FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

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

Re: Comment on Proposed Amendments to Rules 5, 12.3, 21 and 32.1 of the Federal Rules of Criminal Procedure

Dear Mr. McCabe:

This letter provides public comment on behalf of the Federal Public and Community Defenders on the proposed amendments to Rules 5, 12.3, 21 and 32.1 of the Federal Rules of Criminal Procedure. We will be submitting comments on the proposed amendment to Rule 15 by separate letter next week.

I. Rule 32.1(a)(6)

The proposed amendment to Rule 32.1(a)(6) would clarify that only subsection (1) of 18 U.S.C. § 3143(a) applies in the decision whether to release or detain a person pending further proceedings concerning revocation or modification of probation or supervised release. It would also state that in all such cases, the defendant bears the burden of establishing "by clear and convincing evidence" that he will not flee or pose a danger.

We agree that the current rule, including its interaction with § 3143(a), is confusing and should be amended. However, the proposed amendment fails fully or correctly to solve existing problems with the rule, in part because it is based on a flawed decision, *United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The *Mincey* court proposed this particular rule change based on a re-writing of § 3143(a)(1) which ignored the text and legislative history of § 3143 and Rule 32.1 and the constitutional and policy considerations upon which they were based. It substituted the phrase, "a person who is alleged to have violated probation or supervised release," for the statutory phrase, "a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment." *Id.* at 164-65. In doing so, it wrote out of existence Congress's intent that persons who are not realistically facing imprisonment upon the final decision not be detained at all, S.

Rep. No. 98-225 at 185-86 (1983), and instead placed the burden of proof by clear and convincing evidence on all persons who are merely "alleged" to have committed a violation, even when prison is not the likely outcome upon final decision.

A. Alternative Proposal

We propose the following alternative, which we believe best resolves the various sources of confusion in the rule and comports with congressional intent and constitutional principles. We recommend that the *Mincey* decision not be relied upon or cited, as it does not comport with congressional intent and would create further confusion.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

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(6) ***Release or Detention.*** If probable cause is found to exist, the magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to the community rests with the person, unless the applicable policy statement promulgated pursuant to 28 U.S.C. § 994(a)(3) provides for modification of the term or conditions upon a finding of a violation, in which case the burden of establishing by clear and convincing evidence that the person will flee or pose a danger to the community rests with the government.

Committee Note

This amendment is designed to clarify the standards for release or detention decisions involving persons alleged to have violated the terms of probation or supervised release pending further proceedings. First, it clarifies that before the magistrate judge may consider release or detention under 18 U.S.C. § 3143(a)(1), a finding of probable cause that the violation occurred is required. Second, it clarifies that only subsection (1) of § 3143(a) applies in proceedings involving an alleged violation of the terms of probation or supervised release because subsection (2) is not suited to this context. Third, it clarifies that the standard of proof is clear and convincing evidence. Fourth, it clarifies that the person bears the burden of proof if the applicable policy statement provides only for a term of imprisonment, but that the government bears the burden if the applicable policy statement provides for modification of the term or conditions. The amendment recognizes the liberty interest at stake, *see Gagnon v. Scarpelli*, 411 U.S. 778 (1973), *Morrissey v. Brewer*, 408 U.S. 471 (1972), as well as the congressional policy disfavoring detention for persons who are not realistically facing imprisonment at the conclusion of further proceedings, *see* 18 U.S.C. § 3143(a)(1), and employs the relevant statutory terminology in doing to. *See* 28 U.S.C. § 994(a)(3), 18 U.S.C. § 3565, 18 U.S.C. § 3583(e).

B. Reasons for Alternative Proposal

In the Bail Reform Act of 1984, Congress enacted stringent procedural safeguards and narrow standards for the detention or release of defendants pending trial, *see* 18 U.S.C. § 3142, in recognition of their constitutional liberty interest in remaining free pending trial. S. Rep. No. 98-225 at 7 (1983). Congress also retained the possibility of release pending imposition or execution of sentence that existed under prior law. However, because "there is clearly no constitutional right to bail once a person has been convicted," and the "conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law," *id.* at 26, Congress reversed the presumption in favor of release pending sentence under the prior version of § 3143 to a presumption in favor of detention. It did so by requiring detention unless the judicial officer "finds by clear and convincing evidence" that the person is not likely to flee or pose a danger to others, and "intend[ed] that in overcoming the presumption in favor of detention the burden of proof rests with the defendant." *Id.* at 26-27. Importantly, Congress "except[ed] from detention defendants for whom the guideline does not recommend a term of imprisonment (new 18 U.S.C. 3143(a))," *id.* at 185-86, with the phrase, "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment." Pub. L. No. 98-473 Sec. 223(f) (Oct. 12, 1984).

Congress did not include procedures for revocation or modification of probation or supervised release in the Bail Reform Act itself, but left those procedures, including release or detention pending final decision, to Rule 32.1, so that they could be periodically revised as necessary, citing *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). *See* S. Rep. No. 98-225 at 102 & n.352 (1983). Those decisions had held that a person on parole (*Morrissey*) or probation (*Scarpelli*) is entitled to retain his liberty as long as he abides by the imposed conditions, that due process requires a preliminary hearing and a final hearing in which procedural protections are accorded, *Scarpelli*, 411 U.S. at 781-82, 786, *Morrissey*, 408 U.S. at 479, 482, 485, 487-89, and that there must be a finding of probable cause in order to hold the person pending the final decision. *Morrissey*, 408 U.S. at 487. Rule 32.1 was promulgated in 1979 in order to satisfy the constitutional requirements of *Morrissey* and *Scarpelli*.[1] *See* Fed. R. Crim. P. 32.1, 1979 & 1993 advisory committee notes.

