions that have been deleted here.

**Subdivision (c)(1).** This amendment implements the victim's statutory right under the Crime Victims' Rights Act to "full and timely restitution as provided by law." *See* 18 U.S.C. § 3771(a)(6). Whenever the law permits restitution, the presentence investigation report should contain information permitting the court to determine whether restitution is appropriate.

**Subdivision (d)(2)(B).** This amendment implements the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771. The amendment employs the term "victim," which is now defined in Rule 1. The amendment also makes it clear that victim impact information should be treated in the same way as other information contained in the presentence report. It deletes language requiring victim impact information to be "verified" and "stated in a nonargumentative style" because that language does not appear in the other subdivisions of Rule 32(d)(2).

**Subdivision (i)(4).** The deleted language, referring only to victims of crimes of violence or sexual abuse, has been superseded by the Crime Victims' Rights Act, 18 U.S.C. § 3771(e). The act defines the term "crime victim" without limiting it to certain crimes, and provides that crime victims, so defined, have a right to be reasonably heard at all public court proceedings regarding sentencing. A companion amendment to Rule 1(b) adopts the statutory definition as the definition of the term "victim" for purposes of the Federal Rules

of Criminal Procedure, and explains who may raise the rights of a victim, so the language in this section is no longer needed.

Subdivision (i)(4) has also been amended to incorporate the statutory language of the Crime Victims’ Rights Act, which provides that victims have the right “to be reasonably heard” in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4).

**Rule 43.1. Victim’s Rights.**

1           **(a) In General.**

2                   **(1) Notice of a Proceeding.** The government must  
 3                           use its best efforts to give reasonable, accurate,  
 4                           and timely notice to the victim of any public court  
 5                           proceeding involving the crime.

6                   **(2) Attending the Proceeding.** The court must not  
 7                           exclude a victim from a public court proceeding  
 8                           involving the crime, unless the court determines  
 9                           by clear and convincing evidence that the victim’s  
 10                          testimony would be materially altered if the victim  
 11                          heard other testimony at that proceeding. The  
 12                          court must make every effort to permit the fullest

13 attendance possible by the victim and must  
14 consider reasonable alternatives to exclusion. The  
15 reasons for any exclusion must be clearly stated  
16 on the record.

17 **(3) Right to Be Heard.** The court must permit a  
18 victim to be reasonably heard at any public  
19 proceeding in the district court concerning release,  
20 plea, or sentencing involving the crime.

21 **(b) Enforcement and Limitations.** The court must  
22 decide any motion asserting a victim's rights  
23 promptly.

24 **(1) Who May Assert Rights.** The rights of a victim  
25 under these rules may be asserted by the victim or  
26 the attorney for the government.

27 **(2) Multiple Victims.** If the court finds that the  
28 number of victims makes it impracticable to  
29 accord all of the victims the rights described in

30 subdivision (a), the court must fashion a  
31 reasonable procedure to give effect to these rights  
32 that does not unduly complicate or prolong the  
33 proceedings.

34 **(3) Where Rights May Be Asserted.** The rights  
35 described in subdivision (a) must be asserted in  
36 the district in which a defendant is being  
37 prosecuted for the crime.

38 **(4) Limitations on Relief.** In no case is a failure to  
39 afford a victim any right under these rules grounds  
40 for a new trial. A victim may make a motion to  
41 re-open a plea or sentence only if:

42 **(A) the victim has asked to be heard before or**  
43 **during the proceeding at issue and the**  
44 **request was denied;**

45 **(B) the victim petitions the court of appeals for**  
46 **a writ of mandamus within 10 days; and**

47                    (C) in the case of a plea, the accused has not  
48                    pled to the highest offense charged.

#### COMMITTEE NOTE

This rule implements several provisions of the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771, in judicial proceedings in the federal courts.

**Subdivision (a)(1).** This subdivision implements 18 U.S.C. § 3771(a)(2), which provides that a victim has a “right to reasonable, accurate, and timely notice of any public court proceedings. . . .” The enactment of 18 U.S.C. § 3771(a)(2) supplemented an existing statutory requirement that all federal departments and agencies engaged in the detection, investigation, and prosecution of crime identify victims at the earliest possible time and inform those victims of various rights, including the right to notice of the status of the investigation, the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial proceedings. *See* 42 U.S.C. § 10607(b) & (c)(3)(A)-(D).

