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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 (Revised August 1, 2006)

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.

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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 43.1,¹ 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.

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¹At its January 6-7, 2006, meeting, the Committee on Rules of Practice and Procedure approved renumbering proposed new Criminal Rule 43.1 as Rule 60, and renumbering present Rule 60 as Rule 61.

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 43.1² be published for public comment.

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²At its January 6-7, 2006, meeting, the Committee on Rules of Practice and Procedure approved renumbering proposed new Criminal Rule 43.1 as Rule 60, and renumbering present Rule 60 as Rule 61.

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

Rule 1. Scope; Definitions

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(b) Definitions. The following definitions apply to these

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rules:

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(11) “Victim” means a “crime victim” as defined in 18

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U.S.C. § 3771(e). A person accused of an offense

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is not a victim of that offense.

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* * * * *

COMMITTEE NOTE

Subdivision (b)(11). 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 statute also specifies the legal representatives who may act on behalf of victims who are under the age of 18, incompetent, or deceased. It provides:

. . . the term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age,

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

incompetent, incapacitated, or deceased, the legal guardians of the crime 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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(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 the

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defendant or the defendant's attorney:

8 (i) ~~(A)~~ the name, ~~address, and telephone~~
9 ~~number~~ of each witness and the
10 address and telephone number of
11 each witness (other than a victim)
12 that the government intends to rely
13 on to establish the defendant's
14 presence at the scene of the
15 alleged offense; and

16 (ii) ~~(B)~~ each government rebuttal witness
17 to the defendant's alibi defense.

18 (B) Victim's Address and Telephone Number. If
19 the government intends to rely on a victim's
20 testimony to establish the defendant's
21 presence at the scene of the alleged offense
22 and the defendant establishes a need for the

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23 victim's address and telephone number,** the

24 court may:

25 (i) order the government to provide the

26 information in writing to the defendant

27 or the defendant's attorney; or

28 (ii) fashion a reasonable procedure that

29 allows the preparation of the defense

30 and also protects the victim's interests.

31 (2) *Time to Disclose.* Unless the court directs

32 otherwise, an attorney for the government must

33 give its Rule 12.1(b)(1) disclosure within 10 days

34 after the defendant serves notice of an intended

**The advisory committee is interested in receiving comments on the question whether Rule 12.1(b)(1)(B) should provide that disclosure of the victim's address and telephone number will not be made unless the defendant establishes a need for this information, or should assume that a defendant will need this information to respond to the government's challenge to his alibi, and that disclosure should be limited only when a special need for the protection of the victim requires the court to fashion some other procedure to allow the preparation of the defense.

35 alibi defense under Rule 12.1(a)(2), but no later
36 than 10 days before trial.

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

38 (1) **In General.** Both an attorney for the government
39 and the defendant must promptly disclose in
40 writing to the other party the name; of each
41 additional witness and the address; and telephone
42 number of each additional witness — other than a
43 victim — if:

44 (A) ~~(1)~~ the disclosing party learns of the
45 witness before or during trial; and

46 (B) ~~(2)~~ the witness should have been disclosed
47 under Rule 12.1(a) or (b) if the
48 disclosing party had known of the
49 witness earlier.

50 (2) **Address and Telephone Number of an Additional**
51 **Victim Witness.** The telephone number and

52 address of an additional victim witness must not be

53 disclosed except as provided in (b)(1)(B).

54 * * * * *

COMMITTEE NOTE

Subdivisions (b) and (c). 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 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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(3) Subpoena for Personal or Confidential Information About Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may not be served on a third party without a court order, which may be granted ex parte. Before entering the order, the court may require that notice be given to the victim so that the victim has an opportunity to move to quash or modify the subpoena.

* * * * *

COMMITTEE NOTE

Subdivision (c)(3). This amendment implements 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 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 attend proceedings under the Crime Victims’ Rights Act, codified at 18 U.S.C. § 3771(b). 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 use,~~
5 ~~or threatened use of physical force against~~
6 ~~another’s person or property; or~~

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 report
19 that contains sufficient information for the
20 court to order restitution.

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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; and
30 (iii) any circumstances affecting the
31 defendant's behavior that may be

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32 helpful in imposing sentence or in
33 correctional treatment;

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

39 * * * * *

40 (i) **Sentencing.**

41 * * * * *

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

43 (A) *By a Party.* Before imposing sentence, the
44 court must:

45 (i) provide the defendant's attorney an
46 opportunity to speak on the defendant's
47 behalf;

48 (ii) address the defendant personally in
49 order to permit the defendant to speak
50 or present any information to mitigate
51 the sentence; and

52 (iii) provide an attorney for the government
53 an opportunity to speak equivalent to
54 that of the defendant's attorney.

55 (B) *By a Victim.* Before imposing sentence, the
56 court must address any victim of a the crime
57 ~~of violence or sexual abuse~~ who is present at
58 sentencing and must permit the victim to be
59 reasonably heard ~~speak or submit any~~
60 ~~information about the sentence. Whether or~~
61 ~~not the victim is present, a victim's right to~~
62 ~~address the court may be exercised by the~~
63 ~~following persons if present:~~

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64 ~~(i) a parent or legal guardian, if the victim~~
65 ~~is younger than 18 years or is~~
66 ~~incompetent, or~~
67 ~~(ii) one or more family members or~~
68 ~~relatives the court designates, if the~~
69 ~~victim is deceased or incapacitated.~~

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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 subdivision 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 60. Victim’s Rights

1 **(a) In General.**

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

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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 by
9 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 on
16 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.**

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- 38 **(5) Limitations on Relief.** A victim may make a
39 motion to re-open a plea or sentence only if:
- 40 **(A) the victim has asked to be heard before or**
41 during the proceeding at issue and the request
42 was denied;
- 43 **(B) the victim petitions the court of appeals for a**
44 writ of mandamus within 10 days of the
45 denial and the writ is granted; and
- 46 **(C) in the case of a plea, the accused has not**
47 pleaded to the highest offense charged.
- 48 **(6) No New Trial.** In no case is a failure to afford a
49 victim any right under these rules grounds for a
50 new trial.

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 incorporates 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).

Subdivision (a)(2). This subdivision incorporates 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.

Rule 615 of the Federal Rule of Evidence address the sequestration of witnesses. Although Rule 615 requires the court upon the request of a party to order the witnesses to be excluded so they cannot hear the testimony of other witnesses, it contains an exception for “a person authorized by statute to be present.” Accordingly, there is no conflict between Rule 615 and this rule, which implements the provisions of the Crime Victims’ Rights Act.

Subdivision (a)(3). This subdivision incorporates 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....”

Subdivision (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 court 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 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.

Rule 6160. Title

- 1 These rules may be known and cited as the Federal
- 2 Rules of Criminal Procedure.