[1] Rule 32.1 originally applied only to persons on probation because there was no supervised release until the Sentencing Reform Act of 1984. Further, the 1984 supervised release statute did not allow supervised release to be revoked; it provided for either a hearing on modification, reduction or enlargement of conditions, or treatment as a contempt of court; minor violations would not result in imprisonment and new offenses would be charged as a new offense and/or a contempt of court, with detention or release decided under § 3142. *See* S. Rep. No. 98-225 at 124-25 (1983). In 1986, § 3583 was amended to permit revocation of supervised release upon a finding by a preponderance of the evidence that the person had violated a condition and pursuant to the Rules of Criminal Procedure applicable to probation revocation. *See* Pub. L. No. 99-570, sec. 1006 (Oct. 27, 1986). Supervised release was incorporated into Rule 32.1 in 1989. *See* Fed. R. Crim. P. 32.1 1989 advisory committee note.

At the time Congress enacted these statutes and entrusted the procedures for revocation or modification of probation or supervised release to Rule 32.1, three things were clear with respect to release or detention pending the final decision. First, Rule 32.1(a)(1) provided that *if*, at the preliminary hearing, probable cause was found to exist, the person could either be held for a revocation hearing or released pursuant to Rule 46(c) pending the revocation hearing. Second, Rule 46(c) provided that "[e]ligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U.S.C. § 3143," and § 3143(a) excepted from detention altogether those persons for whom the applicable guideline did not recommend a term of imprisonment. Third, *if* probable cause was found to exist *and* a term of imprisonment was recommended, Rule 46(c) provided that "[t]he burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant."[2]

The minimum requirement of a finding of probable cause before detention may be imposed seems to have been inadvertently removed from the rule in 2002, when a provision for initial appearance was added and the provision for release or detention was moved from the preliminary hearing section of the rule to the initial appearance section of the rule. In most cases, the government moves for detention at the initial appearance and the decision is made at the preliminary hearing when a finding of probable cause is required. However, the current rule suggests that a decision to detain the person could be made at the initial appearance absent any finding of probable cause. This would violate the person's right to due process, *see Morrissey*, 408 U.S. at 487, and should be remedied.

The current rule would also benefit from clarification of how the statutory phrase, "a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment," applies pending further proceedings on revocation or modification of probation or supervised release. Such clarification must take account of the policy Congress sought to promote, which was that persons who are not realistically facing prison upon the final outcome not be detained. S. Rep. No. 98-225 at 185-86 (1983). And it should do so by employing the applicable statutory terms as implemented by the Sentencing Commission.

When, in 1984, Congress added the language to § 3143(a) precluding detention for persons awaiting imposition or execution of sentence for whom the applicable guideline did not recommend imprisonment, which it intended to apply to persons facing revocation or modification of probation or supervised release through Rule 32.1, it had instructed the Commission, in 28 U.S.C. § 994(a)(3), to promulgate "guidelines or general policy statements regarding the appropriate use of the probation revocation

[2] The substance of Rule 46(c) was moved to Rule 32.1(a)(6) in 2002. *See* Fed. R. Crim. P. 32.1, 2002 advisory committee note.

provisions set forth in section 3565 of title 18, and the provisions of modification of the term or conditions of probation or supervised release set forth in sections 3563(c), 3564(d), and 3583(e) of title 18." *See* Pub. L. No. 98-473 sec. 217(a) (Oct. 12, 1984). The supervised release statute did not provide for revocation at all, *id.*, sec. 212(a), until two years later. Pub. L. No. 99-570, sec. 1006 (Oct. 27, 1986). Thus, Congress undoubtedly expected the Commission to use "guidelines" for sentencing upon revocation of probation and "policy statements" for modification of the conditions of probation or supervised release. As it turned out, the Commission promulgated no "guidelines" but only "policy statements" for both purposes. Moreover, just as the Commission promulgated "guidelines" recommending only prison for sentencing defendants in Zones C and D, and either prison or probation for defendants in Zones A and B,[3] these "policy statements" recommend only prison for persons found to have committed a Grade A or B violation, and either prison or modification of the term or conditions for persons found to have committed a Grade C violation.[4]

The *Mincey* court failed to engage in any analysis of legislative history, but simply concluded, based on the fact that the Commission had not promulgated "guidelines," that no one could be detained pending further proceedings unless the entire phrase, "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment," was deleted and revised such that every "person who is alleged to have violated probation or supervised release" may be detained pending final decision, and must be detained unless they establish by clear and convincing evidence that they will not flee or pose a danger.[5] This extreme solution is not only unnecessary, but is clearly wrong in light of congressional policy disfavoring detention for persons unlikely to be facing imprisonment if a violation of probation or supervised release is found at the final hearing. *See* S. Rep. No. 98-225 at 185-86 (1983).

