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OF THE
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WASHINGTON, D.C. 20544

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To: Hon. Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

From: Hon. Richard C. Tallman, Chair
Advisory Committee on Federal Rules of Criminal Procedure

Subject: Report of the Advisory Committee on Criminal Rules

Date: December 12, 2007 (Revised June 16, 2008)

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure (“the Committee”) met on October 1-2, 2007, in Park City, Utah, and took action on a number of proposed amendments to the Rules of Criminal Procedure.

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This report addresses three action items; it recommends approval for publication and comment of proposed amendments to Rules 5, 12.3, and 21, relating to crime victims.

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

The three amendments recommended for publication reflect the Advisory Committee’s continuing focus on the Crime Victims’ Rights Act (CVRA), codified as 18 U.S.C. § 3771. The Committee’s initial package of CVRA amendments to Rules 1, 12.1, 17, 18, 32, 60, and 61 was approved by the Standing Committee in June 2007 and by the Judicial Conference in September 2007. As noted when the initial amendments were under consideration, the Advisory Committee has classified issues relating to crime victims as a continuing agenda item, recognizing that additional amendments might be appropriate. The Advisory Committee now proposes amendments concerning pretrial release, public order defenses, and transfer of trial.

1. ACTION ITEM—Rule 5. Initial Appearance; Proposed Amendment Requiring Consideration of Victim’s Right to be Protected from Defendant in Decision to Retain or Release.

The proposed amendment to Rule 5(d)(3) draws attention to a factor that the courts are now required to consider under both the Bail Reform Act and the Crime Victims’ Rights Act when deciding whether to release or detain a defendant. In determining whether a defendant can be released on personal recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider “the safety of any other person or the community.” See 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18 U.S.C. § 3142(g)(4) requires the court to consider “the nature and seriousness of the danger to any person in the community that would be posed by the person’s release.” Finally, the Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the “right to be reasonably protected from the accused.” Since Rule 5 now states that the court must detain or release the defendant “as provided by statute” the Committee recognized that it already incorporates these statutory requirements. The Committee concluded, however, that it would be desirable to highlight the victim’s right to reasonable protection in the text of Rule 5.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 5(d)(3) be published for public comment.

2. ACTION ITEM—Rule 12.3. Notice of Public-Authority Defense; Proposed Amendment Regarding Victim’s Address and Telephone Number.

The proposed amendment parallels the amendment to Rule 12.1 concerning alibi defenses, which has been approved by the Judicial Conference. Both are intended to implement the CVRA, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for their 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 a public authority 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.

In the case of victims who will testify concerning a public authority claim, the same procedures and standards apply to both the prosecutor’s initial disclosure and the prosecutor’s continuing duty to disclose under subdivision (b).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12.3 be published for public comment.

3. ACTION ITEM–Rule 21. Transfer for 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 parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceeding to another district for trial under Rule 21(b). The Committee recognizes that the court has substantial discretion to balance any competing interests in determining the appropriate venue. The amendment does not apply to Rule 21(a), which governs transfers for prejudice.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 21 be published for public comment.

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Attachments

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

Rule 5. Initial Appearance

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2 **(d) Procedure in a Felony Case.**

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4 **(3) *Detention or Release.*** The judge must detain or
5 release the defendant as provided by statute or
6 these rules. In making that decision, the judge
7 must consider the right of any victim to be
8 reasonably protected from the defendant.

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COMMITTEE NOTE

Subdivision (d)(3). This amendment draws attention to a factor that the courts are required to consider under both the Bail Reform Act and the Crime Victims’ Rights Act. In determining whether a defendant can be released on personal recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider “the safety of any other person or the community.” *See* 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18

*New material is underlined; matter to be omitted is lined through.

U.S.C. § 3142(g)(4), requires the court to consider “the nature and seriousness of the danger to any person in the community that would be posed by the person’s release.” In addition, the Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the “right to be reasonably protected from the accused.”

Rule 12.3. Notice of a Public-Authority Defense

1 **(a) Notice of the Defense and Disclosure of Witnesses.**

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3 **(4) *Disclosing Witnesses.***

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5 (C) *Government’s Reply.* Within 7 days after
6 receiving the defendant’s statement, an
7 attorney for the government must serve on
8 the defendant or the defendant’s attorney a
9 written statement of the name, ~~address, and~~
10 ~~telephone number~~ of each witness and the
11 address and telephone number of each
12 witness other than a victim — that the

13 government intends to rely on to oppose the
14 defendant's public-authority defense.

15 (D) Victim's Address and Telephone Number. If
16 the government intends to rely on a victim's
17 testimony to oppose the defendant's
18 public-authority defense and the defendant
19 establishes a need for the victim's address
20 and telephone number, the court may:

21 (i) order the government to provide the
22 information in writing to the defendant
23 or the defendant's attorney; or

24 (ii) fashion a reasonable procedure that
25 allows for preparing the defense and
26 also protects the victim's interests.

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28 **(b) Continuing Duty to Disclose.**

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29 **(1) In General.** Both an attorney for the
30 government and the defendant must promptly
31 disclose in writing to the other party the name
32 of any additional witness — and the address,
33 and telephone number of any additional
34 witness other than a victim — if:

35 **(~~1~~ A)** the disclosing party learns of the
36 witness before or during trial; and

37 **(~~2~~ B)** the witness should have been
38 disclosed under Rule 12.3(a)(4) if
39 the disclosing party had known of
40 the witness earlier.

41 **(2) Address and Telephone Number of an**
42 **Additional Victim-Witness.** The address and
43 telephone number of an additional victim-witness
44 must not be disclosed except as provided in Rule
45 12.3(a)(4)(D).

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COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims’ Rights Act, which states that victims have the right 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 a public-authority 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.

In the case of victims who will testify concerning a public-authority claim, the same procedures and standards apply to both the prosecutor’s initial disclosure and the prosecutor’s continuing duty to disclose under subdivision (b).

Rule 21. Transfer for Trial

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(b) For Convenience. Upon the defendant’s motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any

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6 victim, and the witnesses, and in the interest of
7 justice.

8 * * * * *

COMMITTEE NOTE

Subdivision (b). This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.