The Department of Justice and the Administrative Office of the United States Courts are working together to design procedures for notification. Eventually it may be possible to generate notices automatically, as is now done in bankruptcy proceedings.

**Subdivision (a)(2).** This subdivision implements 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim’s testimony would be materially altered by attending and hearing other testimony at the proceeding,

and 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim.

**Subdivision (a)(3).** This subdivision implements 18 U.S.C. § 3771(a)(4), which provides that a victim has the “right to be reasonably heard any public proceeding in the district court involving release, plea, [or] sentencing...”

**Subsection (b).** This subdivision incorporates the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). The statute provides that the victim and the attorney for the government may assert the rights provided for under the Crime Victims’ Rights Act, and that those rights are to be asserted in the district where the defendant is being prosecuted (or if no prosecution is underway, in the district where the crime occurred). Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

Finally, the statute and the implementing rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771 (d)(3), and — in the case of a plea — the defendant did not plead guilty to the highest offense charged.







**INFORMATION ITEM**

**SUBCOMMITTEE DRAFT**

**RULE 29**



**PROPOSED AMENDMENTS TO THE  
CRIMINAL RULES OF PROCEDURE**

**Rule 29. Motion for a Judgment of Acquittal**

1           **(a) Time for a Motion.**

2                   **(1) *Before Submission to the Jury.*** After the  
3                   government closes its evidence or after the close  
4                   of all the evidence, a defendant may move for a  
5                   judgment of acquittal on any offense. The court  
6                   may invite the motion.

7                   **(2) *After a Guilty Verdict or a Jury's Discharge.*** A  
8                   defendant may move for a judgment of acquittal,  
9                   or renew such a motion, within 7 days after a  
10                  guilty verdict or after the court discharges the jury,  
11                  whichever is later. A defendant may make the  
12                  motion even without having made it before the  
13                  court submitted the case to the jury.

14           **(b) Ruling on a Motion Made Before Verdict.** If a  
15           defendant moves for a judgment of acquittal before

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16 the jury reaches a verdict (or after the court discharges  
17 the jury before verdict), the following procedures  
18 apply:

19 **(1) *Denying Motion or Reserving Decision.*** The  
20 court may deny the motion or may reserve  
21 decision on the motion until after a verdict. If the  
22 court reserves decision, it must decide the motion  
23 on the basis of the evidence at the time the ruling  
24 was reserved. The court must set aside a guilty  
25 verdict and enter a judgment of acquittal on any  
26 offense for which the evidence is insufficient to  
27 sustain a conviction.

28 **(2) *Granting Motion; Waiver.*** The court may not  
29 grant the motion before the jury returns a verdict  
30 (or before any retrial in the case of discharge)  
31 unless:

32                   **(A)** the court informs the defendant personally  
33                   in open court and determines that the  
34                   defendant understands that:

35                   **(i)** the court can grant the motion before the  
36                   verdict only if the defendant agrees that  
37                   the government can appeal that ruling;

38                   and

39                   **(ii)** if that ruling is reversed, the defendant  
40                   could be retried; and

41                   **(B)** the defendant in open court personally  
42                   waives the right to prevent the government  
43                   from appealing a judgment of acquittal (and  
44                   retrying the defendant on the offense) for  
45                   any offense for which the court grants a  
46                   judgment of acquittal before the verdict.

47                   **(c) Ruling on a Motion Made After Verdict.** If a  
48                   defendant moves for a judgment of acquittal after the jury

49 has returned a guilty verdict, the court must set aside the  
50 verdict and enter a judgment of acquittal on any offense  
51 for which the evidence is insufficient to sustain a  
52 conviction.

#### COMMITTEE NOTE

**Subdivisions (a), (b), and (c)** The purpose of the amendment is to allow the government to seek appellate review of any judgment of acquittal. At present, the rule permits the court to grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

The amendment permits preverdict acquittals, but only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts). Following the usage in other rules, the amendment uses the terms “offense” and “offenses,” rather than count or counts.

The amended rule protects both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous judgments of acquittal, while ensuring that the court will only have to consider the motion once. Although the change has required some reorganization of the subdivisions, no substantive change is intended other than the limitation on preverdict rulings and the new waiver provision.

**Subdivision (a).** Amended Rule 29(a), which states the times at which a motion for judgment of acquittal may be made, combines provisions formerly in subdivisions (a) and (c)(1). No change is intended except that the court may not grant the motion before submission without a waiver by the defendant.