To effectuate congressional intent, the rule should first construe the statutory phrase, "applicable guideline promulgated pursuant to 28 U.S.C. 994," to mean

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[3] USSG § 5C1.1.

[4] USSG § 7B1.3(a) and (b) (upon a finding of a Grade C violation, the court "may (A) revoke probation or supervised release; or (B) extend the term . . . and/or modify the conditions"; upon a finding of a Grade A or B violation, the court "shall revoke probation or supervised release" and impose a term of imprisonment).

[5] The cases cited in *Mincey* do not support its reading of the statute, as they did not involve or address the limitation on detention set forth in§ 3143(a)(1). In *United States v. Loya*, 23 F.3d 1529 (9th Cir. 1994), the violation was distribution of marijuana, for which the Commission's policy statement recommends prison. In *United States v. Giannetta*, 695 F. Supp. 1254 (D. Me. 1988), the violations were repeated instances of criminal activity constituting fraud, for which the policy statement recommends prison. Further, these cases hold that a supervised releasee or probationer is to be treated like a defendant convicted and awaiting sentence. Such a defendant, if his applicable guideline does not recommend imprisonment, is exempted from detention altogether. The *Mincey* court's solution fails to take account of this limitation in the context of proceedings on alleged violations of probation or supervised release.

"applicable policy statement promulgated pursuant to 28 U.S.C. § 994(a)(3)." Further, it should use the relevant terminology from the applicable statutes by distinguishing between policy statements that recommend only prison and policy statements that provide for modification of the term or conditions.[6] Pursuant to these statutes, the Commission's policy statements recommend only prison for Grade A and B violations, and either prison or modification of the term or conditions for Grade C violations,[7] just as the guidelines recommend only prison for defendants in Zones C and D, and either prison or probation for defendants in Zones A and B.[8]

The rule should then clarify what should occur when the applicable policy statement does not recommend only prison but provides for modification of the term or conditions. A strict construction would exempt all such persons from the possibility of detention. *See* 18 U.S.C. § 3143(a)(1); S. Rep. No. 98-225 at 185-86 (1983). Any person charged with a Grade C violation, *see* USSG § 7B1.3(a)(2), which includes the most minor offenses (punishable by one year or less) and violations of conditions that are not a crime at all, *see* USSG § 7B1.1(a)(3), could not be detained.

The solution we propose is more moderate. It would construe § 3143(a)(1) in this context as providing that the judicial officer shall order the person to be detained unless the judicial officer finds by clear and convincing evidence that he or she is not likely to flee or pose a danger to the community if released under § 3142(b) or (c), *unless* the applicable policy statement promulgated pursuant to 28 U.S.C. § 994(a)(3) provides for modification of the term or conditions, *in which case* the judicial officer shall order the person detained if the judicial officer finds by clear and convincing evidence that the person is likely to flee or pose a danger to the community if released under section 3142(b) or (c). This would permit detention for any kind of violation, but would honor the statutory text and congressional policy disfavoring detention when imprisonment is unlikely. It would simply specify the circumstances under which the person *can* be detained if the policy statement provides for modification of the term or conditions, *i.e.*, the government must establish by clear and convincing evidence that the person will flee or pose a danger.

II. Rules Relating to Alleged Victims

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[6] *See* 18 U.S.C. § 3565 (court may either modify the term or conditions, or revoke the sentence of probation and resentence the defendant to prison); 18 U.S.C. § 3583(e) (providing for either revocation with a term of imprisonment, or modification of the term or conditions); 28 U.S.C. § 994(a)(3) (Commission to promulgate guidelines or policy statements regarding the "provisions" for "revocation" or "modification of the term or conditions" of probation set forth in § 3565, and the "provisions" for "revocation" or "modification of the term or conditions" of supervised release set forth in § 3583(e)).

[7] *See* note 4, *supra*.

[8] *See* note 3, *supra*.

The Committee has published for comment three amendments that reflect a "continuing focus on the Crime Victims Rights Act (CVRA)." We urge the Committee not to adopt these amendments, and to refrain from adopting any new rules for crime victims unless and until the rules that went into effect December 1, 2008 have proven to be inadequate in some way that is actually required by the CVRA, that does not deprive defendants of their rights, and that is not prohibited by the Constitution or the Rules Enabling Act. "The Supreme Court shall have the power to prescribe general rules of practice and procedure," which "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. *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.").

A. Background and General Principles

When the Committee first considered the CVRA, there was a question as to whether any rules were necessary or appropriate, in light of the fact that the CVRA is self-executing. *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 23, September 2007 ("September 2007 Report"). Once the decision was made to promulgate at least some rules, the Committee resolved to incorporate, but not go beyond, the rights expressly stated in the CVRA, not to create rights based on the general right "to be treated with fairness" or "with respect for dignity and privacy," and not to use the rules to resolve questions of statutory interpretation but to leave that to the courts on a case-by-case basis.[9] Adherence to those principles would have ensured that the rules stayed within the bounds of the Rules Enabling Act and the Constitution.

