FEDERAL PUBLIC DEFENDER
Western District of Washington

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Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Proposed Rules Relating to Crime Victims' Rights Act

Dear Mr. McCabe:

I write on behalf of the Federal Public and Community Defenders to oppose and suggest changes to the set of rules said to implement the Crime Victims' Rights Act (CVRA) which has been approved by the Advisory Committee. The National Association of Criminal Defense Lawyers joins us in these comments.[1] The CVRA-based rule proposals are ill-conceived, poorly drafted, and exceed the limitations of the Rules Enabling Act.

The Rules Enabling Act authorizes the Supreme Court to prescribe "general rules of practice and procedure" for cases in the United States courts. 28 U.S.C. § 2072(a). That power is limited: "Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). *See also Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (federal courts may make rules "not inconsistent with the statutes or Constitution of the United States.").

It is especially important to adhere to those limits here. Congress enacted the CVRA when sponsors of a crime victims' constitutional amendment failed to secure sufficient support for its passage after years of debate.[2] The fundamental objection to creating constitutional rights for victims was that it would install the private prosecution model the Framers rejected, unbalance the adversary criminal justice system the Framers created, and threaten the Bill of Rights.[3] The constitutional amendment failed, a statute

[1] Peter Goldberger, Co-Chair of the Committee on Federal Rules of Procedure of the National Association of Criminal Defense Lawyers, has reviewed and supports the views expressed in this letter and the attached memorandum.

[2] 150 Cong. Rec. at S4261 (Apr. 22, 2004) (statement of Sen. Feinstein).

[3] *See* S. Rep. No. 108-191 at 68-69 (minority views) (The "colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as 'inefficient, elitist, and sometimes vindictive.' . . . [T]he Framers believed victims and defendants alike were best protected by the system of public prosecutions that was then, and remains, the American standard

was passed, and our adversary criminal justice system was intended to remain intact. Since then, a small but vocal group of victim advocates has promoted aggressive interpretations of the CVRA which would create a *de facto* victim rights constitutional amendment. (One of the principal advocates of these interpretations was recently heard on National Public Radio's "All Things Considered" acknowledging that the objective is to overthrow the adversary system and replace it with a three-party system.[4]) The Advisory Committee was presented with a raft of proposals which would do just that.[5] The Committee rejected many of the most extreme proposals, but appears to have made certain compromises. Several of the proposed rules have no basis in the CVRA, and would abridge, enlarge and modify existing rights. At the same time, "general rules of practice and procedure," which are needed, are by and large missing.

We urge the Standing Committee to disapprove the Advisory Committee proposal, and send the matter back to that committee. To the extent that the Standing Committee believes it can do so without another round of publication and comment, it may wish to adopt some of the purely procedural language suggested by the Defenders and the NACDL, such as our proposed substitute Rule 60(b). The following is a summary of the problems in the proposed rules, which are set forth in more detail in the attached Memorandum to the Subcommittee on the Crime Victims' Rights Act dated April 11, 2007 (hereinafter "Memorandum").

Rule 1(b)(11), which would define "victim" for all rules of criminal procedure as a "crime victim" as defined in 18 U.S.C. § 3771(e), should be revised to specify that the definition applies only to the rules that implement the Crime Victims' Rights Act, and to state that the offense by which the victim allegedly was harmed is one with which a defendant has been charged and is being prosecuted or has been convicted and which is the subject of a pending criminal proceeding in a federal district court. The rule as written suggests a definition that is inconsistent with Rule 1(a) and 18 U.S.C. § 3771

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for achieving justice."); *id.* at 70 ("[W]e have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy."); *id.* at 56 ("Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights to a politically popular group of citizens at the expense of a powerless minority," or "to guarantee rights that intrude so technically into such a wide area of law, and with such serious implications for the Bill of Rights.").

[4] *Debating the Value of Victims' Rights Laws,* All Things Considered, National Public Radio, April 29, 2007 (interview of Judge Paul G. Cassell), http://www.npr.org/templates/story/story.php?storyId=9907104.

[5] Paul G. Cassell, *Treating Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure* (draft of January 16, 2007), http://old.law.utah.edu/faculty/bios/cassellp/website/index.html.

(b)(1), and would do nothing to stop wasteful litigation by persons whom the courts have uniformly held are not "crime victims" within the meaning of the CVRA.[6] *See* Memorandum at 16-18.

Rule 12.1 should be withdrawn because it requires no showing by the victim or the government to avoid the ordinary (and constitutional) requirement of reciprocal discovery in alibi cases, much less any showing based on the Crime Victims' Rights Act. Instead, it would create a new right for victims and a constitutionally prohibited advantage for the government. The rule is unconstitutional under *Wardius v. Oregon*, 412 U.S. 470 (1973), *Smith v. Illinois*, 390 U.S. 129 (1968) and *Alford v. United States*, 282 U.S. 687 (1931), and violates the Rules Enabling Act. *See* Memorandum at 1-5.