The amended rule omits the statement in Rule 29(a) that: "If the defendant moves for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so." The Committee concluded that this language was no longer necessary. It referred to a practice in some courts, no longer followed, of requiring a defendant to "reserve" the right to present a defense when making a Rule 29 motion. There is no reason to require such a reservation under the amended rule.

**Subdivision (b).** Amended Rule 29(b) sets forth the procedures for motions for a judgment of acquittal made before the jury reaches a verdict or is discharged without reaching a verdict. (There is, of course, no need to rule if a not guilty verdict is returned.) Prior to verdict, the Rule authorizes the court to deny the motion or reserve decision, but the court may not grant the motion absent a defendant's waiver of Double Jeopardy rights. See *Carlisle v. United States*, 517 U.S. 416, 420-33 (1996) (holding that trial court did not have authority to grant an untimely motion for judgment of acquittal under Rule 29).

Accordingly, if the defendant moves for a judgment of acquittal at the close of the government's evidence or the close of all the evidence, in the absence of a waiver the court has two options: it may deny the motion or proceed with trial, submit the case to the jury, and reserve its decision until after a guilty verdict is returned. As under the prior Rule, if the defendant made the motion at the close of the government's evidence, the court must grant the motion if the evidence presented in the government's case is insufficient, *see Jackson v. Virginia*, 443 U.S. 307 (1979), even if evidence in the whole trial is sufficient. If the government successfully appeals, the guilty verdict can be reinstated. This general rule requiring the court to defer its ruling applies equally to motions for judgments of acquittal made in bench trials. *Cf. United States v. Morrison*, 429 U.S. 1 (1976) (holding that Double Jeopardy does not preclude appeal from judgment of acquittal entered after guilty verdict in bench trial, because verdict can be reinstated upon remand).

Similarly, if the defendant moves for a judgment of acquittal after the jury is discharged and the government wishes to retry the case, absent a waiver the court has two options. It may deny the motion, or it may reserve decision, proceed with the retrial, submit the case to that jury, and rule on the reserved motion if there is a guilty verdict after the retrial. *See Richardson v. United States*, 468 U.S. 317, 324 (1984) ("a retrial following a 'hung jury' does not violate the Double Jeopardy Clause"). After the second trial, the court must grant the motion if the evidence presented at the first trial was insufficient when the motion was made, even if the evidence in the retrial was sufficient. This procedure permits the government to appeal, because the verdict at the second trial can be reinstated if the appellate court rules that the judgment of acquittal was erroneous.

The court may grant a Rule 29 motion for acquittal before verdict only as provided in subdivision (b)(2), the waiver provision.



Under amended Rule 29(b)(2), the court may rule on the motion for judgment of acquittal before the verdict with regard to some or all of the counts, after first advising the defendant in open court of the requirement of the Rule and the protections of the Double Jeopardy Clause, and after the defendant waives those protections on the record. Although the focus of the rule is on the waiver of the defendant's Double Jeopardy rights, the rule does not refer explicitly to Double Jeopardy. Instead, it puts the waiver in terms a lay defendant can most readily understand: the defendant's waiver allows the government to appeal a judgment of acquittal, and to retry him if that appeal is successful.

As with any constitutional right, the waiver of Double Jeopardy rights must be knowing, intelligent, and voluntary. See generally *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must be shown to have been done with awareness of its consequences."). Although there are cases holding that a defendant's action or inaction can waive Double Jeopardy, the Committee believed that it was appropriate for the Rule to require waiver both under the rule and explicitly on the record. See *United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (when consent order did not specifically waive Double Jeopardy rights, no waiver occurred); *Morgan*, 51 F.3d at 1110 (civil settlement with government did not waive Double Jeopardy defense when settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation). For a case holding that a defendant may waive his Double Jeopardy rights to allow the government to appeal, see *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986), *appeal after remand*, *United States v. Kington*, 835 F.2d 106 (5th Cir. 1988).

Before the court may accept a waiver, it must address the defendant in open court, as required by subdivision (b)(2). A general

model for this procedure is found in Rule 11(b), which provides for a plea colloquy that is intended to insure that the defendant is knowingly, voluntarily, and intelligently waiving a number of constitutional rights.

**Subdivision (c).** The amended subdivision applies to cases in which the court rules on a motion made after a guilty verdict. This was covered by subdivision (c)(2) prior to the amendment. The amended rule clarifies the applicable standard, using the same terminology as subdivision (a)(1). No change is intended.