In our view, the Committee has already departed from these principles in certain respects in the Rules effective December 1, 2008. For example, Rules 12.1 and 17, which are based on the right to be treated with "respect for dignity and privacy," instruct judges to deny reciprocal discovery and subpoenas under circumstances that would abridge defendants' constitutional rights to prepare for trial and to confront and cross-examine adverse witnesses. Rule 18, which is not based on any language in the CVRA and is inconsistent with its legislative history, requires judges to set the place of trial within the district with regard to the convenience of alleged victims who are not witnesses but wish to attend as spectators. These rules appear to "have inserted into the criminal procedure rules substantive rights that are not specifically recognized in the Act – in effect creating new victims' rights not expressly provided for in the Act." September 2007 Report at 23.

The three new proposals would continue on the same hazardous and unnecessary path. The proposed amendment to Rule 5(d)(3) is in direct conflict with the carefully

[9] *See* Memorandum to Criminal Rules Advisory Committee from CVRA Subcommittee at 1-2 (Sept. 19, 2005); Memorandum to Standing Committee on Rules of Practice and Procedure from Criminal Rules Advisory Committee at 2 (Aug. 1, 2006).

drafted provisions of the Bail Reform Act designed to avoid constitutional violations. The proposed amendments to Rules 12.3 and 21 would spread the problems in Rules 12.1 and 18 to additional contexts. Each of the proposals would require judges to vindicate alleged victims' interests in ways that are not expressly required by the CVRA, to do so at the expense of defendants' rights, and to engage in this conflicted activity at a time when the defendant must be presumed innocent. They would essentially require the judge to act as the victim's advocate and the defendant's adversary, rather than the protector of the defendant's rights as the Constitution requires, thus depriving the defendant of a neutral judge to resolve potentially adverse rulings. *See* Erin C. Blondel, *Victims' Rights in an Adversary System*, 58 Duke L. J. 237, 261, 265, 269-70 (2008) (arguing that the CVRA should be interpreted narrowly in order to avoid these problems and preserve the structure of the adversary system).

When victim advocates pressed these and numerous other rule changes last year,[10] the Committee stated that "such proposals not only could create new substantive rights," but that adopting them without a sufficient basis in case law or judicial experience "is premature and invites error." *See* September 2007 Report at 23-24. The Committee determined to "(1) gather more information on precisely how the proposals would operate in specific proceedings and what effects they might have; (2) obtain empirical data substantiating the existence and nature of problems that could be addressed by rule; and (3) provide additional time for courts to acquire experience under the Act and to develop case law construing it." *Id.* at 24. Because the new rules have yet to be applied or tested, and there is no case law or empirical evidence to support the new proposed amendments, they should be withdrawn.

The Government Accountability Office (GAO) has now completed its report on the CVRA, and nothing in it supports a need to single out alleged victims' interests in the decision whether to release or detain a defendant, a need to deny reciprocal discovery to defendants in furtherance of alleged victims' interests, or a need to consider non-testifying alleged victims' convenience in a decision to transfer the place of trial. Indeed, contrary to alarmist warnings that the CVRA is not being implemented, the GAO reports that most victims who responded to its survey were satisfied with the provision of all of the CVRA rights except the right to confer with the government, with which just under half were satisfied. *See* United States Government Accountability Office, *Crime Victims' Rights Act* at 83-84 (Dec. 2008) (hereinafter "GAO Report"). The general perception among criminal justice participants was that the treatment of victims had improved under the CVRA, though many believed that victims were already treated well before the CVRA. *Id.* at 13, 86. The vast majority of victim-witness professionals reported that judicial attentiveness to victim rights had increased and a large minority (40%) reported that it had greatly or very greatly increased. *Id.* at 85.

[10] The proposals were first made to the Committee by then Judge Cassell, who has since left the bench to litigate on behalf of victims and to teach about victim rights. In June 2007, Senator Kyl introduced the same proposals as direct amendments of the rules in S. 1749, a bill that had no cosponsors which died in committee.

While the Report makes several recommendations to DOJ, and one recommendation to Congress,[11] it makes no recommendations to the Judiciary in general, or to the Rules Committee in particular. It does make at least three observations that should counsel restraint in adopting rules that would expand on the statute's specific terms. First, both Federal Defenders and judges expressed concerns that certain provisions of the CVRA, or certain interpretations of it, conflict with the rights of defendants. *Id.* at 13, 87-88. Second, a number of district court judges said that because the Rules are mandatory and regularly consulted by judges, they will be "most helpful in increasing awareness of CVRA rights." *Id.* at 85-86. Thus, the new rules effective December 1, 2008 will increase awareness among judges to the extent any increase in awareness is needed. Further, some judges may too readily accept an interpretation of the CVRA simply because it appears in a rule when in fact it expands on the statute and conflicts with the defendant's rights. Third, judges and others expressed concern that the 72-hour mandamus timetable does not provide enough time to decide complex issues, produce well-thought-out opinions, or allow the parties to respond, and that the time limit would interfere with the handling of other cases of equal or greater importance if the number of petitions were to increase.[12] *See* GAO Report at 50-51. When a rule exceeds the express terms of the CVRA, it invites mandamus actions that would not otherwise be filed.

B. Rule 5(d)(3)

The proposed amendment of Rule 5(d)(3) would make the general right to be reasonably protected from the accused under § 3771(a)(1) a mandatory and primary consideration in every decision regarding pretrial release or detention. This is not required by the CVRA, would conflict with the Bail Reform Act and the Due Process Clause, and would directly compromise judicial neutrality.