Rule 17, which would require a court order before service of a subpoena on a third party requiring the production of "personal or confidential" information about a victim, and notice to the victim absent "exceptional circumstances," with no similar restriction on grand jury subpoenas, should be withdrawn, or at least re-written to change the "exceptional circumstances" exception to a "good cause" exception. This rule is based on the dangerous notion that victims' "dignity and privacy" is threatened by ordinary procedures designed to facilitate adversarial testing. The circumstances listed in the Note as "exceptional" – loss or destruction of evidence and premature disclosure of defense strategy – are quite ordinary, not exceptional. The rule would abridge defendants' Fifth and Sixth Amendment right against disclosure of defense strategy to the government,[7] and Sixth Amendment right to confront and cross-examine without advance

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[6] *See In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007) (civil plaintiff seeking restraining orders and arrests of various persons); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir., Sept. 25, 2006) (similar); *United States v. Moussaoui*, __F.3d__, 2007 WL 755276 (4th Cir. Mar. 14, 2007) (civil plaintiffs in Southern District of New York seeking to intervene in criminal case in Eastern District of Virginia for purpose of obtaining non-public discovery materials from criminal case); *In re Searcy*, 202 Fed. Appx. 625 (4th Cir. Oct. 6, 2006) (civil RICO plaintiff claiming entitlement to restitution and damages); *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (victims seeking to vacate settlement agreement approved by district court between United States and convicted, acquitted and uncharged persons; "the CVRA does not grant victims any rights against individuals who have not been convicted of a crime"); *United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (woman claiming right to make impact statement at defendant's sentencing on the basis that her former boyfriend, not charged with any crime, abused her as a result of smoking marijuana purchased from defendant); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006) (plaintiffs seeking prosecution and sentencing of various uncharged persons).

[7] *See Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); *Weatherford v. Bursey*, 429 U.S. 554, 558 (1977); *Williams v. Woodford*, 384 F.3d 567, 585 (9th Cir. 2004); *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995).

disclosure to the witness,[8] in violation of the Rules Enabling Act The rule would also unfairly disadvantage defendants as it does not apply to grand jury subpoenas, with which the government obtains its trial evidence. *See* Memorandum at 5-6.

Rule 18, which would require the court to set the place of trial within the district with due regard to the convenience of *non-testifying* victims (more accurately, alleged victims, as the question at trial is whether anyone is a victim and in certain cases, such as self defense, who is the victim), should be withdrawn because it is based on an interpretation of the CVRA as creating a general right to have the district court make "every effort" to ensure "the fullest attendance possible." This is directly contrary to the plain language of the CVRA, as well as a clear explanation by the bill's primary sponsor that the statute was drafted to avoid that very result. The rule would impose unwarranted hardship on the parties, witnesses and judges, would encourage mandamus actions without basis in the CVRA, and would violate the Rules Enabling Act by creating a new right for victims. *See* Memorandum at 6-8.

Rule 32(d)(2)(B), which would strike the requirement that victim impact information be "verified" and "stated in a nonargumentative style," should be withdrawn or revised because it essentially instructs Probation Officers that such information need not be verified and may be stated in an argumentative style. The Subcommittee believes that "[a]ll information in the PSR should meet these requirements," *see* March 25, 2007 Memorandum at 70, but neither the Rule nor its Note say so. The removal of the requirement without making clear that it applies to all information in a pre-sentence report would exacerbate what is already a serious problem of unreliable information in pre-sentence reports, in derogation of defendants' right to be sentenced on the basis of accurate information. *See* Memorandum at 15-16.

Rule 32(i)(4) and its Committee Note would re-define the statutory right to "be reasonably heard" as a "right to speak directly to the judge," and a right to be individually spoken to. This departs from the statutory language and would discourage courts from responding flexibly as Congress intended. Further, the rule makes no provision for notice or a fair opportunity to respond to a victim's statement. **Rule 60(a)(3)** fails to provide any procedure to implement the right to be "reasonably heard." Rule 32(i)(4) exceeds the plain language of the CVRA and is contrary to the Rules Enabling Act. Neither rule provides needed procedural guidance. The rules should be re-written. *See* Memorandum at 9-15.

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[8] *See In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 893 (D.C. Cir. 1999); *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985); *United States v. Bohle*, 445 F.2d 54, 75 (7th Cir. 1971). *See also* Fed. R. Evid. 613(a) (cross-examiner need not show witness document from which s/he is cross-examining, abrogating "Rule in Queen Caroline's Case"); *Kirby v United States*, 174 US 47, 55 (1899) (Confrontation Clause permits impeachment "in every mode authorized by the established rules governing the trial or conduct of criminal cases.").

Rule 60(a)(2) should be re-written to correctly incorporate the right "not to be excluded" (unless, in the case of a testifying witness, his or her testimony would be "materially altered"), and to provide that reasons be given for *any* decision under this rule. Like Rule 18, Rule 60(a)(2) is based on an erroneous interpretation of the CVRA as creating a general right to have the district court make "every effort" to ensure "the fullest attendance possible." Whether a court decides to exclude a testifying victim or to allow her to remain, an adequate record of reasons is necessary, not just for a victim's mandamus action but for a defendant's appeal. *See* Memorandum at 6-8.

Rule 60(b) should be revised to provide "general rules of practice and procedure" to guide the courts, the parties and victims when victims seek to assert rights and to obtain a remedy if denied. The rule as written parrots some portions of the poorly coordinated procedural provisions of the CVRA, omits or misstates others, and fails to fill in the gaps. As a result, the most basic components of an orderly system are missing. Thus, the rules fail in their primary purpose. *See* Memorandum at 18-22.

We respectfully urge the Standing Committee to reject the Advisory Committee's proposals for implementing the Crime Victims Rights Act.

Very truly yours,

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Attachment