Current Rule 5(d)(3) provides that the judge "must detain or release the defendant as provided by statute or these rules." As the Committee recognizes, the current rule "already incorporates" an alleged victim's right to be reasonably protected from the accused. As the courts have recognized, this right does not add to or change the substantive bases upon which an accused may be released or detained under 18 U.S.C. § 3142. *See United States v. Turner*, 367 F.Supp.2d 319, 332 (E.D.N.Y. 2005), *United*

[11] GAO recommends that DOJ notify victims of their rights to file complaints against DOJ personnel and to file motions in court (while acknowledging that this is not required by the CVRA), improve the impartiality of its complaint investigation procedure, and adopt further measures of the performance of its employees in implementing the CVRA. *Id.* at 88-91. It recommends that Congress clarify whether the CVRA applies to local offenses prosecuted in D.C. Superior Court. *Id.* at 91.

[12] The Report also notes that court personnel reported that it is difficult to assemble a panel of judges and provide them with the necessary case documents during the weekend when a petition is filed on a Friday. GAO Report at 51. As noted in our letter of December 15, 2008 regarding the Committee's Proposed Legislation Extending Statutory Deadlines, the proposed legislation would exacerbate this problem.

States v. Rubin, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008). Nonetheless, the amendment would add that "[i]n making that decision, the judge must consider the right of any victim to be reasonably protected from the defendant." While the Committee Note asserts that "[t]his amendment draws attention to a factor that the courts are to consider under both the Bail Reform Act" (citing the "safety of any person" and/or "the community" under § 3142(b), (c) and (g)), "and the Crime Victims' Rights Act" (citing the right to be "reasonably protected from the accused" under § 3771(a)(1)), in fact the rule would mandate consideration only of an alleged victim's right to be protected, and says nothing about any, much less all, of the factors that must be considered under § 3142. Because § 3142 and the current rule already incorporate an alleged victim's right to reasonable protection from the accused, the proposed amendment is unnecessary. If, instead, the amendment adds something that is not already incorporated in § 3142 and the current rule, as it clearly indicates, it conflicts with the preventive detention provisions of the Bail Reform Act of 1984, which were carefully drafted to comply with the Due Process Clause.

Before the Bail Reform Act of 1984, the primary purpose of the bail laws was to assure the appearance of the defendant at judicial proceedings. The Bail Reform Act of 1984 marked a significant departure from this basic philosophy by adding, as an additional consideration, the safety of other persons and the community. S. Rep. No. 98-225 at 3, 8-9 (1983). This preventive detention concept was controversial because it would permit imprisonment of a person accused of one crime, presumed to be untrue, on the basis of a prediction of future crimes, in derogation of the person's liberty interest pending trial.

Congress, however, was satisfied that the statute was "not per se unconstitutional," based on *United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), a decision from the District of Columbia Court of Appeals regarding a similar provision in the D.C. code. *See* S. Rep. No. 98-225 at 8 (1983). Congress recognized, as the *Edwards* court did, that a preventive detention statute "may nonetheless be constitutionally defective" if it either "does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect" or "fails to provide adequate procedural safeguards." S. Rep. No. 98-225 at 8 (1983). The Bail Reform Act was "carefully drafted with these concerns in mind," *id.*, to ensure that it was "appropriately narrow in scope," and provided "necessarily stringent safeguards to protect the rights of defendants." *Id.* at 7.

Thus, the Bail Reform Act allows preventive detention only when necessary to satisfy a "compelling" need to protect individuals or the community from a "limited group" of "demonstrably" and "particularly dangerous" defendants. *See* S. Rep. No. 98-225 at 5-10, 18-21. It limits the possibility of detention to persons charged with or previously convicted of particularly serious crimes. *See* 18 U.S.C. § 3142(e) and (f). Before ordering a defendant in this category to be detained, the judicial officer must first consider, on a case-by-case basis, whether any condition or combination of conditions set forth in § 3142(c) will assure the safety of another and the community, in light of all of

the mitigating and aggravating factors set forth in § 3142(g). The judicial officer may detain the person only if clear and convincing evidence establishes that the most stringent conditions or combination of conditions will not reasonably assure the safety of others. 18 U.S.C. § 3142(e). The person is entitled to a full blown adversary hearing, 18 U.S.C. § 3142(f), immediate review by the district court judge of a magistrate judge's detention order, and immediate appeal to the court of appeals. 18 U.S.C. § 3145.

The Supreme Court upheld the preventive detention provisions of the Bail Reform Act against a facial substantive due process challenge because, under "these narrow circumstances" -- where detention may be sought only for "individuals who have been arrested for a specific category of extremely serious offenses," and may be imposed only when the government "proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community" -- the government's interest in preventing crime is "compelling." *United States v. Salerno*, 481 U.S. 739, 750-51 (1987). The Act survived a facial procedural due process challenge because the determination of future dangerousness is subject to "extensive" procedural safeguards "specifically designed to further the accuracy of that determination," including the right to counsel, to testify, to cross-examine, to a neutral judge guided by statutorily enumerated factors, to proof by clear and convincing evidence, to written findings, and to immediate appellate review. *Id.* at 751-52.

The proposed amendment would directly conflict with this careful constitutional balance. First, while preventive detention may not be considered unless the person is charged with or was previously convicted of certain enumerated crimes or if there is a serious risk of obstruction or witness or juror intimidation, 18 U.S.C. § 3142(f)(1) & (2), and the Bail Reform Act was upheld on that basis, *see Salerno*, 481 U.S. at 750, the proposed amendment states that the judge "must" consider the right of an alleged victim to be reasonably protected from the accused in *every* case.

Second, the proposed amendment omits all of the other factors the Supreme Court relied on to uphold the Bail Reform Act. Congress acknowledged that there was no empirical evidence or experience upon which predictions of future crime could be based, but believed that judges could make such predictions "with an acceptable level of accuracy" based on all of the factors enumerated in 18 U.S.C. § 3142(g).[13] *See* S. Rep.

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[13] Section 3142(g) currently provides:
The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning –
(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive or destructive device or involves a narcotic drug;
(2) the weight of the evidence against the person;
(3) the history and characteristics of the person, including –
(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

No. 98-225 at 9. Congress intended that these factors would be weighed on an individualized case-specific basis, to set conditions to reasonably assure the safety of others, or, as a last resort, to determine that no set of conditions can reasonably assure the safety of others. *See* S. Rep. No. 98-225 at 14, 18-19 (1983). The Bail Reform Act survived a facial due process challenge because it could be constitutionally applied by a judge, guided by these statutory factors on a case-specific basis, to at least some persons charged with crimes. *See Salerno*, 481 U.S. at 745, 751-52. Thus, the right of an alleged victim to protection from the accused cannot be the sole or overriding consideration, as the proposed rule would indicate.

Third, while the Bail Reform Act explicitly preserves the presumption of innocence, 18 U.S.C. § 3142(j), the proposed amendment would emphasize, to the exclusion of all else, a finding that the defendant is likely to be guilty of future misconduct, without explicitly preserving the presumption of innocence.

Fourth, the right of an alleged victim to be reasonably protected from the accused necessarily imports with it the procedural provisions of the CVRA, which fail to provide adequate, much less stringent, procedural safeguards to the accused. After the judge "denies the relief sought" by the alleged victim, he or she has ten days to file a petition for a writ of mandamus, to which the accused (and the district court judge and the prosecutor) must respond in time for the court of appeals to issue a decision within 72 hours. *See* 18 U.S.C. § 3771(d)(3), (5)(B). This is not a procedure designed to ensure fair or accurate review, *cf. Salerno*, 481 U.S. at 746; *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), but one that encourages error to the detriment of the accused. *See* GAO Report at 50 ("judges and others said that it may not provide enough time to decide on complex issues, produce well-thought-out opinions, and allow parties to respond"); *In re Antrobus*, 519 F.3d 1123, 1128 (10th Cir. 2008) (attributing contrary holdings of two other circuits regarding the standard of review for mandamus actions to "the time pressures under which they operated.").

In addition to upsetting the constitutional design of the Bail Reform Act, the proposed amendment would encourage frivolous and even abusive petitions for mandamus, thus creating unnecessary burdens and unfairness for the parties, judges and courts of appeals. An alleged victim's view of what is required for his or her "reasonable protection" may well include the prevention of conduct that is not a crime and that does not threaten his or her safety at all. For example, alleged victims of securities fraud in *United States v. Rubin*, 558 F.Supp.2d 411 (E.D.N.Y. 2008) claimed that the government's failure to freeze the defendant's assets before he was charged with any crime, the court's allowing the defendant to travel to Israel for the impending death and

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(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

funeral of a family member, and "even [to] walk 'freely' on bond . . . represented an affront to their right to be protected from the accused." *Id.* at 413, 419-20; *see also id.* at 420 ("movants fasten on this first enumerated right as a wellhead of boundless authority to fashion protection for victims in the guise of 'protecting them from the accused.'"). The alleged victim may then file a petition for mandamus, to which the district court judge, the parties and the court of appeals must scramble to respond within 72 hours, no matter how specious.

C. Rule 12.3

The proposed amendment of Rule 12.3 is not based on any specific right found in the CVRA, would compromise the judge's neutrality, and would violate the Due Process Clause. For the same reasons, we believe that new Rule 12.1 will be invalidated if and when it is applied to force a defendant to provide his alibi witness's address and telephone number without reciprocal discovery of the same information regarding the government's rebuttal witness. The Committee should await the development of case law on Rule 12.1 before adopting proposed Rule 12.3.

Denial of reciprocal discovery of a rebuttal witness's address and telephone number interferes with the defendant's ability to investigate in preparation for trial and to cross examine the witness at trial, and it confers an unfair advantage on the government. Yet no provision of the CVRA requires this. When Congress meant to confer a right on victims that upset the adversarial balance and threatened the defendant's right to a fair trial, it did so explicitly, *see* 18 U.S.C. § 3771(a)(3), (b)(1) (specifying that victim witnesses have a right not to be excluded from a public court proceeding unless the court finds by clear and convincing evidence that their testimony would be materially altered by hearing the testimony of other witnesses and there is no reasonable alternative to exclusion), and this has created grave concerns among judges. *See* GAO Report at 87 (judges said that it would be very difficult, if not impossible, to provide this evidence in advance of the victim's testimony). Congress did not expect that such a right would simply flow from undefined and inherently subjective rights, such as the right to "dignity and privacy," or the right "to be protected from the accused" without any showing that protection is needed.

The Committee Note states that the amendment implements a victim's right to be "reasonably protected from the accused," but the rule is *un*reasonable because it does not require any showing that there is a need for protection, but rather presumes such a need in all cases without empirical evidence to support it. The Note states that the rule also implements the right to be "treated with respect for the victim's dignity and privacy." Given that all witnesses are treated with respect for dignity and privacy within the constraints and demands of the adversary system, the proposed amendment entitles alleged victims to special treatment and it does so to the detriment of defendants' rights. This is entirely unnecessary, as Rule 12.3(d) already encourages appropriate protective orders and filings under seal when warranted by the facts of the individual case.

The proposed rule would compromise the judge's neutrality and violate the defendant's due process right to reciprocal discovery. Under, the proposed amendment, the defendant would be required to disclose his public authority defense along with his witnesses' names, addresses and telephone numbers, on pain of having the witnesses excluded, for the government's unfettered use in preparing its case against him and cross-examining his witnesses. After having done so, the defendant would then be required to make a showing of need for any victim rebuttal witness's address and telephone number. The judge would be required to deny disclosure of the information or any "reasonable alternative procedure" if the defendant did not make a sufficient showing of need, perhaps because, as the rule suggests, a showing of ordinary need is not enough when the rebuttal witness is an alleged victim.

If the judge concludes that the defendant has made the requisite showing of need, he has two choices. He can order the information disclosed, in response to which the alleged victim can file a mandamus action if, in her wholly subjective view, this would harm her interests in dignity, privacy or protection. Or, the judge can order a "reasonable alternative procedure" that somehow "allows" preparation of the defense but must "protect" the alleged victim's "interests" and denies disclosure of the information itself. This instruction, by telling the judge to give at least as much weight to a victim's "interests" as to the defendant's constitutional rights, is itself unconstitutional and places the judge in an untenable position. An alleged victim may well insist that her interest in dignity and privacy can be maintained only by being interviewed in the presence of the government, but such a procedure would violate the defendant's rights to effective assistance of counsel and due process of law.[14] Even if a victim agreed to a private interview by defense counsel at some neutral location, the defense would still be deprived of the address and telephone number, information which is often critical to investigation and cross examination. The witness's address is needed in order to interview the witness's neighbors. Telephone numbers are often essential to corroborate or refute the government's allegations, for example, to determine whether alleged conversations actually took place, whether there were calls the government did not disclose, or whether the witness was where he says he was at relevant times.

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[14] *See Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) (Sixth Amendment violated when sheriff in whose presence defense attorney was forced to prepare client for trial passed attorney work product on to prosecutor); *Williams v. Woodford*, 384 F.3d 567, 585 (9th Cir. 2004) ("Substantial prejudice results from . . . the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial."); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he . . . prepare his legal theories and plan his strategy without undue and needless interference."); *Ake v. Oklahoma,* 470 U.S. 68, 82-83 (1985) (indigent defendant has a right to make an *ex parte* showing of relevance of expert testimony); *Weatherford v. Bursey*, 429 U.S. 554, 558 (1977) ("communication of defense strategy to the prosecution" would violate Sixth Amendment).

Under the current rule, the judge appropriately is not involved in whether or not or under what circumstances the government's rebuttal witnesses can be interviewed by the defense, or in whether or how the defense otherwise uses an address or telephone number in its investigation or cross-examination. The proposed rule would squarely involve the judge in these matters and place her in the conflicted position of vindicating victims' "interests" against defendants' constitutional rights. This is "precisely the kind of dispute a court should not involve itself in since it cannot do so without potentially compromising its ability to be impartial to . . . the only true parties." *United States v. Rubin*, 558 F. Supp.2d 411, 428 (E.D.N.Y. 2008).

Once reciprocal discovery of the witness's address and telephone number is denied, the defendant cannot retract his disclosure to the government, and the government receives an unfair advantage. This can occur in the complete absence of any case-specific showing for the denial, but instead on the basis of a presumption that all alleged victims need protection from all defendants and that their dignity and privacy are threatened by defense trial preparation. This presumption is empirically baseless, is not required by the CVRA, and is unconstitutional under applicable Supreme Court law:

> [W]e do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. . . . Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor. . . . It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Wardius v. Oregon, 412 U.S. 470, 475-76 & n. 9 (1973). A presumption that alleged victims are in need of protection and that their dignity and privacy are threatened by ordinary trial preparation, rather than a case-by-case showing, is not a "strong showing of state interests." *See, e.g., Maryland v. Craig*, 497 U.S. 836, 845 (1990); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608-09 (1982).

It is no answer that the court *might* order reciprocal discovery after the defendant disclosed his information:

> [I]t is this very lack of predictability which ultimately defeats the State's argument. At the time petitioner was forced to decide whether or not to reveal his . . . defense to the prosecution, he had to deal with the statute as written with no way of knowing how it might subsequently be interpreted. Nor could he retract the information once provided should it turn out later that the hoped-for reciprocal discovery rights were not granted.

Id. at 477.

The proposed rule is also unconstitutional under Supreme Court cases holding that witnesses are not entitled to a presumption that their addresses may be withheld at the expense of the defendant's rights to effectively investigate, to cross-examine, and to call witnesses in his own behalf. The law presumes the opposite. In *Smith v. Illinois*, 390 U.S. 129 (1968), the Supreme Court reversed a conviction where the trial court prohibited questions of a government witness regarding his real name and address, stating:

> When the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination *and out-of-court investigation.* To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Id. at 131 (internal quotation marks and citations omitted) (emphasis supplied). *See also Alford v. United States*, 282 U.S. 687, 693 (1931) ("The question, 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face without any declaration of purpose as was made by [defense] counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed."). Disclosure of a key witness's name and address before trial is often even more important than eliciting it in open court because it assures that the defendant can investigate the witness's background to discover avenues for impeachment. *Martin v. Tate*, 96 F.3d 1448 (Table), 1996 WL 506503 *6 (6th Cir. 1996).

Smith and *Alford* made clear that to require the defendant to establish that elicitation of the identity and address of a key government witness would necessarily lead to discrediting the witness is itself "to deny a substantial right and to withdraw one of the safeguards essential to a fair trial." *Alford*, 282 U.S. at 692; *Smith*, 390 U.S. at 132 (same). "*Alford* and *Smith* thus make it clear that a defendant is presumptively entitled to cross-examine a key government witness as to his address and place of employment." *United States v. Navarro*, 737 F.2d 625, 633 (7th Cir. 1984). To overcome that presumption, the government or the witness must make a specific showing that disclosure would endanger the witness' safety, or would *merely* harass, annoy, or humiliate the witness. *See Smith*, 390 U.S. at 133-34 (White, J., Marshall, J., concurring); *Alford*, 282 U.S. at 694; *see also, e.g., United States v. Hernandez*, 608 F.2d 741, 745 (9th Cir. 1974); *United States v. Dickens*, 417 F.2d 958, 961-62 (8th Cir. 1969); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969); *United States v. Varelli*, 407 F.2d 735, 750-51 (7th Cir. 1969); *United States v. Barajas*, 2006 WL 35529 **7-9 (E.D. Cal. 2006); *United States v. Fenech*, 943 F. Supp. 480, 488-89 (E.D. Pa. 1996). The proposed rule would reverse these presumptions and would therefore be unconstitutional.

D. Rule 21

The current rule requires the court to consider the convenience of witnesses, including any alleged victim who is a witness, in a decision to transfer for convenience on the defendant's motion. The proposed rule would require the court to also consider the convenience of non-testifying alleged victims in such a decision.

The Committee Note cites no source in the CVRA for this rule, and there is none. While non-testifying alleged victims have a general right to attend public court proceedings like any other member of the public, they have no right to have the judge ensure that the proceeding is held at a place where it is convenient for them to attend or to otherwise ensure their attendance. This is clear from the absence of any such right in the plain language of the CVRA and from the explanation in the legislative history of the right of a testifying victim not to be excluded from public proceedings. *See* 150 Cong. Rec. S10910 (Oct. 9, 2004) ("This language [in § 3771(a)(3)] was drafted in a way to ensure that the government would not be responsible for paying for the victim's travel and lodging to a place where they could attend the proceedings" and "is not intended to alter" laws or procedures excluding the public from grand jury or court proceedings).

The Committee Note's reference to "competing interests" is not helpful as it suggests that the convenience of a non-testifying alleged victim is on an equal footing with the convenience of the defendant, the prosecutor and the witnesses. Indeed, the alleged victim's convenience may, as a practical matter, have greater weight than that of the parties and witnesses, as only the victim would have the ability to file a mandamus action. Suppose the defendant moves for transfer to a district where the relevant witnesses are located, but an alleged victim who is not a witness objects because it would be too costly and time-consuming for him to travel. If the judge declines to transfer the trial in light of the alleged victim's objection, the defendant may not be able to secure the attendance of his witnesses. If the judge transfers the trial as the defendant requested, the non-testifying alleged victim can file a mandamus action. Absent the proposed amendment, such an action would surely fail because it would find no support in the CVRA, but with the proposed amendment, the action may succeed because it would find support in the rule, and this alone should give the Committee pause. Regardless of final outcome, the rule would invite mandamus actions that would not otherwise be filed, to which the judge, parties and court of appeals would have to respond.

The GAO Report discusses situations in which victims live at a distance from the proceedings, but it does not recommend that the rules be amended to address these situations. It notes that it has been difficult to notify victims who live on Indian reservations of their rights when they do not have access to a mailbox, telephone or Internet, and that it is difficult to notify and allow participation by victims who live outside the United States. *See* GAO Report at 30-31. In response to these challenges, victim-witness professionals have driven to reservations, prosecutors and agents have coordinated with officials in foreign countries, and courts have used teleconferencing to allow victims who live outside the United States or live in the United States but may not

be able to travel to court to "participate in court proceedings." *Id.* These measures, while not required by the CVRA, have been sufficient to facilitate rights that are required by the CVRA, *i.e.*, the right to notice and to be reasonably heard. The rules should not suggest that more is required, particularly by involving judges in ensuring that it is convenient for alleged victims to attend proceedings in which they are not testifying.

We appreciate the opportunity to comment on these proposed amendments, and respectfully urge the Committee to adopt our proposed alternative to Rule 32.1(a)(6), and to withdraw the proposed amendments to Rules 5(d)(3), 12.1, and 21.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender