

Rights and Procedures Under the Crime Victims' Rights Act and New Federal Rules of Criminal Procedure

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April 30, 2009

On December 1, 2008, new Federal Rules of Criminal Procedure said to incorporate or implement provisions of the Crime Victims Rights Act, 18 U.S.C. § 3771 (“CVRA”) went into effect. The Appendix contains the two new rules (Rules 1(b)(11) and 60), and the amendments to existing rules (Rules 12.1, 17(c), 18 and 32) in redline and strikeout.

Part I of this paper provides the briefest overview of the CVRA’s eight rights and enforcement provisions, and the new rules. Part II explains the rulemaking background behind these rules, including the political forces at work and the Committee’s intent in promulgating the rules. Part III explains that the CVRA left the adversary system and defendants’ constitutional rights intact, that defendants’ constitutional rights trump victims’ statutory rights, and that victims are not parties. Part IV explains that rules of procedure must be interpreted to avoid conflict with the Constitution and the Rules Enabling Act if possible, and are invalid if no such limiting construction is possible. Part V covers each of the eight CVRA rights in detail, including courts’ interpretations of those rights, changes to the rules associated with some of the CVRA rights (Rule 32(c)(1)(B) & (i)(4)(B) and new Rule 60(a)), and related rights of defendants. Part VI covers special procedures, not contained in the CVRA, which were created solely by amendments to the rules (Rules 12.1(b), 17(c)(3), 18 and 32(d)(2)(B)), and ways to avoid problematic applications of those amendments. Part VII sets forth general procedures for the conduct of proceedings in which a victim or alleged victim is involved, based on the procedural provisions of the CVRA, new Rules 1(b)(11) and 60(b), and the procedural rights of defendants that must be observed in criminal proceedings. Finally, Part VIII provides suggestions on how defense counsel can help clients make amends with victims in ways that are beneficial to both.

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¹ Thanks to Denise Barrett, Jennifer Coffin, and Rachelle Barbour for their contributions to this paper.

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I. Overview of CVRA and New Rules

The CVRA, enacted on October 30, 2004, lists the following eight “rights.”

- (1) “to be reasonably protected from the accused”
- (2) “to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused”
- (3) “not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding”
- (4) “to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding”
- (5) the “reasonable right to confer with the attorney for the Government in the case”

- (6) “to full and timely restitution as provided in law”
- (7) “to proceedings free from unreasonable delay”
- (8) “to be treated with fairness and with respect for the victim’s dignity and privacy”

18 U.S.C. § 3771(a). Certain limitations on these rights and the CVRA’s procedural provisions are scattered throughout subsections (b)(1), (c), (d) and (e). Notably, the CVRA allows a victim or alleged victim to file a petition for mandamus in the court of appeals if he or she asserted a “right” by motion in the district court and the judge denied the “relief sought,” no matter how unreasonable. The court of appeals must decide the petition within 72 hours. 18 U.S.C. § 3771(d)(3). The CVRA also allows a “motion to re-open” a plea or sentence if a victim asserted a “right to be heard” before or during a public proceeding involving a plea or sentencing, that right was denied, a petition for mandamus was filed within 10 days, and the petition was granted. 18 U.S.C. § 3771(d)(5).

Effective December 1, 2008, the following rules changes went into effect:

- Rule 1(b)(11) incorporates the statutory definition of “victim.”
- Rule 12.1(b) appears to alter the right to reciprocal discovery alibi cases.
- Rule 17(c)(3) requires a court order for a subpoena for documents containing “personal or confidential” information, permits *ex parte* applications, and permits notice and an opportunity to challenge the application as unreasonable or oppressive only if to do so would not prematurely disclose defense strategy, would not result in the loss or destruction of evidence, and no other “exceptional circumstances” exist that would interfere with a constitutional and orderly adversary procedure.
- Rule 18 requires the court to consider the convenience of spectator victims in setting the place of trial within the district.
- Rule 32 inserts the “right to be reasonably heard” at sentencing, removes the requirement that victim impact information be “verified” and “stated in a nonargumentative style,” and requires a pre-sentence investigation if the law “permits” restitution.
- Rule 60(a) restates the procedural rights set forth in § 3771(a)(2), (3) and (4).
- Rule 60(b), entitled “Enforcement and Limitations,” restates some of the procedural provisions of the CVRA, and leaves it to the courts and the parties to ensure an orderly adversary procedure.

Rules that create, or appear to create, rights beyond the plain terms of the CVRA may invite mandamus petitions that would not otherwise be filed. Such rules fail in their overall purpose “to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.”² More importantly, if the result of such rules is to abridge a substantive right of the defendant, or to change a substantive outcome for the defendant, the rule is both unconstitutional and violates the Rules Enabling Act.

² 28 U.S.C. § 331.

II. Rulemaking Background

The impetus for these amendments came from then Judge Cassell, a well-known victim rights advocate who was then Chair of the Criminal Law Committee of the Judicial Conference.³ In March 2005, Judge Cassell submitted, in his personal capacity, twenty-five proposed rules changes that would have done through the rules what Congress did not do in the CVRA, *i.e.*, replace the adversary system with a three-party/two-against-one system.⁴ In April 2005, the Criminal Rules Advisory Committee (“Committee”) appointed a CVRA Subcommittee (“Subcommittee”). The Committee initially questioned whether any amendments should be made, since the CVRA “is self-executing” and rules “cannot alter or add force to those statutory provisions,” but concluded that “carefully drafted rule amendments to implement the specific rights set out in the Act would be appropriate and helpful.”⁵ The Subcommittee determined to take a “conservative” approach and “not create rights beyond those provided by the Act,”⁶ and not to use “general language” stating that victims have a right “to be treated with fairness” as a “springboard for a variety of rights not otherwise provided for in the CVRA.”⁷ From the beginning and through the end of the process, the Committee stated that it did not intend to and did not upset the careful balance of the CVRA, abridge defendants’ rights, or enlarge or create new victim rights, and in particular that it did not create any procedures based on the CVRA’s right to be treated fairly and with respect.⁸

The Judicial Conference has strived to make the rulemaking process “the most thoroughly open, deliberative, and exacting process in the nation for developing substantively

³ Judge Cassell has since left the bench to litigate on behalf of victims and to teach about victim rights.

⁴ Criminal Rules Docket (Historical) at 33, <http://www.uscourts.gov/rules/2008-Criminal-Suggestions-Docket-Historical.pdf>.

⁵ See Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 23 (September 2007), <http://www.uscourts.gov/rules/Reports/ST09-2007.pdf>.

⁶ Advisory Committee on Rules Minutes at 13, October 24 & 25, 2005, <http://www.uscourts.gov/rules/Minutes/CR10-2005-min.pdf>.

⁷ See Memorandum to Criminal Rules Advisory Committee from CVRA Subcommittee at 1-2 (Sept. 19, 2005), included in <http://www.uscourts.gov/rules/Agenda%20Books/CR2005-10.pdf>.

⁸ See Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 20, 22 (September 2007), <http://www.uscourts.gov/rules/Reports/ST09-2007.pdf>; Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 6, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf; Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 2 (Aug. 1, 2006), http://www.uscourts.gov/rules/Excerpt_CRReport1205_Revised_01-06.pdf; Report of the Advisory Committee on Criminal Rules to the Standing Committee on Rules of Practice and procedure, December 8, 2005, <http://www.uscourts.gov/rules/Reports/CR12-2005.pdf>.

neutral rules.”⁹ The Committee published for comment initial versions of two new rules (Rule 1(b)(11) & 60) and amendments to four existing rules (Rules 12.1(b), 17(c)(3), 18 & 32) in August 2006, and held a public hearing on these proposals in January 2007.¹⁰ The Federal Defenders and NACDL strenuously opposed most of these proposals and offered alternative language for others.¹¹ By then, Judge Cassell had proposed nearly thirty rule changes.¹² Senator Kyl, the primary sponsor of both a failed victim rights constitutional amendment and the CVRA, followed up with a letter indicating that legislation would follow if the Committee did not implement his and Judge Cassell’s interpretation of the CVRA through the rules.¹³ Representatives Poe and Costa, co-chairs of the Congressional Victims’ Rights Caucus, also wrote, stating, in what was either a Freudian slip or a typographical error, that the CVRA gave victims the right “to be reasonably protected from the rights of accused.”¹⁴

The Committee took note of the letters from these congressmen, especially Senator Kyl’s, while also noting the substantial “criticism that the proposed rules went too far, tipping the adversarial balance and depriving the defense of critical rights.”¹⁵ “The package of amendments

⁹Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am. U. L. Rev. 1655, 1656 (1995) (internal quotation marks omitted), quoting Committee on Long Range Planning, Judicial Conference of the U.S., Proposed Long Range Plan for the Federal Courts recommendation 30, at 54 (2d prtg. 1995).

¹⁰ Criminal Rules Docket (Historical) at 33, <http://www.uscourts.gov/rules/2008-Criminal-Suggestions-Docket-Historical.pdf>.

¹¹ Federal Defenders’ Testimony and Comments on Federal Rules of Criminal Procedure Published for Comment in August 2006, <http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-003.pdf>; Comments of NACDL Concerning Proposed Amendments to Federal Rules of Criminal Procedure Published for Comment in August 2006, <http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-010.pdf>; Transcript of Public Hearing, January 26, 2007, http://www.uscourts.gov/rules/CR_Hearing_012607.pdf.

¹² Paul G. Cassell, *Treating Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure* (draft of January 16, 2007), submitted as written testimony, <http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-002.pdf>.

¹³ Letter from Senator Jon Kyl to the Honorable David Levi, Chairman, Committee on Rules of Practice and Procedure, February 16, 2007, <http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-026.pdf>. Attached to the letter were Senator Kyl’s floor statements.

¹⁴ See Letter from Representatives Poe and Costa to Rules Committee, February 8, 2007, <http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-027.pdf>.

¹⁵ See Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 2, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf. See also Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 22 (September 2007), <http://www.uscourts.gov/rules/Reports/ST09-2007.pdf>.

was revised to account for some of the concerns raised during the public comment.”¹⁶ Not satisfied that the Committee had gone far enough, Senator Kyl introduced Judge Cassell’s proposals as direct amendments to the rules in S. 1749, the Crime Victims’ Rights Rules Act of 2007. The bill had no cosponsors and died in committee.

III. Constitutional Background

A. The CVRA Keeps The Two-Party Adversary System and Defendants’ Constitutional Rights Intact. Congressional Floor Statements to the Contrary Cannot Alter the Statute Congress Voted Into Law or the Constitutional Framework.

The Framers created a two-party adversary system, with a public prosecutor, a criminal defendant and a neutral judge. The Framers did not intend that the rights of the accused would be degraded by or subordinated to competing rights of victims. Nor did they envision that prosecutors would gain an advantage over the accused in the name of victims, or that judges’ impartiality would be compromised by an obligation to enforce victim rights against the accused.

Congress enacted the CVRA after a victim rights constitutional amendment failed.¹⁷ The proposed constitutional amendment would have given victims rights at least equal to defendants’ constitutional rights. It stated that “victims’ rights ‘shall not be denied . . . and may be restricted only as provided in this article.’”¹⁸ The fundamental objection to the victim rights constitutional amendment was that it would have replaced the two-party adversary system the Framers created with a three-party system in which criminal defendants would face both the public prosecutor and one or more private prosecutors with rights equal to or greater than the rights of the accused. The opposition argued that the “colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as ‘inefficient, elitist, and sometimes vindictive,’” and that “the Framers believed victims and defendants alike were best protected by the system of public prosecutions that was then, and remains, the American standard for achieving justice.”¹⁹ Further, they argued, “we have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy,”²⁰ and “[n]ever 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.”²¹

¹⁶ See Advisory Committee on Criminal Rules Minutes at 8, October 1-2, 2007, <http://www.uscourts.gov/rules/Minutes/CR10-2007-min.pdf>.

¹⁷ 150 Cong. Rec. at S4262 (Apr. 22, 2004) (“It is clear to me that passage of a Constitutional amendment is impossible at this time.”) (statement of Sen. Feinstein).

¹⁹ See S. Rep. No. 108-191 at 68-69 (2003) (minority views).

²⁰ *Id.* at 70.

²¹ *Id.* at 56.

In passing the CVRA instead of the constitutional amendment, Congress intended to preserve the system the Framers created -- with a public prosecutor charged with acting in the public interest, a criminal defendant with the full panoply of constitutional rights, and a neutral judge. *See United States v. Turner*, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005) (The “CVRA strikes a different balance [than the failed constitutional amendment], and it is fair to assume that it does so to accommodate the concerns of those legislators [who opposed the amendment]. . . . In particular, it lacks the language that prohibits all exceptions and most restrictions on victims’ rights, and it includes in several places the term ‘reasonable’ as a limitation on those rights.”). As Senator Durbin explained:

By enacting legislation rather than amending the Constitution, our approach today also addresses my concerns regarding the rights of the accused. The premise of criminal justice in America is innocence until proven guilty, and our Constitution therefore guarantees certain protections to the accused. . . . Although these protections for the accused sometimes are painful for us to give, they are absolutely critical to our criminal justice system. When the victim and the accused walk into the courtroom, both are innocent in the eyes of the law, but when the trial begins, it is the defendant’s life and liberty that are at stake.²²

Thus, it remains that only the defendant has constitutional rights in criminal proceedings. Victims and alleged victims do not have constitutional rights. Nor are they parties. Under the CVRA, victims “are not accorded formal party status, nor are they even accorded intervenor status as in a civil action. Rather, the CVRA appears to simply accord them standing to vindicate their rights as victims under the CVRA and to do so in the judicial context of the pending criminal prosecution of the conduct of the accused that allegedly victimized them.” *United States v. Rubin*, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008). A court cannot “compromise[e] its ability to be impartial to the government and defendant, the only true parties.” *Id.* at 428. *See also United States v. Hunter*, 548 F.3d 1308, 1311 (10th Cir. 2008) (victim has no right to appeal a defendant’s sentence because a victim is not a party).

Beware of victim advocates citing to the floor statements of Senator Kyl, the primary sponsor of the failed constitutional amendment and of the CVRA, for interpretations of the CVRA that differ from what Congress intended. For example, Senator Kyl stated that the right to be treated with “fairness” and with “respect for dignity” is synonymous with a right to “due process.”²³ “Floor statements from two Senators [who sponsored the bill] cannot amend the clear and unambiguous language of a statute.” *Barnhart v. Sigmon Coal Co., Inc.* 534 U.S. 438, 457 (2002). Floor statements may “open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President,” *Regan v. Wald*, 468 U.S. 222, 237 (1984), and this may be particularly true of a bill’s

²² *See* 150 Cong. Rec. S4275 (April 22, 2004) (statement of Sen. Durbin).

²³ *See* 150 Cong. Rec. S10911 (Oct. 9, 2004) (statement of Sen. Kyl); 150 Cong. Rec. S4260-01, S4264 (April 22, 2004) (statement of Senator Kyl).

sponsor disappointed in some respect with the final bill. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006). “The *only* reliable indication of *that* intent—the only thing we know for sure can be attributed to *all* of them—is the words of the bill that they voted to make law.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) (Scalia, J., concurring) (emphasis in original). The plain statutory language controls. See *Crandon v. United States*, 494 U.S. 152, 160 (1997); *Whitfield v. United States*, 543 U.S. 209, 215 (2005); *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 130-36 (2002); *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Further, relying on floor statements to expand upon the text would violate the constitutional requirements for enactment, bicameralism and presentment. U.S. Const. art. I, § 7; *INS v. Chadha*, 462 U.S. 919, 945 (1983).

B. Defendants’ Constitutional Rights Trump Victims’ Statutory Rights.

Because a defendant’s constitutional rights always trump a victim’s statutory rights, see, e.g., *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (“the right of confrontation is paramount to the State’s policy of protecting a juvenile offender”), no provision of the CVRA or a related rule may infringe on any right of the defendant.

Defendants have a number of constitutional rights. Among them are the rights to an impartial judge, *In re Murchison*, 349 U.S. 133 (1955); to be presumed innocent, and to be found guilty only based on proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970); the right to confront adverse witnesses, *Coy v. Iowa*, 487 U.S. 1012 (1988); the right to cross-examine adverse witnesses, *Crawford v. Washington*, 541 U.S. 36 (2004); the right to compulsory process, *Taylor v. Illinois*, 484 U.S. 400 (1988), *Washington v. Texas*, 388 U.S. 14, 19 (1967); the right to present a complete defense, *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986); the right to effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984); the right to obtain favorable evidence that is relevant to guilt or punishment, *Kyles v. Whitley*, 514 U.S. 419 (1995); the right to an impartial jury, *United States v. Gaudin*, 515 U.S. 506 (1995); and the right to notice and opportunity to challenge any information that may be used to deprive the defendant of life, liberty or property in sentencing. See *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007); *Burns v. United States*, 501 U.S. 129, 137-38 (1991); *Gardner v. Florida*, 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

The right to an impartial judge is one that the CVRA and some of the rules can implicate to an unusual degree. See *In re Murchison*, 349 U.S. 133, 136 (1955) (a “fair trial in a fair tribunal is a basic requirement of due process”); *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927) (“Every procedure which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.”). The threat of a disruptive mandamus action may place pressure on judges to favor victims’ rights over defendants’ rights. Indeed, according to Senator Kyl, the mandamus provision was intended to “encourage[] courts to broadly defend the victims’ rights.” See also 150 Cong. Rec. S10910, S10912 (Oct. 9, 2004). But judges cannot act as a victim’s advocate and the defendant’s adversary. Judges must protect defendants’ rights. See Erin C. Blondel, *Victims’ Rights in an Adversary System*, 58 Duke L. J. 237, 261, 265, 269-

70 (2008). Judges must avoid any reading of a rule that places them in the conflicted position of “defending” victims’ statutory interests against defendants’ constitutional rights. *See United States v. Rubin*, 558 F. Supp.2d 411, 428 (E.D.N.Y. 2008) (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.”).

IV. The Rules Must Be Interpreted to Avoid Abridging Defendants’ Rights or Enlarging Victims’ Rights; If No Such Interpretation is Possible, the Rule is Invalid.

When construing the rules, consider the avoidance canon, constitutional limits on rulemaking, and the Rules Enabling Act. Both the Constitution and the Rules Enabling Act prohibit the Rules Committee from promulgating rules that abridge defendants’ constitutional or statutory rights or that enlarge victims’ statutory rights, and prevent the courts from interpreting the rules in such a manner.

How is it possible for a rule to run afoul of the Constitution or the Rules Enabling Act when the Supreme Court approved it? The Court ordinarily depends on adversary testing of concrete disputes to sharpen its understanding of difficult questions.²⁴ It approves the rules in the abstract without adversary testing. The Court may not be aware of problematic applications of a rule, or it may not feel the need to disapprove a rule unless the lower courts interpret it in a way that violates the Constitution or the Rules Enabling Act. For example, the Rules Committee received extensive public comment opposing Rules 12.1(b), 17(c)(3) and 18 because they posed problems under the Constitution or the Rules Enabling Act, but the Committee’s report to the Supreme Court regarding controversial rules made no mention of those rules.²⁵ According to other Committee reports, the Committee did not intend that any of the amendments would transgress the bounds of the Constitution or the Rules Enabling Act. *See Part II, supra*; Part IV.D, *infra*.

A. Avoidance Canon

Like any law, a rule of procedure must be interpreted, if possible, to avoid violating the Constitution. *See Martinez v. Clark*, 534 U.S. 371, 381 (2005); *Jones v. United States*, 526 U.S. 227, 239-40 (1999). Similarly, a rule must be interpreted to avoid violating the Rules Enabling Act. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845-48 (1999); *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503-04 (2001).

The Rules Committee’s expressed understanding in promulgating a rule can aid in a limiting construction. For example, in interpreting a civil procedure rule that might have violated both the Constitution (the Seventh Amendment and the Due Process Clause) and the Rules Enabling Act, the Supreme Court adopted a limiting construction, stating that “this

²⁴ *See Federal Election Comm. v. Akins*, 524 U.S. 11, 20-21 (1998); *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 382-83 (1980).

²⁵ *See Proposed Rule Amendments of Significant Interest*, http://www.uscourts.gov/rules/supct0108/Controversial_report_Sup_Ct_2007.pdf.

limiting construction finds support in the Advisory Committee's expressions of understanding, minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999).

If no limiting construction is possible to save the rule from violating the Constitution or the Rules Enabling Act, the rule is invalid, *Holmes v. South Carolina*, 547 U.S. 319 (2006), and the prior rule or practice applies, assuming it is valid. *Ortiz*, 527 U.S. at 845.

B. The Constitution

A rule that abridges a weighty interest of the accused, and that does not serve a legitimate procedural purpose or is arbitrary or disproportionate to its purpose, is invalid. For example, in *Holmes v. South Carolina*, 547 U.S. 319 (2006), the Supreme Court struck down a state evidence rule that prohibited the accused from introducing evidence of a third party's guilt if the prosecution introduced forensic evidence that, if believed, strongly supported a guilty verdict. The right to "present a complete defense . . . is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* at 324-25 (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998) and *Rock v. Arkansas*, 483 U.S. 44, 58 (1987)). The Court observed that the Constitution "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose . . . in the criminal trial process . . . or that are disproportionate to the ends that they are asserted to promote." *Id.* at 327. The Court found that the rule was arbitrary in that it did not rationally serve any procedural purpose. *Id.* at 331.

In *United States v. Scheffer*, 523 U.S. 303 (1998), the Court upheld a military rule of evidence that flatly excluded polygraph evidence. The Court found that the rule served three "legitimate interests in the criminal trial process": reliability, preservation of the jury's function in determining credibility, and avoiding litigation over issues other than the guilt or innocence of the accused. *Id.* at 309-15. The Court found that the rule did not affect a significant interest of the accused because it did not exclude any evidence or testimony about the facts of the case, but only bolstered the defendant's credibility. *Id.* at 317.

In *Wardius v. Oregon*, 412 U.S. 470 (1973), the Court struck down a notice of alibi rule that did not guarantee reciprocal discovery to the defendant. While the state's "interest in protecting itself against an eleventh-hour defense is both obvious and legitimate," *id.* at 471 n.1, "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." *Id.* at 475.

C. The Rules Enabling Act

The Supreme Court has no jurisdiction to promulgate rules except through a delegation of congressional power. Congress, not the Supreme Court, has the power to regulate practice and procedure in the federal courts. It "may exercise that power by delegating to [the courts] authority to make rules not inconsistent with the statutes or Constitution of the United States."

Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941). Congress, through the Rules Enabling Act, has delegated to the Supreme Court, acting on recommendations from the Judicial Conference,²⁶ “the power to prescribe general rules of practice and procedure.” 28 U.S.C. § 2072(a). “Such rules shall not abridge, enlarge or modify any substantive right.” *Id.*, § 2072(b); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845-48 (1999); *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503-04 (2001).

In sum, there are two requirements: (1) every rule must be procedural; and (2) if a rule is procedural, it also must not abridge, enlarge or modify any substantive right. If possible, a rule must be interpreted to avoid violating these jurisdictional limitations. *Semtek*, 531 U.S. at 503-04; *Ortiz*, 527 U.S. at 845. If a limiting construction is not possible, the rule is invalid.

1. A rule’s purpose must be to regulate procedure without regard to substantive interests.

The Rules Enabling Act is “restricted in its operation to matters of pleading and court practice and procedure.” *Sibbach.*, 312 U.S. at 10. The test is whether it “really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” *Id.* at 13. The purpose of the rule must be “procedural,” *i.e.*, “concerned only with the most sensible way to manage a litigation process,” “designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes.” John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724, 726 & nn. 170 (1974). The purpose of a “procedural rule” must be “to achieve accuracy, efficiency, and fair play in litigation, without regard to the substantive interests of the parties,” *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 882 (10th Cir. 2006), much less the substantive interests of persons who are not parties.

Under these authorities, a rule with the stated purpose of advancing a substantive interest of an alleged victim, such as the amendments to Rules 12.1 (reciprocal discovery of alibi) and 17 (restricting issuance of subpoenas), *see* Part VI.A & B, *infra*, is not “procedural.” If possible, these rules must be interpreted as procedural only, *i.e.*, concerned only with the most sensible way to manage a two-party adversary litigation process without regard to an alleged victim’s substantive interests. If such a construction is not possible, the amendment cannot be applied.

2. A rule shall not abridge, enlarge or modify any substantive right.

A “substantive right [is] a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.” Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. at 725. A substantive reason is “concerned with something other than the way litigation is to be managed.” *Id.* at 728. A substantive reason is one that “characteristically and reasonably affect[s] . . . conduct” or “states of mind” beyond the litigation in the courtroom; an example of the latter is a statute of limitations, which fosters “the feeling of release, the assurance that the ordeal has passed.” *Id.* at 725-26.

²⁶ 28 U.S.C. §331.

The rules implementing the CVRA implicate two sets of “substantive rights”: statutory rights of victims under the CVRA, which may not be “enlarged,” and constitutional and statutory rights of defendants, which may not be “abridged.” Even “procedurally neutral rules may affect substantive rights” and “may give a practical advantage to one type of litigant over another.”²⁷ The government does not have constitutional rights, and should not be given a practical advantage over defendants through rules created for victims.

Many of the rights contained in the CVRA are substantive because they are not concerned with the way litigation is managed but with affecting conduct and feelings outside the litigation in the courtroom. The purpose of the right to be “reasonably protected from the accused” is to affect conduct outside the courtroom.²⁸ The right to be treated with “respect for the victim’s dignity and privacy” is aimed at improving victims’ state of mind outside the litigation by preventing the “secondary traumatization” that victims sometimes experience “at the hands of the criminal justice system.”²⁹ The amendments to Rules 12.1(b) and 17(c)(3), which are said to “implement” these statutory rights, cannot be interpreted to “enlarge” them.

Nor may any rule be interpreted in a way that abridges a defendant’s constitutional rights, whether procedural or substantive. Defendants have a substantive constitutional right to life, liberty and property.³⁰ See U.S. Const. Amend. V. Defendants also have many procedural constitutional rights, including the right to due process of law, the right to effective assistance of counsel, the right to confront and cross-examine witnesses, and the right to compulsory process. See U.S. Const. Amend. V, VI. According to a seminal article on the legislative history and interpretation of the Rules Enabling Act, Congress’s concern that the rules not be used to abridge, enlarge or modify any substantive right extends to these procedural constitutional rights. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1169 (1982).

Although it does not appear that the Supreme Court has interpreted a criminal rule under the Rules Enabling Act, it has interpreted a civil rule to avoid conflict with the Act. In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the district court had read Fed. R. Civ. P. 23(b)(1)(B) as allowing it to certify a mandatory settlement-only class under a “limited funds” rationale, which meant that all members of the class would receive a *pro rata* share of the settlement fund, and that absent members, who were by definition unidentifiable at the time the class was certified, had no ability to consent or right to abstain. The Court rejected this interpretation to avoid conflict with the Rules Enabling Act, because it may have abridged the rights of absent class members to pursue individual tort claims at law. *Id.* at 845. Instead, the Court interpreted the rule in a manner that would keep it “close to the practice preceding its adoption.” *Id.* The Court also applied the doctrine of constitutional avoidance, finding that the lower court’s interpretation

²⁷ Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am. U. L. Rev. 1655, 1683 (1995).

²⁸ See 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

²⁹ See 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

³⁰ Other substantive rights include the right to trial by jury, U.S. Const. Art. III, § 1, U.S. Const. Amend. VI; the right not to be subject to *ex post facto* laws, U.S. Const. Art. I, § 10; and the right against unreasonable searches and seizures, U.S. Const. Amend. IV.

of the rule would violate the absent class members' Seventh Amendment jury trial rights and their due process rights to notice and an opportunity to be heard. *Id.* at 845-48.

D. The Criminal Rules Advisory Committee's Intent and Understanding was that the Rules Comply with the Constitution and the Rules Enabling Act.

The Committee repeatedly recognized that “the CVRA reflects a careful Congressional balance between the rights of defendants, the discretion afforded the prosecution, and the new rights afforded to victims,” and stated that “[g]iven that careful balance,” it “sought to incorporate, but not go beyond, the rights created by statute.”³¹ It stated that it (1) “proposed rule amendments to implement the specific rights recognized in the Act,” and (2) “did not propose . . . amendments . . . to provide specific rights in particular proceedings, not expressly stated in the Act but based on the Act’s general right that crime victims be treated fairly and with respect.”³² It said that rules in the latter category “would have inserted into the criminal procedural rules substantive rights that are not specifically recognized in the Act – in effect creating new victims’ rights not expressly provided for in the Act,” and thus “could create new substantive rights.”³³

To the extent any of the rules appears to violate the Constitution and/or breach the limits of the Rules Enabling Act, they must be read otherwise if possible. The Committee’s “expressions of understanding” are relevant to that interpretation. *See Ortiz*, 527 U.S. at 842.

V. The Eight “Rights,” Associated Rules, and Related Constitutional Requirements

All eight of the CVRA “rights” are discussed in this Part. Not all of them resulted in an amendment to the rules. Changes to Rules 32 and 60 associated with one of the eight “rights” are described in this Part. Three of the “rights” (notice, (a)(2); not to be excluded, (a)(3); and to be reasonably heard, (a)(4)) can fairly be characterized as procedural and were incorporated into new Rule 60(a)(1)-(3) nearly verbatim. One of the “rights” (restitution as provided in law, (a)(6)) is “implemented” by Rule 32(c)(1)(B). Two of the “rights” (to be “reasonably protected from the accused,” (a)(1), and to be treated “with fairness and with respect for the victim’s dignity and privacy,” (a)(8)) are clearly not procedural but are said to be “implemented” by the amendments to Rules 12.1(b) and 17(c)(3). Rules 12.1(b) and 17(c)(3), as well as Rule 18 and Rule 32(d)(2)(B) which do not cite to any section of the CVRA, are addressed in Part VI.

³¹ *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 6, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf; Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 2 (Aug. 1, 2006), http://www.uscourts.gov/rules/Excerpt_CRReport1205_Revised_01-06.pdf; Report of the Advisory Committee on Criminal Rules to the Standing Committee on Rules of Practice and procedure, December 8, 2005, <http://www.uscourts.gov/rules/Reports/CR12-2005.pdf>.

³² *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 22 (September 2007), <http://www.uscourts.gov/rules/Reports/ST09-2007.pdf>.

³³ *Id.* 20.

A. “Reasonably Protected from the Accused,” § 3771(a)(1)

While this provision is broadly worded, it should not be construed as a “wellhead of boundless authority to fashion protection for victims in the guise of ‘protecting them from the accused.’” *United States v. Rubin*, 558 F. Supp. 2d 411, 419-21 (E.D.N.Y. 2008). For example, it does not add to or change the bases upon which a defendant 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 States v. Rubin*, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008). The Bail Reform Act 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). 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 future crime is “compelling.” *United States v. Salerno*, 481 U.S. 739, 750-51 (1987). Nothing in the CVRA alters the limited circumstances under which the court may detain a defendant.

The right to be “reasonably protected from the accused” also does not permit a victim to dictate a defendant’s financial affairs or restrict travel. *United States v. Rubin*, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008). In *Rubin*, the court found that the government had not violated this provision of the CVRA when it chose not to freeze assets of the defendant or prevent him from engaging in securities activities. The right to be “reasonably protected” also was not violated when the court permitted the defendant to visit sick relatives in Israel after his arrest. *Id.*

Nor does § 3771(a)(1) permit the government to withhold the identity of victims. *United States v. Vaughn*, slip op., 2008 WL 4615030 *2 n.1 (E.D. Cal. Oct. 17, 2008). “[A] defendant has the right to test the government’s evidence, and only the most unpracticed lawyers would be satisfied with their preparation if they had no opportunity to meet the government’s star witness(es) until the day of testimony. Why even bother with cross-examination if one cannot prepare for it?” *Id.* at * 3. Thus, where the government argued that the defendant may retaliate because he had used coercion and threats in the course of the offense, the court ordered disclosure of the names, addresses, email addresses, and telephone numbers of government witnesses under a protective order precluding dissemination to the defendant or anyone other than the defense team. *Id.* at *2.

Section 3771(a)(1) is one of the stated bases for the amendment to Rule 12.1(b) notice of alibi, which is discussed in Part VI.A, *infra*.

B. “Reasonable, Accurate and Timely Notice of Any Public Court Proceeding . . . Involving the Crime,” § 3771(a)(2), (c)(1); Rule 60(a)(1)

Incorporating § 3771(a)(2) and (c)(1), new Rule 60(a)(1) states: “The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.”

The duty to give a victim notice is appropriately assigned to the government, rather than the judge, because the government already has notification duties under 42 U.S.C. § 10607(b) & (c)(3)(A)-(D), and, importantly, the judge should not be involved in notifying “victims” at any point in time before the defendant has been convicted and while he is still presumed innocent. Otherwise, the judge’s actions might interfere with the presumption of innocence. *See United States v. Turner*, 367 F. Supp.2d 319, 326 (E.D.N.Y. 2005).

The CVRA applies only in “public” court proceedings and has no effect on the court’s authority to close or seal court proceedings. *See* 150 Cong. Rec. S10910 (Oct. 9, 2004); *United States v. L.M.*, 425 F.Supp.2d 948, 951-52 (N.D. Iowa 2006). A court may close proceedings if the defendant’s right to a fair trial, the need to protect the safety of any person, or the need to protect sensitive information so requires. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 581 (1980); *Estes v. Texas*, 381 U.S. 532 (1965); 28 C.F.R. § 50.9. Victims are not entitled to notice of matters handled without court appearance or that arise without prior notice at a status conference. *United States v. Rubin*, 558 F. Supp. 2d 411, 423 (E.D.N.Y. 2008).

“Notice of release otherwise required pursuant to [the CVRA] shall not be given if such notice may endanger the safety of any person,” including the defendant. § 3771(c)(3).

C. “Not to be Excluded from any Such Public Court Proceeding” Unless the Court Determines by “Clear and Convincing Evidence” that the Victim’s Testimony “Would be Materially Altered,” § 3771(a)(3), (b)(1); Rule 60(a)(2)

Incorporating § 3771(a)(3) and (b)(1) fairly closely, Rule 60(a)(2) states:

The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim’s testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

1. No Right to Attend, but a Qualified Right Not to be Excluded

While victims are generally allowed to attend public court proceedings, they have no “right” to attend. Thus, neither the courts nor the government have an affirmative duty to ensure that they are present. *See* 150 Cong. Rec. S10910 (Oct. 9, 2004); *United States v. Turner*, 367

F.Supp.2d 319, 332 (E.D.N.Y. 2005); *United States v. Rubin*, 558 F. Supp. 2d 411, 423-24 (E.D.N.Y. 2008).

Victims have a right “not to be excluded from” a public court proceeding involving the crime, “unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.” § 3771(a)(3).

2. Violation of Due Process

The right not to be excluded is a significant incursion on defendants’ right to a fair and reliable trial. Fed. R. Evid. 615 lessens the risk of a witness presenting tainted testimony by requiring the court upon request to order witness sequestration. “The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion.” Fed. R. Evid. 615, 1972 advisory committee note. Sequestration has been used since biblical times and “is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.” *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 628-29 (4th Cir. 1996).

Fed. R. Evid. 615, however, contains an exception for “a person authorized by statute to be present,” and the CVRA allows (but does not require) victims to be present. This exception to the sequestration rule was promulgated in response to an earlier statute, 18 U.S.C. § 3510, stating that victims may not be excluded from *trial* on the basis that they may make a victim impact statement at *sentencing*. See Fed. R. Evid. 615, 1998 advisory committee note. Unlike § 3510, § 3771(a)(3), permits tainted *factual* testimony *at trial*, unless the defendant can prove in advance that the testimony will be materially altered by the victim-witness’s attendance. As judges have reported, proving in advance by clear and convincing evidence that a witness’s testimony will be altered is difficult if not impossible to do. See United States Government Accountability Office, *Crime Victims’ Rights Act* at 87 (Dec. 2008), <http://www.gao.gov/new.items/d0954.pdf>.

Section 3771(a)(3) and Rule 60(a)(1) should be challenged as a violation of the Due Process Clause because they provide inadequate protection against false testimony.

3. Full Discovery and Development of the Facts

Because the defendant bears the nearly impossibly burden of proving by clear and convincing evidence that a victim-witness’s testimony would be materially altered if the witness were allowed to remain in the courtroom,³⁴ the defendant should be entitled to obtain all information relevant to the question and an evidentiary hearing. The government and the probation department should be required to produce all statements and criminal records of the victim, all statements of other witnesses expected to testify on the same subject matter, and all

³⁴ See, e.g., *United States v. Edwards*, 526 F.3d 747, 758 & n.28 (11th Cir. 2008) (upholding denial of exclusion where defendant “does not argue that he provided the district court with clear and convincing evidence of the likelihood that the victim-witnesses would materially alter their testimony if they were not sequestered,” and “conceded [that such evidence was] not discernible from the record.”).

other evidence or information in their possession or control that bears on whether the victim's testimony would be materially altered. To help prove that a witness's testimony would be materially altered, you may want to apply for Rule 17(c) subpoenas for information such as psychiatric history, tax records, employment records, benefit applications and other documents that may bear on a victim-witness's credibility and character for truthfulness. Your use of these records should not be constrained by Federal Rule of Evidence 608(b) (generally prohibiting extrinsic evidence to prove specific instances of a witness's character for truthfulness), because the court is not bound by rules of evidence in deciding preliminary questions. Fed. R. Evid. 104 (a).

To avoid premature disclosure of defense strategy, consider making an ex parte proffer of your evidence and seek a preliminary ruling on whether you have proffered sufficient evidence to go forward with a hearing. Otherwise, you risk the government and the witness being prepared to meet your impeachment at trial. Whether to pursue a pretrial hearing in an effort to exclude a victim-witness from the courtroom is a strategic decision that must be made on a case-by-case basis. It may be advantageous, however, to skip the usually futile exercise of trying to prove in advance that the testimony would be materially altered so as not to alert the witness. On the other hand, going through the process may provide useful discovery information.

4. Alternatives to Prevent Fabrication and Tailoring

The second sentence of Rule 60(a)(2) is based on § 3771(b)(1), which provides that “[b]efore making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.” Since subsection (a)(3) states that there is a right “not to be excluded” unless the court determines that the testimony would be materially altered, subsection (b)(1) appears to mean that the court should consider alternatives to complete exclusion only after having found that the testimony would be materially altered. *See In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006). The court can order that the victim testify before any other witnesses or that she be excluded during testimony on the same subject matter. Even absent a finding that the testimony would be materially altered, the government may cooperate in keeping the witness out of the courtroom during other testimony to avoid damaging cross-examination and jury instructions.

5. Cross-Examination and Jury Instruction

If the court permits an alleged victim to remain in the courtroom and hear other testimony, you can cross-examine the victim-witness on how his or her testimony differed from prior statements and was tailored to fit the other testimony.

You can also seek a jury instruction explaining that she was not subject to sequestration like other witnesses, that the purpose of the sequestration rule is “as a means of discouraging and exposing fabrication, inaccuracy, and collusion,” Fed. R. Evid. 615, 1972 advisory committee note, and that it is “natural and irresistible for a jury, in evaluating the relative credibility of a [witness] . . . to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him.” *Portuondo v. Agard*, 529 U.S. 61, 67-68 (2000).

6. Reason for Any Decision Must Be Clearly Stated on the Record

Rule 60(a)(2) states that “[t]he reasons for any exclusion must be clearly stated on the record.” This comes from § 3771(b)(1), which is designed to make a record for a mandamus petition. Of course, reasons for allowing a victim to remain should also be clearly stated on the record so that an adequate record exists for appeal by the defendant.

D. “Reasonably Heard At Any Public Proceeding Involving Release, Plea, Sentencing,” § 3771(a)(4); Rule 32(i)(4)(B); Rule 60(a)(3)

Section 3771(a)(4) provides a right to be “reasonably heard” at public proceedings involving release, plea or sentencing, which is not necessarily a right to “speak.”

Rule 60(a)(3) states: “The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.” The committee note states that it “incorporates 18 U.S.C. § 3771(a)(4).”

Rule 32(i)(4)(B) states: “Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.” The committee note, however, indicates that this is a right to “speak” absent “unusual circumstances,” as discussed below.

If the “right to be heard” is asserted at a public proceeding involving plea or sentencing, is denied, and is followed by a successful mandamus petition, this triggers a right to move to “re-open” a plea or sentencing. 18 U.S.C. § 3771(d)(5). Thus, to avoid abridging defendants’ constitutional rights and to avoid a substantive effect on the outcome, the right to be reasonably heard, and any rule adopted to implement it, must be interpreted as narrowly as possible.

1. In general

“Reasonably heard” is a legal term of art meaning to bring one’s position to the attention of the court, in person or in writing, as the court deems reasonable under the circumstances.³⁵ When Congress uses a legal term of art, it is presumed to intend its traditional meaning.³⁶ Congress apparently chose deliberately to enact a right to be “reasonably heard,” rather than a right to “speak.” A principal objection to the failed constitutional amendment was that it would have created an absolute right to be heard and would have prohibited judges from responding flexibly if, for example, there were multiple victims, the victim was involved in the criminal activity, the victim provoked the crime, or the victim’s statement would violate the defendant’s right to due process. See S. Rep. No. 108-191 at 76, 85, 106-107 & n.133 (Nov. 7, 2003)

³⁵ See, e.g., *O’Connor v. Pierson*, 426 F.3d 187, 198 (2d Cir. 2005); *Fernandez v. Leonard*, 963 F.3d 459, 463 (1st Cir. 1992); *Commodities Futures Trading Com. V. Premex, Inc.*, 655 F.2d 779, 783 n.2 (7th Cir. 1981); USSG. § 6A1.3, backg’d. comment.

³⁶ *Morissette v. United States*, 342 U.S. 246, 263 (1952).

(minority views). The CVRA does not include the language from the failed constitutional amendment that would have prohibited judges from restricting the right to be heard,³⁷ and added the modifier “reasonably.” Thus, Congress intended for the courts to have the flexibility to permit victims to be “reasonably heard,” under the circumstances, in a manner that does not infringe on the rights of the defendant or the orderly administration of justice.³⁸

As of this writing, only one published district court decision squarely addresses an actual dispute about the meaning of the statutory right to be “reasonably heard.” In *United States v. Marcello*, 370 F.Supp.2d 745 (N.D. Ill. 2005), involving a bail hearing, the court concluded that the “statute clearly and unambiguously . . . does not mandate oral presentation of the victim’s statement.” *Id.* at 748. According to the court, the statute gives victims a right to be “reasonably heard,” the “ordinary legal and statutory meaning [of which] typically includes consideration of the papers alone.” *Id.* The “statute, which contains both a reasonableness requirement and a legal term of art (the opportunity to be ‘heard’), does not require the admission of oral statements in every situation, particularly one in which the victim’s proposed statement was not material to the decision at hand.” *Id.* at 745. The court noted that a victim’s oral impact statement may be relevant at sentencing, but also noted that even the defendant’s right to allocute at sentencing is not absolute, and may be denied in certain situations, or limited in duration and content. *Id.* at 750 & n.10, citing *United States v. Mack*, 200 F.3d 653 (9th Cir. 2000); *Ashe v. North Carolina*, 586 F.2d 334, 336-37 (4th Cir. 1978) (“need not be heard on irrelevancies or repetitions”). Because the statutory language was clear, the court declined to look to the statements of the floor sponsors indicating that victims always have a right to speak directly to the court if they choose. *Id.* at 748-49.

Another district court decision addresses the right to be “reasonably heard,” but it issued in a case where the defense made no objection to the victim speaking at sentencing and against the backdrop of pending litigation in the Ninth Circuit, which makes it appear as if the opinion were written to effect that litigation rather than resolve a disputed controversy. In *United States v. Degenhardt*, 405 F. Supp.2d 1341 (D. Utah 2005), the Honorable Paul J. Cassell found that the right to be “reasonably heard” was ambiguous as to whether it required oral statements in all cases, and thus turned to the statements of the floor sponsors and concluded that “the CVRA gives victims the right to speak directly to the judge at sentencing.” *Id.* at 1345-46, 1349. The *Degenhardt* opinion issued twelve days after the defendant’s sentencing (where no objection was made to the victim speaking), while a petition for mandamus was pending in the Ninth Circuit in *Kenna v. United States District Court*, No. 05-73467. In the opinion, Judge Cassell expressly commented on that pending litigation, stating, “the court cannot agree with another district court’s conclusion that in-court victim allocation at one defendant’s sentencing eliminates the need to allow victim allocation when a co-defendant is sentenced.” *See* 405 F. Supp.2d at 1348 n. 42. The day after Judge Cassell’s opinion issued, the Crime Victim Legal Assistance Project

³⁷ It stated that the right to be heard “shall not be denied . . . and may be restricted only as provided in this article.” S.J. Res. 1, § 1 (108th Cong.).

³⁸ The “CVRA strikes a different balance, and it is fair to assume that it does so to accommodate the concerns of such legislators. . . . In particular, it lacks the language that prohibits all exceptions and most restrictions on victims’ rights, and it includes in several places the term ‘reasonable’ as a limitation on those rights.” *United States v. Turner*, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005).

submitted it to the Ninth Circuit under Fed. R. App. P. 28(j). See December 22, 2005, Letter of Steve Twist to Clerk, Ninth Circuit Court of Appeals, docketed December 23, 2005, *Kenna v. United States District Court*, No. 05-73467. Against this background, *Degenhardt* should be viewed as an advisory opinion and taken with a large grain of salt.

Thus far, the Ninth Circuit is the only court of appeals to have addressed the meaning of the right “to be reasonably heard” at a sentencing hearing. In *Kenna v. United States District Court*, 435 F.3d 1011 (9th Cir. 2006), involving father and son defendants, the victims had submitted written impact statements and spoken in court at the more culpable father’s sentencing hearing. The judge declined one victim’s request to speak again at the son’s hearing. On appeal, two members of the panel stated that victims “now have an infeasible right to speak.” *Id.* at 1016. In reaching this conclusion, they appear to have misconstrued what the victim wished to speak about. Although he wished to speak about further financial “impacts” since the father’s sentencing, *id.* at 1013, the panel said, puzzlingly, that a request to “present evidence . . . is not at issue here.” *Id.* at 1014 n.2. Instead, the panel thought that the content of this speech would be the “effects of a crime,” “victims’ feelings,” “broken families and lost jobs,” and “to look this defendant in the eye and let him know the suffering his misconduct has caused.” *Id.*

The opinion acknowledged that the district court “may place reasonable constraints on the duration and content of victims’ speech, such as avoiding undue delay, repetition or the use of profanity,” and presumably relevance. *Id.* at 1014. Further, § 3771(d)(2)’s procedure for cases involving multiple victims “may well be appropriate in a case like this one, where there are many victims.” *Id.* at 1014 n.1. One judge wrote separately to state that he doubted that a “victim has an absolute right to speak at sentencing, no matter what the circumstances,” and that the “statutory standard of ‘reasonably heard’ may permit a district court to impose reasonable limitations on oral statements.” *Id.* at 1018-19 (Friedman, J., *dubitante*).

Kenna, which was decided without briefing by the defendant or the government, is somewhat confused. Its more extreme statements – that victims must always be allowed to “speak” -- are based on a misapplication of the rules of statutory construction and reliance on *Degenhardt*. *Kenna*, 435 F.3d at 1015. In concluding that the phrase “reasonably heard” was ambiguous, it gave weight to the dictionary definition of “hear” as “to perceive (sound) by the ear,” *id.* at 1014, contrary to two rules of statutory construction. See *Buckhannon Bd. And Home Care, Inc. v. West Virginia Dept. of Health and Human Services*, 532 U.S. 598, 615 (2001) (Scalia and Thomas, JJ., concurring) (meaning of a legal term of art is followed over a dictionary definition); *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990) (“where a phrase in a statute appears to have become a term of art . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning.”). Further, the court said, Congress’ use of the word “public” made “the right to be ‘heard’ at a ‘public proceeding’ . . . synonymous with ‘speak.’” *Kenna*, 435 F.3d at 1015. But the purpose of the word “public” was to limit the right to be “reasonably heard” to public, as opposed to closed, proceedings.³⁹

³⁹ See 150 Cong. Rec. S10910 (Oct. 9, 2004); 150 Cong. Rec. S4268 (April 22, 2004).

Once having found the statute “ambiguous,” the court, as in *Degenhardt*, turned to the floor statements of the bill’s sponsors stating that the meaning of the right to be “reasonably heard” was that “[o]nly if it is not practical for the victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard.” *Kenna*, 435 F.3d at 1015, quoting 150 Cong. Rec. S4268 (April 22, 2004) (statements of Sen. Kyl and Sen. Feinstein); 150 Cong. Rec. S10911 (Oct. 9, 2004) (statement of Sen. Kyl). The court’s reliance on the floor statements was misplaced. As the Supreme Court has said:

Floor statements from two Senators [who sponsored the bill] cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

Barnhart v. Sigmon Coal Co., Inc. 534 U.S. 438, 457 (2002). Floor statements, in fact, may “open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President,” *Regan v. Wald*, 468 U.S. 222, 237 (1984), and this may be particularly true of a bill’s sponsor disappointed in some respect with the final bill. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006). The court even relied on the legislative history of the constitutional amendment, to the effect that victims “always have the power to determine the form of the statement,” *Kenna*, 435 F.3d at 1016, which failed for that reason, among others.

The court believed it appropriate to follow these floor statements because other legislators did not register disagreement. *Kenna*, 435 F.3d at 1015-16 (citing *A Man for All Seasons*). Such congressional silence, however, is irrelevant for reasons well-stated by Justice Scalia:

Of course this observation, even if true, makes no difference unless one indulges the fantasy that Senate floor speeches are attended (like the Philippic of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes’ practice sessions on the beach) alone into a vast emptiness. Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator.

Hamdan, 126 S. Ct. at 2815-16 (Scalia, J., dissenting). *See also Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) (“the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor) . . . [are not] a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us. The *only* reliable indication of *that* intent—the only thing we know for sure can be attributed to *all* of them—is the words of the bill that they voted to make law.”) (Scalia, J., concurring) (emphasis in original).

Victims, like any other witness, are not free to “speak” without notice, limitation or challenge. Even a defendant’s right to allocute at sentencing is not absolute, and may be denied in certain situations, or limited as to duration and content. *Marcello*, 370 F.Supp.2d at 750 &

n.10. When a defendant wishes to testify to facts, he is placed under oath, subjected to cross-examination, and limited to matters that are relevant and material and about which he is competent to testify. *Id.* at 750. The defendant may be precluded from testifying at all if he fails to comply with rules requiring notice. *Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991); *Taylor v. Illinois*, 484 U.S. 400, 417 (1988); *Williams v. Florida*, 399 U.S. 78, 81-82 (1970). Nor do defendants have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the rules of evidence, *Taylor*, 484 U.S. at 410, nor may they “testify[] *falsely*.” *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (emphasis in original). They also have no right to introduce inadmissible hearsay, *Chambers v. Mississippi*, 410 U.S. 484 (1973), or evidence that is otherwise unreliable. *United States v. Scheffer*, 523 U.S. 303, 309 (1998). Victims cannot be afforded greater rights than defendants, whose liberty is at stake.

2. Public Proceeding Involving Release or Plea

Rule 60(a)(3) does not suggest that victims must be allowed to “speak” at a proceeding involving release or plea. They might be able to offer relevant factual testimony. *United States v. Marcello*, 370 F.Supp.2d 745, 745 (N.D. Ill. 2005) (excluding testimony of murder victim’s son at bail hearing where oral statement was “not material to the decision at hand”). The right to be reasonably heard “does not empower victims to [have] veto power over any prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing or parole.” *United States v. Rubin*, 558 F. Supp. 2d 411, 424 (E.D.N.Y. 2008)

As with any other witness, the defendant should have prompt access to any statement of the victim and a fair opportunity to prepare for and respond at the hearing. Victims and alleged victims should be placed under oath and subject to cross-examination. They are not entitled to offer testimony that is false, unreliable, irrelevant, prejudicial, incompetent, privileged, or otherwise inadmissible under the rules of evidence. If the right to be heard is to be “reasonable,” the court must have the authority to hear the victim in writing, to control the timing, duration and tenor of any oral statement, and to impose any reasonable restriction necessary to ensure a fair proceeding and a decision based only on considerations that are relevant to the question before the court.

3. Public Proceeding Involving Sentencing

Under new Rule 32(i)(4)(B), “[b]efore imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.” The committee note states that “the judge must speak to any victim present in the courtroom at sentencing,” and “[a]bsent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge.” *See* Fed. R. Crim. P. 32, 2008 advisory committee note. This rule raises a number of issues about the scope of the victim’s “right to be heard” and the defendant’s right to notice and an opportunity to challenge or otherwise address victim statements at sentencing.

a. Victims have no right to “speak” in all instances.

As explained in the Committee’s report to the Supreme Court regarding controversial rules, the Committee declined to amend the rule to provide victims with the right to “speak to the court in all instances” because that would have “go[ne] beyond the language of the CVRA.”⁴⁰ The language in the committee note was intended merely to “recognize[] current courts’ practices,” not to require it in every instance.⁴¹

You may wish to oppose a particular victim or all victims speaking and being spoken to. The statute itself (and Rule 60(b)(3)) provides for the court to “fashion a reasonable procedure . . . that does not unduly complicate or prolong the proceedings” when the number of victims makes it “impracticable to accord all of the victims the rights described in” subsection (a). 18 U.S.C. § 3771(d)(2). The judge may appoint one or a few spokespersons, or require all of the victims to be heard in writing. There may be other “unusual circumstances,” *e.g.*, the victim(s) may be particularly untrustworthy, contentious or disruptive. It may be clear that they intend to make statements or arguments that threaten the defendant’s right to a dispassionate and reasoned sentencing decision, or that would require a response that the court, or the victim, may not wish to occur in open court.

The purpose of a sentencing hearing is to sentence the defendant – the only person whose constitutional right to liberty is at stake – in accordance with 18 U.S.C. § 3553(a). This purpose should not be eclipsed by a series of individual conversations with victims, irrelevant disputes, or emotional displays. *See United States v. Korson*, 243 Fed. Appx. 141, 149 (6th Cir. Aug. 8, 2007) (upward departure based on victim statements would be a problem if judge “was influenced by the emotional nature” of the statements, but judge’s explanation for upward departure was “well-reasoned and dispassionate”).

b. The defendant has the right to notice and full opportunity to challenge victim status, victim impact statements, and victim testimony.

A person who merely shows up at sentencing claiming to be a “victim” should not automatically be allowed to “speak.” The court must determine in advance whether the person even is a “victim” as defined by the CVRA, which can be a complex question requiring briefing and hearings. *See* Part VII.A, *infra*. Further, the defendant must be given prior notice, discovery of prior and proposed statements, and a fair opportunity to challenge the information through contrary information or cross-examination.

To guard against an unfair process, the Federal Defenders and NACDL asked the Rules Committee to adopt the following procedure:

At or before any public proceeding in the district court concerning release, plea, or sentencing, the court shall adopt appropriate procedures which afford any

⁴⁰ *See* Proposed Rule Amendments of Interest, http://www.uscourts.gov/rules/supct0108/Controversial_report_Sup_Ct_2007.pdf.

⁴¹ *Id.*

victim the right to be reasonably heard. Such procedures must afford the parties notice, including prompt disclosure of any statement of the victim in the possession of the court, the Probation Officer or either party, and a fair opportunity to respond.

The Committee did not adopt this proposal, apparently because victim impact statements are included in presentence reports and because issues with fair notice could be addressed in the future if problems arose.⁴² Meanwhile, defense counsel must insist on notice and a fair opportunity to challenge any statement by a victim or the right of a person claiming to be a victim to be heard at all, and seek a continuance if necessary to fully litigate the issues. If not, you will be appealing under a plain error standard.⁴³

The right to notice and an opportunity to be heard is rooted in the Due Process Clause.⁴⁴ This right is protected through various provisions of Rule 32 and Rule 26.2, which require notice in the presentence report; the opportunity to investigate, object and present contrary evidence and argument to the Probation Officer; the opportunity to file a sentencing memorandum and argue orally to the court; the opportunity for a hearing; the right to obtain witness' statements, to have witnesses placed under oath and to question witnesses at any such hearing; and the right to have the court resolve any disputed matter. See Rule 32(e)(2), (f), (g), (h), (i); Fed. R. Crim. P. 26.2(a)-(d), (f). These protections apply to information about victim impact and restitution, see *United States v. Rakes*, 510 F.3d 1280, 1285-86 & n.3 (10th Cir. 2007); Fed. R. Crim. P. 32(d)(2)(B), (D); 18 U.S.C. § 3664(a), (b), (e), just as they apply to information provided by the government or any other witness.

In *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009), the government made the astonishing argument that “the victim has a right to make a statement about how he feels the crime impacted him,” but “the defendant has no parallel right to counter the information provided by the victim, especially not with extrinsic evidence.” *Id.* at *1. The judge easily rejected this argument, holding that the defendant had a right to full adversary testing of sentencing issues, to be sentenced based on accurate information, and thus, “to challenge the government’s [and the victim’s] argument that the crime here had ‘life-altering implications for the young victim.’” *Id.* at *2 & n.1. While the CVRA requires that a victim be treated “with fairness and with respect for [his] dignity and privacy,” this did not “impinge[] on a

⁴² Advisory Committee on Criminal Rules, Minutes at 9, April 16-17, 2007, <http://www.uscourts.gov/rules/Minutes/CR04-2007-min.pdf>.

⁴³ See *United States v. Eberhard*, 525 F.3d 175, 178 (2d Cir. 2008) (where the defendant “neither objected to the victim statements nor requested additional time to prepare a more thorough response,” it was “not plain error for the district court to impose sentence immediately thereafter”); *United States v. Korson*, 243 Fed. Appx. 141, 151 (6th Cir. Aug. 8, 2007) (no plain error in lack of notice that victims would speak at sentencing where no objection, no request for continuance, PSR contained some description of victim impact, and defendant did not claim on appeal that oral statements were false or show how he could have rebutted them).

⁴⁴ See *Burns v. United States*, 501 U.S. 129, 137-38 (1991); *Gardner v. Florida*, 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

defendant's right to refute by argument and relevant information any matter offered for the court's consideration at sentencing," and the "the court will evaluate the victim impact statements against the same standards of reliability and reasonableness applied to all matters introduced at sentencing hearings." *Id.* at *2.

If a victim impact statement is offered in support of a "departure" or "variance," counsel is entitled to notice of it. The Supreme Court recently held that the requirement of Rule 32(h) that the court give the parties reasonable notice that it is contemplating a "departure" on a ground not identified for "departure" in the presentence report or in a party's prehearing submission does not apply to the court's contemplation of a "variance." *Irizarry v. United States*, 128 S. Ct. 2198 (2008). However, *Irizarry* still requires that the parties receive advance notice of all information relevant to sentencing, that all sentencing information be subjected to thorough adversarial testing, and that continuances should be requested and granted if any information comes as a surprise. *Id.* at 2203-04 & n.2. See also *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (district court subjects "the defendant's sentence to thorough adversarial testing contemplated by federal sentencing procedure"); *Gall v. United States*, 128 S. Ct. 586, 597 (2007) (basing a sentence on clearly erroneous facts would be "procedural error"); *United States v. Warr*, 530 F.3d 1152, 1162-63 & n.8 (9th Cir. 2008). For further discussion, see Amy Baron-Evans, *After Irizarry*: (1) Notice of All Facts Must Still Be Given in the PSR, (2) Object and Seek a Continuance if Any Unnoticed Facts Arise, (3) Argue that the Reason is a "Departure" (August 11, 2008).⁴⁵

c. Special issues with victim impact letters used by the government in child pornography cases

In child pornography cases, the government often submits written victim impact statements from "known victims" depicted in the images for inclusion in the presentence report. The Department of Justice apparently has a stock of such letters for use at sentencing. While Fed. R. Crim. P. 32(d)(2)(B) requires that the report contain "information that assesses any financial, social, psychological, and medical impact on any victim," it does not appear that any individual Probation Officer has assessed the accuracy or relevance of these letters. Defense counsel should not accept unquestioningly that they are accurate or admissible.

Defense counsel should be prepared to object to the government reading these letters aloud at sentencing when the victim is not present. The Eleventh Circuit, reviewing for plain error, has found such letters relevant to the seriousness of the offense and allowed by the CVRA. See *United States v. Horsfall*, 552 F.3d 1275 (11th Cir. 2008). Notwithstanding *Horsfall*, Rule 32(i)(4)(B), providing that the "court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard," does not contemplate an oral reading of letters from victims who are not present. For victims appearing in person, a written statement may sometimes be inadequate for those who want "to look [a] defendant in the eye and let him know the suffering his misconduct has caused." *Kenna*, 435 F.3d at 1016, 1017. For absent victims, those considerations do not apply. Hence, reading letters from absent victims aloud, particularly when the letters come from a stock of such letters that the government has on

⁴⁵ Available at http://www.fd.org/pdf_lib/After%20Irizarry.pdf.

file, does not serve a legitimate or necessary purpose under § 3553(a) or the CVRA. Because the letters themselves are available for the judge to review, reading them aloud serves no purpose other than to place public pressure on the judge to impose a stiff sentence.

These letters may not be relevant and are likely to be unduly prejudicial. Any statement of a victim at sentencing must be relevant to the “impact” on the victim, or to the defendant’s own conduct or characteristics under § 3553(a). Some of the letters in the government’s stock contain graphic information and details about other crimes, namely, sexual abuse by others that occurred many years ago, of which the defendant had no knowledge and for which he had no responsibility. The letters often contain graphic information about the production of the pornography. This is not relevant to the conduct of the defendant, or the “impact” of the defendant’s conduct on the victim. All of this information is irrelevant and prejudicial and should be redacted.

The farther removed from the actual crime, the less probative the evidence, and the more likely that it will lead to sentences based on emotion rather than reason. *See, e.g., Kenna v. United States District Court*, 435 F.3d 1011, 1014 (9th Cir. 2006) (acknowledging that district court “may place reasonable constraints on the duration and content of victims’ speech”); *United States v. Hunter*, 2008 WL 53125 *6 (D. Utah Jan. 3, 2008) (no right to be heard under CVRA by persons who were not “victims,” and no right under court’s discretionary power because they had no information regarding the defendant’s background, character or conduct); *United States v. Forsyth*, slip op., 2008 WL 2229268 (W.D. Pa. May 27, 2008) (excluding “victim impact” letter because author was not a “victim” under CVRA, and although “relevant” under § 3553(a), it did not have sufficient reliability under Due Process Clause).

Finally, many of these letters are written by parents of victims who are now adults. The CVRA provides no authority for parents of a competent adult to assert or assume her rights. *See* Part VII.A.2, *infra*.

d. Unduly prejudicial victim impact presentations

Dissenting opinions of Justices Stevens and Breyer in two cases involving inflammatory victim impact presentations provide a helpful framework for challenges to the admission of victim impact evidence. *See Zamudio v. California*, 129 S.Ct. 564 (2008) (Stevens, J., dissenting from denial of certiorari); *Zamudio v. California*, 129 S.Ct. 567 (2008) (Breyer, J., dissenting from denial of certiorari). In *Kelly*, the jury was shown a 20-minute video consisting of a montage of photographs and video footage of the victim’s life and images of things she loved, narrated by the victim’s mother with soft music playing in the background. 129 S. Ct. at 564. In *Zamudio*, the jury heard testimony from four of the victims’ family members (two daughters and two granddaughters), and saw a video montage of 118 photographs of the victims’ lives. *Id.*

Justice Stevens’ dissent gives a good outline of challenges to the admission of victim impact evidence. He examines the background on the recent phenomenon of victim impact evidence and the Supreme Court’s shifting approach to it. He then discusses due process concerns both with the usefulness of the evidence and the format in which it was presented in

both cases. In terms of the substance, Justice Stevens would have found the evidence “especially prejudicial” in these cases because it was “emotionally evocative,” was “not probative of the culpability of the character of the offender or the circumstances of the offense,” and was “not particularly probative of the impact of the crimes on the victims’ family members.” *Id.* at 567. As for the format, Justice Stevens said that “when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming”:

[T]heir primary, if not sole, effect was to rouse jurors’ sympathy for the victims and increase jurors’ antipathy for the capital defendants. The videos added nothing relevant to the jury’s deliberations and invited a verdict based on sentiment, rather than reasoned judgment. . . . In their form, length, and scope, they vastly exceed the “quick glimpse” the Court’s majority contemplated [in *Payne v. Tennessee*, 501 U.S. 808 (1991)].

Id. Justice Stevens closed his dissent with a call to the Court to provide guidance on the scope of admissible victim evidence: “Having decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor’s side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use.” *Id.*

Justice Breyer’s dissent stressed his concerns with the manner in which the evidence was presented. 129 S.Ct. at 567. “[T]he film’s personal, emotional, and artistic attributes themselves create the legal problem. They render the film’s purely emotional impact strong, perhaps unusually so.” *Id.* at 568. That impact was driven, according to Justice Breyer, by the sum of its parts – the music, the voice-over, and the use of scenes without the victim or her family – which told the jury little or nothing about the circumstances of the crime. “It is this minimal probity coupled with the video’s *purely emotional impact* that may call due process protections into play.” *Id.* (emphasis in original). Justice Breyer would have used the cases as examples to “help elucidate constitutional guidelines.”

e. Victims do not have a right to litigate the sentence or make sentencing recommendations.

In some cases, victims have claimed that the “right to be reasonably heard” includes a right to litigate the sentence and make a specific sentencing recommendation. The courts have rejected this position. *See In re Brock*, 262 Fed. Appx. 510 (4th Cir. 2008) (no right to present argument regarding, or to appeal, guideline calculations); *United States v. Hunter*, 548 F.3d 1308, 1311-12 (10th Cir. 2008) (victim has no right to appeal a defendant’s sentence because a victim is not a party); *United States v. Hughes*, 283 Fed. Appx. 345, 354 n.7 (6th Cir. 2008) (disapproving district court’s reliance on speculation as to the victim bank’s preference for a sentence that would allow defendant to repay the debt rather than a lengthy prison term, in part because the bank’s preference was speculation, but also because the court of appeals questioned “why the particular desires of this victim should affect the legal analysis necessary for sentencing Hughes”); *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) (affirming district court’s rejection of victim’s claimed right to litigate guidelines as basis for disclosure of PSR); *Kenna I*, 435 F.3d at 1014 & n.2 (stating that the right to be “reasonably heard” is similar to a “right of allocution,”

not a right to present evidence and legal argument). *See also Defending Against the Crime Victim Rights Act* at 19-23 (May 5, 2007) (discussing plain language, congressional intent and constitutional principles on this point), http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf.

Although it has been suggested that *Payne v. Tennessee*, 501 U.S. 808 (1991) provides support for a right of victims to recommend a sentence, the opposite is true. There, the Court held that the Eighth Amendment does not bar the admission of “‘victim impact’ evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim’s family” during the penalty phase of a capital trial, *id.* at 817, though such evidence may be unduly prejudicial such that it violates the Due Process Clause. *Id.* at 825. In *Payne*, a family member testified to the emotional impact on the victim’s family, but did not recommend a sentence. *Id.* at 814-15. The Court explicitly limited its holding to “the impact of the victim’s death on the victim’s family” and explicitly left standing its previous holding prohibiting “a victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence.” *Id.* at 830 n.2 (emphasis supplied). *See also Welch v. Simons*, 451 F.3d 675, 703 (10th Cir. 2006) (collecting cases).

f. Victims do not have a right to obtain the presentence report.

By statute and rule, the pre-sentence report is disclosed only to the parties.⁴⁶ Before the CVRA, a solid wall of authority held that no one but the parties may obtain the pre-sentence report.⁴⁷ All of the courts to have ruled on the question after the CVRA have held that victims may not obtain the presentence report.⁴⁸

While victims have the right to provide the court with information about restitution, they do not have the right to review the pre-sentence report to learn about the defendant’s assets or ability to pay restitution. Victims are given the opportunity to provide information to the court regarding restitution, *see* 18 U.S.C. § 3664(d)(1), (2), (5), but the “privacy of any records filed, or testimony heard” on the subject of restitution, whether from the defendant, other victims, or anyone else, “shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.” 18 U.S.C. § 3664(d)(4). This “is not an inherently collaborative effort” but “clearly only for gathering the necessary information, not for the solicitation of creative input.” *United States v. Rubin*, 558 F. Supp. 2d 411, 426 (E.D.N.Y. 2008).

⁴⁶ *See* 18 U.S.C. § 3552(d); 18 U.S.C. § 3664(b); Fed. R. Crim. P. 32(e)(2).

⁴⁷ *See Defending Against the Crime Victim Rights Act* at 23-24 (May 5, 2007) (discussing policy basis of and caselaw regarding confidentiality of PSR), http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf.

⁴⁸ *See In re Brock*, slip op., 2008 WL 268923 (4th Cir. Jan. 31, 2008); *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006); *United States v. Coxtton*, 598 F. Supp. 2d 737 (W.D.N.C. 2009); *United States v. BP Products*, 2008 WL 501321 *9 (S.D. Tex. Feb. 21, 2008); *United States v. Hunter*, 2008 WL 53125 *7 (D. Utah Jan. 3, 2008) (Kimball, J.); *United States v. Citgo Petroleum Corp.*, 2007 WL 2274393 *2 (S.D. Tex. Aug. 8, 2007); *United States v. Sacane*, 2007 WL 951666 *1 (D. Conn. Mar. 28, 2007); *United States v. Ingrassia*, 2005 WL 2875220 *17 (E.D.N.Y. 2005).

E. “Reasonable Right to Confer with the Attorney for the Government,” § 3771(a)(5)

Victims have a “reasonable right to confer with the attorney for the government in the case.” 18 U.S.C. § 3771(a)(5). This right, however, is limited. First, “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.” 18 U.S.C. § 3771(d)(6). Second, the legislative history of the CVRA makes clear that “[u]nder this provision, victims are able to confer with the Government’s attorney after charging.” 150 Cong. Rec. S4260, S4268 (daily ed. Apr. 22, 2004) (emphasis supplied). Third, in addition to these statutory limits, defendants have certain due process rights that cannot be upset by victims’ interference with the terms of a plea bargain; they have the right to be accurately apprised of the consequences of a plea, *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), and to specific enforcement of a promise made in a plea bargain. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

“[T]here is absolutely no suggestion in the statutory language that victims have a right independent of the government to prosecute a crime, set strategy, or object to or appeal pretrial or in limine orders entered by the Court whether they be upon consent of or over the objection of the government. Quite to the contrary, the statute itself provides that ‘[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.’ 18 U.S.C. § 3771(d)(6). In short, the CVRA, for the most part, gives victims a voice, not a veto.” *United States v. Rubin*, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008); *see also In re Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005) (“Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.”).

The Fifth Circuit, however, perhaps in its haste to issue a decision within 72 hours on a mandamus petition, missed this legislative analysis in *In re Dean*, 527 F.3d 391 (5th Cir. 2008). *Dean* originated in the district court as *United States v. BP Products North America Inc.*, 2008 WL 501321 (W.D. Tex. Feb 21, 2008). There, the alleged victims asked the court to reject an 11(c)(1)(C) agreement based on the claim that the government failed to comply with its duty to use best efforts to give them notice of their rights, *see* 18 U.S.C. § 3771(c)(1), by not notifying them of their right to confer until after the plea agreement was signed. The judge wrote that “[d]ecisions on whether to charge, who to charge, and what to charge, are all in the prosecutor’s discretion,” *id.* at *11, and that the “right to confer is not a right to approve or disapprove a proposed plea in advance of the government’s decision.” *Id.* at *15.

Although alleged victims do not have a right to confer before charges have been filed, *see* 150 Cong. Rec. S4260, S4268 (daily ed. Apr. 22, 2004), the government moved for and received, *ex parte*, an order from the court delaying notice until the agreement was executed based on (1) the large number of victims, (2) the extensive media coverage, (3) the potential damage to plea negotiations, and (4) the prejudice to the defendants’ right to a fair trial if negotiations broke down. Counsel for the victims argued that “the government had no constitutional obligation to protect [the defendant’s] right to a fair trial in the event plea negotiations failed” because “there is no constitutional right to plea bargain,” and that “if there was a choice between protecting the

rights of the crime victims or the rights of [the defendant], the CVRA required the government to side with the victims.” *Id.* at *17. The district court rejected these arguments on policy and constitutional grounds. *Id.* at **17-18. At the plea hearing, the victims were allowed to speak and asked the court to reject the agreement, which the court declined to do.

The victims then petitioned for mandamus seeking instructions that the plea agreement not be accepted. *In re Dean*, 527 F.3d 391, 392 (5th Cir. 2008). The Fifth Circuit panel denied the petition because the victims were allowed to be heard at the plea hearing. *Id.* at 395-96. Overlooking the legislative history that the right to confer applies only after charging, the court held that the district court violated the CVRA by not fashioning a way to inform the victims of the likelihood of criminal charges and to ascertain their views on a plea bargain. Because the panel was careful to confine this to the specific facts, circumstances and posture of this case, *id.* at 394-95, the opinion should have limited precedential value regarding a victim’s right to confer with the government regarding a charge and plea.

Nor does the “right to confer” give victims a greater voice in seeking restitution. The MVRA, not the CVRA, controls the extent to which the prosecutor discusses restitution with victims. “Under 18 U.S.C. § 3664(d)(1), the government is to consult, ‘to the extent practicable, with all identified victims’ in order to ‘promptly provide the probation officer with a listing of the amounts subject to restitution.’ . . . [T]he MVRA’s ‘consultation’ requirement [requires] the government to gather from victims and others the information needed to list the amounts subject to restitution in the report” which “does not require the victim’s seal of approval, or even solicitation of the victim’s opinion beyond those facts that would assist the government’s required calculations,” and “is not an inherently collaborative effort,” but “clearly only for gathering the necessary information, not for the solicitation of creative input.” *Id.* at 426.

F. “Full and Timely Restitution As Provided in Law,” § 3771(a)(6); Rule 32(c)(1)(B)

Victims have a “right to full and timely restitution as provided in law.” 18 U.S.C. § 3771(a)(6). The CVRA “makes no changes in the law with respect to victims’ ability to get restitution.” *See* H.R. Rep. No. 108-711, 2005 U.S.C.C.A.N. 2274, 2283 (Sept. 30, 2004). The CVRA does not expand a victim’s rights to restitution, *United States v. Rubin*, 558 F. Supp. 2d 411, 420-21, 425-27 (E.D.N.Y. 2008), and confers no right to appeal a restitution order. *United States v. Hunter*, 548 F.3d 1308, 1313 (10th Cir. 2008).

Under new Rule 32(c)(1)(B), the probation officer must conduct an investigation and submit a report with sufficient information for the court to order restitution if the law “permits” restitution. Previously, such a report was required only if the law “requires” restitution. This is to “implement[] the victim’s statutory right . . . to ‘full and timely restitution as provided in law.’” Fed. R. Crim. P. 32, 2008 committee note. The only apparent effect of this amendment will be to require preparation of a report on restitution when the court would otherwise find that no presentence report, or any part of a presentence report, is required for it to meaningfully exercise its discretion under § 3553(a). *See* Fed. R. Crim. P. 32(c)(1)(A)(ii).

G. Proceedings “free from unreasonable delay,” § 3771(a)(7)

This provision is “not intended to infringe on the defendant's due process right to prepare a defense.” 150 Cong. Rec. S4260-01 at S4268 (Apr. 22, 2004). Nor is it meant to deprive the parties or the court of adequate time to prepare the case and review the issues. In *United States v. Tobin*, 2005 WL 1868682 (D.N.H. July 22, 2005), the judge granted a joint motion for a continuance over the alleged victim's objection, noting that Congress did not intend the CVRA to undermine the Speedy Trial Act or deprive defendants or the government of a full and adequate opportunity to prepare for trial; the defendant's right to adequate preparation is of “constitutional significance”; and allowing the victim's “discrete interests” to control “runs the unacceptable risk of [the] wheels [of justice] running over the rights of both the accused and the government, and in the end, the people themselves.” See also *United States v. Hunter*, 2008 WL 53125 *1 n.1 (D. Utah Jan. 3, 2008) (victims have no right to deprive the court of adequate time to review the positions of the parties and decide the issue)

H. “Right to be Treated with Fairness and with Respect for the Victim's Dignity and Privacy,” § 3771(a)(8)

The “right to be treated with fairness and with respect for the victim's dignity and privacy” is one of the stated bases of the amendment to Rule 12.1(b), and the only stated basis for the amendment to Rule 17(c)(3). These rules are more fully discussed in Part VI, but the following is also relevant.

1. Decisions construing the right

Three courts have recognized that this “right” cannot be used to up-end the adversary system or infringe the defendant's rights. See *United States v. Endsley*, slip op., 2009 WL 385864 *2 (D. Kan. Feb. 17, 2009) (the right to be treated “with fairness and with respect for dignity and privacy” does not “impinge[] on a defendant's right to refute by argument and relevant information any matter offered for the court's consideration at sentencing.”); *United States v. Rubin*, 558 F. Supp. 2d 411, 427-28 (E.D.N.Y. 2008) (“the Court refuses to adopt an interpretation of (a)(8) that prohibits the government [or the defendant] from raising legitimate arguments in support of its opposition to a motion simply because the arguments may hurt a victim's feelings or reputation.”); *United States v. Vaughn*, slip op., 2008 WL 4615030 at **2-3 & n.1 (E.D. Cal. Oct. 17, 2008) (while “§ 3771(a)(1) and (8) point to the need to protect victims from their assailants,” and even “the most civil of defense investigators may chill the desire of a victim/witness to testify simply because of the [victim's] fears,” but “a defendant has the right to test the government's evidence.”).

Two courts have relied on “dignity and privacy,” in part, to limit press access to information about victims of extortion. See *United States v. Patkar*, 2008 WL 233062 (D. Hawaii Jan. 28, 2008); *United States v. Robinson*, slip op., 2009 WL 137319 (D. Mass. Jan. 20, 2009).

2. The right is impermissibly vague.

Defense counsel should strongly oppose any effort to use the “right” to “respect for the victim’s dignity and privacy” as a standard for any decision in the trial process as impermissibly vague in violation of the Due Process Clause. Such standardless language runs afoul of the “arbitrary enforcement” component of the vagueness doctrine by authorizing determinations based on the subjective feelings of the alleged victim or the subjective views of the court, which would be impossible to contest.

Due process requires a government to provide meaningful standards to guide the application of its laws. See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). A statute, rule or policy is impermissibly vague “if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). “Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections.” *Smith v. Goguen*, 415 U.S. 566, 575 (1974); *Kolender*, 461 U.S. at 358 (“Where the legislature fails to provide such minimal guidelines, a criminal statute may permit “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.”).

The Supreme Court has struck down several criminal statutes as impermissibly vague. In *Coates v. Cincinnati*, 402 U.S. 611 (1971), the Court struck down a statute that based criminal liability on whether the defendant’s conduct was “annoying,” because it specified no standard of conduct at all, depending instead on the wholly subjective judgments of those enforcing the law. *Id.* at 614. In *Smith*, the Court struck down as impermissibly vague a statute that made it a crime to “treat contemptuously” the United States flag. See 415 U.S. at 575.

The law in question need not define a crime to be found impermissibly vague due to inadequate guidance or insufficient standards. “[T]he procedural or substantive law, the purposes of which are to direct a cause of action through the courts, cannot afford such vagueness.” *United States v. Colorado Supreme Court*, 189 F.3d 1281, 1287 (10th Cir. 1999). For example, in *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991), the Supreme Court held that a state court’s interpretation of an ethical rule was “so imprecise that discriminatory enforcement is a real possibility.” *Id.* at 1048-51; see also *United States v. Wunsch*, 84 F.3d 1110, 1119-20 (9th Cir. 1996) (quoting *Gentile*) (holding that a rule, which provided that it is the duty of an attorney to abstain from “all offensive personality,” was unconstitutionally vague because it is “so imprecise that discriminatory enforcement is a real possibility.”). In *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), the Court struck down a statute and accompanying jury instructions that permitted a jury to place trial costs on an acquitted defendant by assessing whether his conduct was “reprehensible in some respect,” “outrageous to morality and justice,” or “some misconduct.” *Id.* at 403-04. The Court held that the statute was “invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs.” *Id.* at 402. The trial judge’s additional guidance, requiring the jury to find “some misconduct,” did not save it. *Id.* at 404. Nor did it matter that the issue was “civil in nature.” *Id.* at 402.

These cases provide powerful tools support for arguments that the “right to be treated with fairness and with respect for the victim’s dignity and privacy” is unconstitutionally vague and should be given a narrow construction.

VI. Special Procedures Created Solely by the Rules

A. Rule 12.1(b)

As amended, Rule 12.1(b) provides that after disclosing the name, address and telephone number of alibi witnesses, the defendant only receives the *name* of any alleged victim that the government intends to rely on in rebuttal. The defendant does not receive the alleged victim’s address or telephone number unless he shows a “need.” If the defendant shows a “need” for the address and telephone number, the court may order the government to provide it, *or* may deny disclosure under “a reasonable procedure that allows preparation of the defense and also protects the victim’s interests.”

The stated purpose of the amendment is to “implement[] 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.” Fed. R. Crim. P. 12.1, 2008 advisory committee note. On its face, the amendment appears to be unconstitutional and in violation of the Rules Enabling Act. According to a Committee Report, however, the Committee did not intend that the rule would actually be applied to violate defendants’ rights.

In challenging the new rule, you can argue that it: (1) is invalid under the Constitution; (2) violates the Rules Enabling Act; and (3) must be interpreted to avoid violating the defendant’s rights.

1. The amendment is unconstitutional.

a. A notice of alibi rule that requires the defendant to disclose information but does not guarantee reciprocal discovery violates the Due Process Clause.

The Due Process Clause, which “speak[s] to the balance of forces between the accused and the accuser,” prohibits notice-of-alibi rules that are not reciprocal:

[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).

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.

- b. Even when the defendant has not been required to disclose any information, placing the burden on the defendant to establish the need for a witness's address violates the Due Process Clause.**

The proposed rule is also unconstitutional under Supreme Court cases holding that witnesses' addresses may not be withheld at the expense of the defendant's rights to effectively investigate, cross-examine, and call witnesses in his own behalf, and that the need for that information is presumed. *Smith v. Illinois*, 390 U.S. 129 (1968); *Alford v. United States*, 282 U.S. 687 (1931).

In *Smith*, 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). The Court held that no declaration of purpose for questioning the witness about his name and address was required. *Id.* at 132.

In *Alford*, defense counsel argued that he needed to elicit the witness's address (federal prison) to establish bias, but the trial judge disallowed the question. The Supreme Court stated:

Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood; that the jury may interpret his testimony in the light

reflected upon it by knowledge of his environment; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased.

Id. at 691-92 (internal citations omitted). To require the defendant to show a need is itself to deny a substantial right:

To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . . 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.

Id. at 692-93.

“*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). 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).

To overcome the 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).

c. The amended rule infringes a weighty right of the accused, fails to advance any legitimate procedural purpose, and is arbitrary and disproportionate to its stated purposes.

A rule that interferes with a weighty interest of the accused, and serves no legitimate procedural purpose, or is arbitrary or disproportionate to its purposes is invalid. See *Holmes v. South Carolina*, 547 U.S. 319 (2006). Amended Rule 12.1(b) interferes with the rights to reciprocal discovery, to investigate and prepare for trial, to cross examine the witness at trial, and not to be put at a disadvantage to the government.

The rule does not advance a procedural purpose at all, but victims’ substantive interests. Moreover, the victim’s interest in non-disclosure is presumed. No case-specific showing of a

need for protection is required. No case-specific showing of impairment of the impermissibly vague right to “dignity and privacy” is required. *See* Part V.H.2, *supra*. The amended rule arbitrarily presumes that all alleged victims need protection from all defendants and that their dignity and privacy are threatened by defense trial preparation

A blanket presumption of nondisclosure is not necessary to protect alleged victims in need of protection because Rule 12.1(d) already contains a good cause exception. Courts have applied this exception where necessary to protect the safety of a witness, while still protecting the defendant’s rights. For example, in *United States v. Wills*, 88 F.3d 704 (9th Cir. 1996), the Ninth Circuit upheld the district’s decision to allow the government’s motion under Rule 12.1(d) to delay disclosure based on witness safety, and to delay witness’s testimony to permit a reasonable time for defense to investigate. *Id.* at 710.

The rule is also disproportionate to its stated purpose. To justify such a rule, there must be a “strong showing of state interests.” *Wardius*, 412 U.S. at 475-76. A presumption that alleged victims are in need of protection and that their dignity and privacy are threatened by ordinary trial preparation 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).

The full Congress did not intend for the rights of a victim to “be reasonably protected from the accused” or to “dignity and privacy” to abridge defendants’ constitutional rights. In the one instance in which it meant to confer a procedural right on victims or alleged victims that altered the traditional adversarial balance, it did so explicitly.⁴⁹ It did not do so here. Congress did not expect that defendants’ longstanding constitutional rights to reciprocal discovery and to effectively prepare for and conduct a defense would be undone through a rule said to “implement” inherently vague and subjective “rights” to “dignity and privacy,” or the right “to be protected from the accused” without any showing that protection is needed. *See United States v. Rubin*, 558 F. Supp. 2d 411, 419-21 (E.D.N.Y. 2008) (CVRA is not a “wellhead of boundless authority to fashion protection for victims in the guise of ‘protecting them from the accused.’”).

Defenders and NACDL asked the Committee to revise the rule to place the burden on the alleged victim or the government to show that disclosure of the address or telephone number would violate the victim’s right to be reasonably protected from the accused, and, if so, to allow an alternative procedure that assured effective preparation of the defense. The Committee declined to adopt that alternative because it might have to be republished for comment and because of a letter it received from Senator Kyl.⁵⁰

⁴⁹ *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).

⁵⁰ *See* Advisory Committee on Criminal Rules, Minutes at 6, April 16-17, 2007, <http://www.uscourts.gov/rules/Minutes/CR04-2007-min.pdf>.

The Committee's deliberations confirm that the rule is arbitrary. It acknowledged the extensive comments criticizing the rule for tipping the adversarial balance too far as a constitutional matter, in particular "that this violates the fundamental requirement that discovery be reciprocal, which is a condition of requiring the defendant to produce information about his defense in advance of trial; the defendant must provide the names and contact information for his alibi witnesses, but he may be denied the same information about victims who will be called as alibi witnesses."⁵¹ Against the authority of *Wardius v. Oregon*, 412 U.S. 470 (1973), the Committee considered comments from victim advocates arguing the rule "gives too little weight" to victim interests because it allowed, on a showing of need for the information, disclosure to the defendant or a reasonable alternative procedure.⁵² Weighing a Supreme Court decision directly on point against a patently absurd position that failed to recognize a defendant's constitutional rights, the Committee adopted the amendment, stating that it "strikes the appropriate balance and does not violate the requirement that discovery be reciprocal."⁵³

2. The amendment violates the Rules Enabling Act.

The amendment violates the Rules Enabling Act because its stated purpose is not to manage the litigation process between the parties – the government and the defendant -- but to advance the substantive interests of alleged victims, and in doing so it abridges the defendant's constitutional rights. *See* Part IV.C, *supra*.

3. Apply the rule to avoid violating the defendant's rights.

Even if the court declines to strike down the rule as unconstitutional or a violation of the Rules Enabling Act, counsel should urge the court to narrowly construe it so as not to violate a defendant's rights. As the Supreme Court found regarding a civil rule that may have violated the Constitution and the Rules Enabling Act, a "limiting construction finds support in the Advisory Committee's expressions of understanding, minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999).

a. "Need" means you don't have it.

The Committee recognized that it may not be appropriate, in one of the few circumstances where defendants must disclose aspects of their defense, to require defendants "to show a need for basic contact information that they would nearly always require to conduct an investigation."⁵⁴ The Subcommittee responded that reciprocal disclosure was "maintained"

⁵¹ *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 4, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf.

⁵² *Id.*

⁵³ *Id.*

because establishing the need for the address and phone number was “not a heavy burden,” and, if the defendant did not already know the address and telephone number, he could “easily show a need.”⁵⁵ The Report to the Standing Committee stated that the showing of need was such a “low threshold” that “the defense will be able to meet this standard” unless “the defense is already aware of the . . . contact information” of the victim rebuttal witness.⁵⁶

b. The alleged victim or the government must establish that disclosure of the information would create a “risk” to the victim’s safety, such that an alternative procedure is necessary.

Once you establish a need for the information by stating that you do not have the address and/or telephone number, the court may either:

- (i) order the government to provide the information in writing to the defendant or the defendant’s attorney; or
- (ii) fashion a reasonable procedure that allows preparation of the defense and also protects the victim’s interests.

Fed. R. 12.1(b)(1)(B).

The Report to the Standing Committee indicates that the burden rests on the government or the alleged victim to show a need for protection. It states that the purpose of requiring the defense to come forward with a showing of “need” for the information is merely to “bring the issue to the court,” to “give[] the government or the victim time to weigh in before disclosure can occur.”⁵⁷ It simply “triggers the court’s consideration of all aspects of the *risk* and need analysis,” which, on the “risk” side, is a need “to *protect* the victim.”⁵⁸ Because no mention is made of a need to protect the victim’s “dignity and privacy,” such considerations should not be sufficient to preclude disclosure to the defense.

In light of this report and the defendant’s constitutional rights, the government or the alleged victim must establish that the risk to the alleged victim’s safety outweighs the defendant’s need for the information itself, such that a “reasonable” alternative procedure is necessary.

⁵⁴ Advisory Committee on Criminal Rules, Minutes at 5, April 16-17, 2007, <http://www.uscourts.gov/rules/Minutes/CR04-2007-min.pdf>.

⁵⁵ *Id.*

⁵⁶ See Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 4-5, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf.

⁵⁷ *Id.* at 5 (emphasis supplied).

⁵⁸ *Id.*

c. Any “reasonable procedure” cannot infringe on the defendant’s rights.

A variety of procedures might be fashioned under the rule. Certain governing principles, however, should be kept in mind. The defense cannot be forced to interview the witness in the presence of the government.⁵⁹ In some cases, it may suffice to meet at a neutral location. However, the address and telephone number themselves are often critical to investigation and cross examination. The address is needed 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.

If the alleged victim needs protection from the accused, a “reasonable” procedure may be that the defendant not attend the interview, or that the victim’s address and telephone number be disclosed to the defense team under a protective order prohibiting disclosure to the defendant. If disclosure is delayed, the court must grant sufficient additional time to investigate. *See Wills*, 88 F.3d at 710.

The court’s decision in *United States v. Vaughn*, slip op., 2008 WL 4615030 (E.D. Cal. Oct. 17, 2008), shows a judicious use of a protective order to fashion a “reasonable procedure.” In *Vaughn*, the defense moved for discovery of the government witnesses’ identities, including names, addresses and telephone numbers, among other things. The government had produced Jencks Act material with that information redacted. The judge ordered the government to file a witness list “with appropriate identification of witnesses,” to “include contact information.” *Id.* at *2. The government argued that the defendant might seek retaliation against the witnesses because he had used coercion and threats in the course of the offense. *Id.*

The judge noted that while “§ 3771(a)(1) and (8) point to the need to protect victims from their assailants,” and even “the most civil of defense investigators may chill the desire of a victim/witness to testify simply because of the [victim’s] fears,” “[t]here is no general concern of the CVRA to hide a victim’s identity at all costs.” *Id.* at *3. Such “costs” were:

[A] defendant has the right to test the government’s evidence, and only the most unpracticed lawyers would be satisfied with their preparation if they had no

⁵⁹ *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).

opportunity to meet the government's star witness(es) until the day of testimony.
Why even bother with cross-examination if one cannot prepare for it?

Id. The judge ordered disclosure of names, addresses, email addresses, and telephone numbers under a protective order precluding dissemination to the defendant or anyone other than the defense team.

B. Rule 17(c)(3)

The amendment to Rule 17(c)(3), requiring a court order for a subpoena "requiring the production of personal or confidential information" about a victim, and, in some circumstances, prior notice to the victim, has already engendered litigation and confusion. In particular, prosecutors and/or victim advocates have argued that the rule bars *ex parte* applications and *ex parte* approval of subpoenas; that the standard for issuance of a subpoena has been modified by the terms "personal and confidential" and "dignity and privacy"; and that the government has "standing" to contest the subpoena. It is important to understand what the amendment says and insist that it be read and applied strictly.

1. Before the Amendment

Historically, Rule 17(c) subpoenas were issued in blank at the request of a party and served without notice to opposing counsel.⁶⁰ The government and defendants able to pay requested the subpoena from the clerk. Fed. R. Crim. P. 17(a). Defendants unable to pay made an *ex parte* showing of inability to pay and necessity for an adequate defense. Fed. R. Crim. P. 17(b).

The provision for *ex parte* application for indigent defendants was added in 1966 because "[c]riticism has been directed at the requirement that an indigent defendant disclose in advance the theory of his defense in order to obtain issuance of a subpoena . . . while the government and defendants able to pay may have subpoenas issued in blank without any disclosure." Fed. R. Crim. P. 17, 1966 advisory committee note. In other words, it was obvious that a noticed application would disclose litigation strategy to the government, placing the defendant at a disadvantage. Thus, the 1966 amendment "plac[ed] all defendants, whether impoverished or with ample financial resources, on equal footing, and it prevent[ed] the Government from securing undue discovery." *United States v. Hang*, 75 F.3d 1275, 1281 (8th Cir. 1996); *see also Holden v. United States*, 393 F.2d 276 (1st Cir. 1968). Further, the court's discretion whether to approve an indigent's application was "considerably narrowed by two constitutional rights of the defendant: (1) the Sixth Amendment right 'to have compulsory process for obtaining witnesses in his favor'; and (2) the Fifth Amendment right to protection against unreasonable discrimination," which meant that "there should be no more discrimination than is necessary to protect against abuse of process." *Welsh v. United States*, 404 F.2d 414, 417 (5th Cir. 1968).

⁶⁰ See Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 6, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf.

2. After the Amendment

The new rule changes the procedures for issuing subpoenas in only two ways. First, any party, able or unable to pay, must obtain a court order before serving on a third party a subpoena requiring the production of “books, papers, documents, data or other objects” containing “personal or confidential information” about an alleged victim. Fed. R. Crim. P. 17(c)(1), (3). Second, if, and only if, the court finds that there are no “exceptional circumstances,” including but not limited to premature disclosure of defense strategy or that evidence might be lost or destroyed, the alleged victim receives “notice” of the application and an opportunity to “move to modify or quash the subpoena under Rule 17(c)(2) . . . on the grounds that it is unreasonable or oppressive.” Fed. R. Crim. P. 17(c)(3).

While the committee note states that the amendment “implements” a victim’s right to “respect for . . . dignity and privacy,” the amendment can, and must, be read to have created only a procedural “mechanism” which does not work a substantive change. The Committee stated that it intended to comply with the Rules Enabling Act, which prohibits rules that “enlarge, abridge, or modify” substantive rights. In particular, the Committee stated that it created no new rights based on the right to be treated with “respect.”⁶¹ And, of course, because no rule may violate the Constitution, the Committee said that it had not altered the constitutional balance.⁶²

The committee note explains the amendment as follows:

- The amendment provides a “mechanism for notifying the victim” so the “victim may move to quash or modify the subpoena under Rule 17(c)(2) – or object by other means such as a letter – on the grounds that it is unreasonable or oppressive.”
- “There may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy.”
- The judge may decide “whether such exceptional circumstances exist . . . *ex parte* and authorize service of the third-party subpoena without notice to anyone.”

⁶¹ See Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 20, 22 (September 2007), <http://www.uscourts.gov/rules/Reports/ST09-2007.pdf>. See also Memorandum to Criminal Rules Advisory Committee from CVRA Subcommittee at 1-2 (Sept. 19, 2005), included in <http://www.uscourts.gov/rules/Agenda%20Books/CR2005-10.pdf>.

⁶² See Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 6, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf; Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 2 (Aug. 1, 2006), http://www.uscourts.gov/rules/Excerpt_CRReport1205_Revised_01-06.pdf; Report of the Advisory Committee on Criminal Rules to the Standing Committee on Rules of Practice and procedure, December 8, 2005, <http://www.uscourts.gov/rules/Reports/CR12-2005.pdf>.

Fed. R. Crim. P. 17, 2008 advisory committee note.

Thus, the amendment permits the defendant to file the application *ex parte*, and the judge to authorize service without notice to anyone. See Fed. R. Crim. P. 17, 2008 advisory committee note. The amendment did not alter in any way the standard for issuance of a subpoena, *i.e.*, whether compliance would be “unreasonable or oppressive.” See Fed. R. Crim. P. 17(c)(2) & 2008 advisory committee note.

3. Constitutional Principles

The amendment creates the potential of interfering with defendants’ ability to obtain evidence with which to present a defense. The amendment also creates a potential unfair advantage for the government because the government obtains most of its trial evidence with grand jury subpoenas, to which the rule does not apply. It applies only “[a]fter a complaint, indictment, or information is filed,” Fed. R. Crim. P. 17(c)(3), and “has no application to grand jury subpoenas.” *Id.*, 2008 advisory committee note. The amendment must be read narrowly to avoid constitutional problems.

a. Defendant’s Right to Obtain Evidence

The Sixth Amendment guarantees that “the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.” U.S. Const. amend VI. “The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.” *Washington v. Texas*, 388 U.S. 14, 19 (1967). Criminal defendants have the right to “put before a jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). “To effect this right, a defendant must have the ability to obtain that evidence.” *United States v. Tucker*, 249 F.R.D. 58, 65 (S.D.N.Y. 2008).

Defendants also have the right under the Due Process Clause to obtain evidence that is favorable and material to guilt or punishment, whether it is exculpatory or impeachment. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). It is often argued that Rule 17(c) may not be used for “discovery,” but this misses the point. “Because Rule 16 only addresses discovery between the parties, if defendants seek documents from non-parties, it must be pursuant to some other rule. If this were not the case, the government could prevent defendants from obtaining material by choosing not to obtain it for itself. This perverse result cannot be intended by the Federal Rules of Criminal Procedure.” *United States v. Tucker*, 249 F.R.D. 58, 65 (S.D.N.Y. 2008). See also *United States v. Tomison*, 969 F. Supp. 587, 593 n.14 (E.D. Cal. 1997) (“The notion that because Rule 16 provides for discovery, Rule 17(c) has no role in the discovery of documents can, of course, only apply to documents in the government’s hands; accordingly, Rule 17(c) may well be a proper device for discovering documents in the hands of third parties.”).

b. Defendant's Right to Obtain Evidence Without Disclosure to the Witness or the Government

Defendants have a Fifth and Sixth Amendment right against disclosure of defense strategy to the government.⁶³ Because the alleged victim has a “reasonable right to confer” with the government, 18 U.S.C. § 3771(a)(5), the judge must assume that if the alleged victim is given notice so that s/he can move to quash or modify the subpoena as unreasonable or oppressive, the government will learn whatever defense strategy is disclosed in that litigation.

Defendants also have a Sixth Amendment right to effectively confront and cross-examine adverse witnesses. A party may delay disclosure of impeachment information until after the witness has testified on direct, both to prevent tailoring of the testimony in expectation of cross-examination and to expose the witness' untruthfulness to the jury through the element of surprise.⁶⁴ This is explicit in 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”). The Confrontation Clause permits impeachment “in every mode authorized by the established rules governing the trial or conduct of criminal cases.”⁶⁵

Procedures that require the defendant to disclose cross-examination to the witness in advance violate the defendant's right to confront the witnesses against him. For example, the Seventh Circuit held that a pretrial conference under Rule 17.1 may not be used to bypass the limitations of Rule 16, because to do so would require disclosure of impeachment evidence and thus impair the Sixth Amendment right to effective cross-examination.⁶⁶ In another case, the Seventh Circuit held that it was error to require defense counsel to cross-examine a witness out of the presence of the jury: “[T]he witness was permitted time by the voir dire procedure to consider her answer and to eliminate any reaction of surprise to the alleged impeaching material out of the presence of the jury. Such a practice would appear to have a strong tendency to undermine the function of confronting the witness with the question in the first place. The loss

⁶³ See *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); *Williams v. Woodford*, 384 F.3d 567, 585 (9th Cir. 2004) (“Substantial prejudice results from the introduction of evidence gained through the interference against the defendant at trial, 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.”); *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); cf. *Weatherford v. Bursey*, 429 U.S. 554, 558 (1977) (finding no violation of the Sixth Amendment where there was “no communication of defense strategy to the prosecution”).

⁶⁴ See, e.g., *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 893 (D.C. Cir. 1999).

⁶⁵ *Kirby v. United States*, 174 U.S. 47, 55 (1899).

⁶⁶ *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985).

to the jury of the witness's initial and immediate response is accompanied by the loss of one potentially significant aspect of the credibility determination."⁶⁷

c. Defendant's Right to Obtain Evidence that is "Personal or Confidential" or that May Offend Alleged Victim's "Dignity and Privacy"

A defendant's right to obtain evidence may not be trumped by an alleged victim's right to "respect for [his or her] dignity and privacy." Indeed, the amendment retains, as the sole standard for quashal or modification, that "compliance would be 'unreasonable or oppressive.'" Fed. R. Crim. P. 17(c)(2) & 2008 advisory committee note.

The Supreme Court's seminal decision in *United States v. Nixon*, 418 U.S. 683 (1974), shows that the need for evidence must overcome a claim of confidentiality. In *Nixon*, the Court interpreted the "unreasonable or oppressive" standard to mean that the proponent must show relevance, admissibility and specificity. *Id.* at 700. The Court rejected the President's claim that a subpoena should be quashed based on his privilege of confidentiality. Although it was a government subpoena at issue, the Court relied heavily on defendants' constitutional rights in rejecting the President's argument:

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor. Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

Id. at 711. The Court weighed the "privilege of confidentiality of Presidential communications . . . against the inroads of such a privilege on the fair administration of criminal justice," in particular "the constitutional need for relevant evidence in criminal trials." *Id.* at 711-12 & n.19. The Court recognized that "the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *Id.* at 712. The Court concluded:

[W]hen the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Id. at 713.

⁶⁷ *United States v. Bohle*, 445 F.2d 54, 75 (7th Cir. 1971).

Other cases also show that a witness's interest in confidentiality cannot interfere with a defendant's constitutional rights. In *Davis v. Alaska*, 415 U.S. 308 (1974), the trial judge had granted the government's motion to prohibit any reference to a witness's juvenile record on cross-examination, pursuant to state law requiring confidentiality of juvenile records. *Id.* at 310-11. Because counsel was thus "unable to make a record from which to argue why [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial," "the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness." *Id.* at 318. The Court held that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record-if the prosecution insisted on using him to make its case-is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." *Id.* at 319.

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the trial court had refused to order Children and Youth Services to produce records the defense had subpoenaed, because such records were "confidential" under state law. The Supreme Court rejected the state's argument that disclosure would override its compelling interest in confidentiality, and held, under the Due Process Clause, that the defendant had the right to a remand for the trial judge to examine the records to determine if the records "probably would have changed the outcome of his trial," and if so, to "be given a new trial." *Id.* at 57-58.

Judges have addressed the asserted right to "respect for the victim's dignity and privacy" in similar contexts. In *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009), the judge said that the statutory right to be treated "with fairness and with respect for the victim's dignity and privacy" does not "impinge[] on a defendant's right to refute by argument and relevant information any matter offered for the court's consideration at sentencing." *Id.* at *2. In *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008), the court said that it could not "adopt an interpretation of (a)(8) that prohibits the [parties] from raising legitimate arguments in support of [their] opposition to a [victim's] motion simply because the arguments may hurt a victim's feelings or reputation." *Id.* at 427-28.

Finally, "dignity and privacy" cannot be any part of the standard in deciding whether a subpoena will issue, first, because such a rule would infringe on a weighty right of the defendant in an arbitrary manner, and second, because the phrase is impermissibly vague. *See* Part IV.B & V.H.2, *supra*.

4. Step by Step Process for Subpoenaing Information About a Victim

a. Is the information "personal or confidential"?

No court order is required if the information sought is not "personal or confidential." *See* Fed. R. Crim. P. 17(c)(3). The committee note states that "personal or confidential" information "may include such things as medical and school records." *Id.*, 2008 advisory committee note. While the meaning is left to "case development," there is no requirement that the judge decide

whether the information is “personal or confidential” and no procedure for doing so. If it is unclear, you can ask the judge to decide, *ex parte*.

If the information is not “personal and confidential,” and the client has the ability to pay, obtain the subpoena from the clerk without a court order under Fed. R. Crim. P. 17(c)(3). If the client is indigent, apply *ex parte* with the ordinary showing under Fed. R. Crim. P. 17(b).

b. If the information is personal or confidential, apply for a court order *ex parte*.

The judge may require notice to the victim only *if* there are no “exceptional circumstances,” and then, only “[b]efore entering the order.” Fed. R. Crim. P. 17(c)(3). When exceptional circumstances exist, including the premature disclosure of defense strategy or the danger of lost or destroyed evidence, the judge may “authorize service of the third-party subpoena without notice to anyone.” *See* Fed. R. Crim. P. 17(c)(3), 2008 advisory committee note. The Committee intended that the amendment would “not deprive courts of their inherent power to entertain any application *ex parte*,” for “without *ex parte* applications, the government could learn of the subpoena request, which might reveal defense strategy.”⁶⁸ Do not file the application on the CM/ECF system.

In cases in the Eastern District of California, the government has recently filed preemptive motions seeking an order (1) “barring” the defense from moving *ex parte*, and (2) “barring” the judge from approving service *ex parte*. It has advanced three theories. One is that the CVRA gives it “standing” to assert a victim’s right to “respect for dignity and privacy” under the CVRA; the amendment “implements” that right; therefore, no application may be filed *ex parte* and no subpoena may be approved *ex parte*. This is refuted by the Committee’s expressed intentions noted above. *See also* Part VI.B.4.f, *infra*, regarding government’s claim to “standing.”

The second theory is that the only way to prevent defense “overreaching” in violation of the *Nixon* test is to require adversarial testing. Numerous decisions have rejected the notion that the government’s participation is needed to decide whether the *Nixon* test is met. *See Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951); *United States v. Tomison*, 969 F. Supp. 587, 594 (E.D. Cal. 1997); *United States v. Beckford*, 964 F. Supp. 1010, 1028 (E.D. Va. 1997); *United States v. Reyes*, 162 F.R.D. 468, 471 (S.D.N.Y. 1995); *United States v. Jenkins*, 895 F. Supp. 1389, 1393-94 (D. Haw. 1995).

The third theory is that even if the amendment permits *ex parte* applications and service if defense strategy would be exposed, “everybody knows” the records will be used to impeach the alleged victims. This, of course, would mean that no subpoena could ever be issued *ex parte*.

⁶⁸ Advisory Committee on Criminal Rules, Minutes at 7, April 16-17, 2007, <http://www.uscourts.gov/rules/Minutes/CR04-2007-min.pdf>.

One judge in the Eastern District of California denied the government's motion in a written memorandum and order.⁶⁹ Another judge "granted" the government's motion to the extent that the defense is to follow new Rule 17(c)(3), which means the defense can continue to file *ex parte* requests.⁷⁰

c. Make an *ex parte* showing of "exceptional circumstances" to preclude notice.

The judge may not "require giving notice to the victim" or an opportunity to "move to quash or modify the subpoena" if "there are exceptional circumstances." See Fed. R. Crim. P. 17(c)(3). The circumstances listed in the note as examples of "exceptional circumstances" – premature disclosure of defense strategy and potential loss or destruction of evidence, Fed. R. Crim. P. 17(c), 2008 advisory committee note – are quite ordinary.

In most cases, you should be able to make a showing that "exceptional circumstances," in the form of premature disclosure, exist. See Part VI.B.3.b, *supra*. The judge should therefore "authorize service of the third-party subpoena without notice to anyone." Fed. R. Crim. P. 17(c), 2008 advisory committee note.

The question of whether "exceptional circumstances" exist must itself be decided *ex parte*. While the committee note "leaves to the judgment of the court" whether to decide this question *ex parte, id.*, this makes no sense. To allow the alleged victim, or the government, to participate in the resolution of this question would necessarily expose defense strategy and impair effective cross-examination. See Part VI.B.3.b, *supra*. The rule must be interpreted not to allow such participation to avoid violating the defendant's constitutional rights.

d. If no "exceptional circumstances" exist

If the judge finds that no "exceptional circumstances" exist, the judge must "require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object" (which can be "by other means such as a letter") "on the grounds that it is unreasonable or oppressive." Fed. R. Crim. P. 17 & 2008 advisory committee note.

The court should deny the application without prejudice to the defense filing a motion with notice to the alleged victim, so that the defense can modify the application or not file an application at all.⁷¹

⁶⁹ See Memorandum and Order re: Motion to Preclude Ex Parte Rule 17(c) Subpoenas, April 7, 2009, *United States v. McClure*, S-08-100 and S-08-270 WBS (E.D. Cal.).

⁷⁰ See Docket entry #60, *United States v. Vaughn*, S-08-052 LKK (E.D. Cal.).

⁷¹ See Memorandum and Order re: Motion to Preclude Ex Parte Rule 17(c) Subpoenas, April 7, 2009, *United States v. McClure*, S-08-100 and S-08-270 WBS (E.D. Cal.).

Although the committee note allows an alleged victim to “object by other means such as a letter,” any objection obviously must be served on the defendant.

e. The applicable standard is relevance, admissibility and specificity.

Whether determined *ex parte*, or with notice to and opportunity to object by the alleged victim, the standard for approval is relevance, admissibility and specificity. It is *not* whether the information is “personal or confidential,” or whether its disclosure would offend the alleged victim’s “dignity and privacy.” In the Eastern District of California cases, the government and a victim advocate seem to have taken the position that the victim’s right to “respect” for “dignity and privacy” mean that “personal or confidential” records cannot be subpoenaed by the defense. If that were so, the amendment would work a substantive change: The defendant would be denied a subpoena, even though it met the relevance, admissibility and specificity standard, because it nonetheless offended the victim’s dignity and privacy.

That is not what the amendment did. The substantive standard under which a subpoena may be quashed or modified remains: “On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.” *See* Fed. R. Crim. P. 17(c)(2). The only “grounds” for a victim’s objection is that it is “unreasonable or oppressive.” Fed. R. Crim. P. 17, 2008 advisory committee note. The Supreme Court has interpreted the “unreasonable or oppressive” standard to mean that the proponent must show relevance, admissibility and specificity, *United States v. Nixon*, 418 U.S. 683, 700 (1974), and interests in confidentiality and privacy – even the President’s -- must bend to constitutional rights. *See* Part VI.B.3.c, *supra*. The amendment did not, and could not, change the standard.

Most courts require a showing of relevance, admissibility and specificity, though some have questioned whether the *Nixon* standard, arising in a case concerning a government subpoena of presidential documents, should be applied to defense subpoenas of evidentiary documents from third parties.⁷² This paper does not attempt to cover the *Nixon* standard in any detail, but here are a few issues that may arise.

- Where it is known that a witness will be called to testify at trial, the court may order production of impeachment material before trial as long as the request is a good faith attempt to obtain evidence.⁷³
- While “hearsay” is not admissible, a statement is not “hearsay” if it is not offered for the truth of the matter, *see* Fed. R. Evid. 801(c), but for some other purpose, *e.g.*, Fed. R. Evid. 801(d).

⁷² *See, e.g., United States v. King*, 194 F.R.D. 569, 574 n.5 (E.D. Va. 2000); *United States v. Tucker*, 249 F.R.D. 58, 65 (S.D.N.Y. 2008).

⁷³ *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1179-80 (1st Cir. 1988); *United States v. King*, 194 F.R.D. 569, 573-75 (E.D. Va. 2000).

- The records you are seeking will often meet a hearsay exception. Medical records come in under Fed. R. Evid. 803(4). Juvenile and school records are public records. *See* Fed. R. Evid. 803(8)(A). Many kinds of records, such as social services and youth services records, contain “factual findings resulting from an investigation made pursuant to authority granted by law,” which are admissible “against the Government in criminal cases.” Fed. R. Evid. 803(8)(C).
- A “statement of a witness” must be produced only as provided in Rule 26.2 and may not be subpoenaed under Rule 17, *see* Fed. R. Crim. P. 17(h), but Rule 26.2 applies only to statements in the possession of the party who called the witness and that relate to the witness’s direct testimony, *see* Fed. R. Crim. P. 26.2(a), not to statements in the possession of a third party or that do not relate to the direct testimony.
- Seeking documents in the hands of third parties is not improper use of a subpoena for “discovery.” *See, e.g., United States v. Tucker*, 249 F.R.D. 58, 65 (S.D.N.Y. 2008); *United States v. Tomison*, 969 F. Supp. 587, 593 n. 14 (E.D. Cal. 1997).

f. Oppose the government’s assertion of “standing” to challenge a subpoena.

In two of the Eastern District of California cases, the government has argued that (even if it does not have “standing” to interfere at the application stage), it has “standing” to act on an alleged victim’s behalf if she decides to move to quash or modify a subpoena. The government’s theory is that § 3771(d)(1) says it may “assert” the victim’s rights “under subsection (a)” of the CVRA; Rule 17(c)(3)’s committee note states that it “implements” the right to be treated with “respect for the victim’s dignity and privacy”; ergo, the government has standing.

The CVRA states that the government may “assert the rights described in subsection (a)” of the CVRA. 18 U.S.C. § 3771(d)(1). Neither subsection (a), nor any other part of the CVRA, creates a “right” to move to quash or modify a subpoena as unreasonable or oppressive. While the CVRA did create a right to “respect for the victim’s dignity and privacy,” that consideration plays no part in the determination of whether a subpoena is “unreasonable or oppressive,” by the rule’s own terms and as necessary to avoid conflict with the Constitution and the Rules Enabling Act. *See* Part VI.B.3.c, *supra*. The Committee specifically disavowed having “provide[d] specific rights in particular proceedings, not expressly stated in the Act but based on the Act’s general right that crime victims be treated fairly and with respect,”⁷⁴ as this “would have inserted into the criminal procedural rules substantive rights that are not specifically recognized in the Act – in effect creating new victims’ rights not expressly provided for in the Act.”⁷⁵ As noted above, it is well-recognized that the government’s assistance is not needed in determining

⁷⁴ *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 22 (September 2007), <http://www.uscourts.gov/rules/Reports/ST09-2007.pdf>.

⁷⁵ *Id.* 20.

whether the subpoena meets the requirements of relevance, admissibility and specificity.⁷⁶ Nothing in the CVRA or the amendment to Rule 17(c)(3) changes this result.

Thus, the court may conclude that the government does not have “standing” in proceedings to determine whether a subpoena is “unreasonable or oppressive,” because there is no “right” described in the CVRA for the government to “assert.”

g. A Rule 17(c) subpoena can be used to obtain information to rebut a victim impact statement at sentencing.

In *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009), the judge held that the right to “dignity and privacy” does not deprive the defendant of the right to present any relevant information to challenge the reliability of a victim impact statement. Thus, the defendant was free to offer information about the victim’s background and misconduct to refute the victim’s assertion that the defendant was the cause of the victim’s behavioral problems. However, the court said that it did not have a “*sua sponte* obligation on these facts to obtain the victim’s personal files.” *Id.* at *2. In many cases, you will have obtained the information in preparation for trial or an informed plea, but there is no reason you cannot apply for a subpoena in preparation for sentencing. In regard to *Nixon*’s “admissibility” requirement, the rules of evidence do not apply in sentencing proceedings. *See* Fed. R. Evid. 1101(d)(3).

C. Rule 18

The amendment of Rule 18 creates an obligation on the part of the judge to consider the convenience of non-testifying *alleged* victims (the very question at trial is whether anyone is a victim, and in certain cases such as self defense, who is the victim) in setting the place of trial, “as well as” the convenience of the defendant and testifying witnesses. The rules committee identified no provision of the CVRA as the basis for this amendment. The committee note merely states that the court has “substantial discretion to balance competing interests.”

While alleged victims are generally allowed to attend public court proceedings, they have no right to have the court ensure or facilitate their attendance. *See* 150 Cong. Rec. S10910 (Oct. 9, 2004). If a non-testifying alleged victim asserts a right to have the trial held in a place within the district that is inconvenient for the defendant and/or his witnesses, the defendant’s right to a fair trial is superior to that of a spectator. Some alleged victims may file mandamus actions if the judge sets the trial in a place that is inconvenient for them. Such a reading of the rule would violate the Rules Enabling Act by creating a new substantive right for alleged victims that is found nowhere in the CVRA and by abridging the defendant’s right to a fair trial.

⁷⁶ *See Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951); *United States v. Tomison*, 969 F. Supp. 587, 594 (E.D. Cal. 1997); *United States v. Beckford*, 964 F. Supp. 1010, 1028 (E.D. Va. 1997); *United States v. Reyes*, 162 F.R.D. 468, 471 (S.D.N.Y. 1995); *United States v. Jenkins*, 895 F. Supp. 1389, 1393-94 (D. Haw. 1995).

D. Rule 32(d)(2)(B)

The amendment to Rule 32(d)(2)(B) struck language requiring that “information that assesses any financial, social, psychological, and medical impact on any victim” in the presentence report be “verified” and stated in a “nonargumentative style.” In striking this language, the Committee did not intend for the report to include unverified information or argument. The committee note states that the amendment “makes it clear that victim impact information should be treated in the same way as other information contained in the presentence report.” Fed. R. Crim. P. 32, 2008 committee note. The Committee believed that “[a]ll information in the PSR should meet these requirements,”⁷⁷ despite widespread recognition that information included in presentence reports can be woefully inaccurate and biased.⁷⁸ The Committee declined to adopt a proposal that would have stated: “All information included in the presentence report must be verified and stated in a nonargumentative style.”

The requirement that victim impact information be “verified, and stated in a nonargumentative style” was added to Rule 32 by Congress in the Sentencing Reform Act of 1984. See Pub. L. No. 98-473, § 215 (Oct. 12, 1984). With the end of the era when courts could base sentences on any reason or no reason at all, the reliability of information included in the presentence report became critically important. See S. Rep. No. 98-225, 98th Cong., 1st Sess. 59, 74 (1984). According to a Probation Monograph issued at the time, victim impact letters, often urging a harsh sentence, were to be “evaluated and investigated,” and only “the information the officer believes to be reliable is included in the report.” See *The Presentence Investigation Report for Defendants Sentenced Under the Sentencing Reform Act of 1984 at I5-I6*, Publication 107, Probation and Pretrial Services Division, Administrative Office of the United States Courts, September 1987, revised March 1992.

If a probation officer includes unverified or argumentative information about a victim in the report, this is improper and defense counsel should challenge it. In *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009), the presentence report contained victim impact statements blaming the victim’s behavioral problems on the assault with which the 19-year-old defendant was charged. When the defendant attempted to offer information about the victim’s background and misconduct to refute the victim’s assertion that he was the cause of the victim’s behavioral problems, the probation officer, remarkably, argued that “it would be

⁷⁷ Memo to Members, Criminal Rules Advisory Committee, from Professor Sara Sun Beale, Reporter, at 4, Mar. 25, 2007, <http://www.uscourts.gov/rules/Agenda%20Books/CR-2007-04.pdf>.

⁷⁸ See *United States v. Booker*, 543 U.S. 220, 304 (2005) (referring to “hearsay-riddled presentence reports”) (Scalia, J., dissenting in part); *Blakely v. Washington*, 542 U.S. 296, 311-12 (2004) (describing unfairness of sentencing based on “facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong”); *United States v. Kandirakis*, 441 F. Supp. 2d 282, 303 (D. Mass. 2006) (“The system relies on ‘findings’ that rest on ‘a mishmash of data[,] including blatantly self-serving hearsay largely served up by the Department [of Justice].”); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50 (2004) (recognizing that “untrustworthy information” is often used to establish relevant conduct), available at http://www.ussc.gov/15_year/15year.htm.

inappropriate for the Court to obtain additional background information on the victim.” *Id.* at *2. The court rejected this argument, holding that the defendant “certainly has the right to challenge the reliability of that causation opinion by argument or evidence,” noting that while the probation officer had included in some detail the victim impact statements, s/he had not independently assessed the asserted impact. *Id.* at *2 & n.2.

VII. General Procedures

A. Who is a “Victim” and Who May “Assert” or “Assume” Victim Rights?

1. Who is a “victim”?

New Rule 1(b)(11) states: “‘Victim’ means a ‘crime victim’ as defined in 18 U.S.C. § 3771(e).” Section 3771(e) states that “[f]or purposes of this chapter [which is only the CVRA], 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.” As the committee note to Rule 1(b)(11) states, “disputes may arise over the question whether a particular person is a victim,” and “the courts have authority to do any necessary fact finding and make any necessary legal rulings.” Indeed, the question can be complex and can have a big impact on the case. Insist on full briefing, argument, and a hearing as necessary.

The defendant, the government, or a person designated by the government as a “victim” may dispute that the person is a “victim.” Victim status exists only if: (1) a federal offense or an offense in the District of Columbia has been charged and is being prosecuted in a United States district court, and (2) the person claiming the rights of a “victim” was directly and proximately harmed by the commission of that offense, assuming that that offense was committed.

The definition of victim under § 3771(e) undermines a defendant’s constitutional rights because it gives *alleged* victims various rights at stages of the proceedings before the defendant has been found guilty and while he is presumed innocent. It is clear, however, that the defendant must at least have been charged with an offense of which a person is an alleged victim for that person to have any rights; putative victims do not have free floating rights.

First, Congress drew the CVRA’s definition of “crime victim” in part from the definition of “victim” in the Victim Witness Protection Act, 18 U.S.C. § 3663(a)(2). The Supreme Court has interpreted the definition of “victim” in 18 U.S.C. § 3663(a)(2) as authorizing restitution only for “loss caused by the conduct underlying the offense of conviction.”⁷⁹ The word “directly” means that the harm resulted from and would not have occurred but for conduct underlying an element of the offense of conviction; the word “proximately” means that there was no intervening cause.⁸⁰

⁷⁹ *Hughey v. United States*, 495 U.S. 411, 420 (1990).

⁸⁰ *See, e.g., United States v. Davenport*, 445 F.3d 366 (4th Cir. 2006); *United States v. Hunter*, 2008 WL 53125 (D. Utah Jan. 3, 2008).

Second, courts have no duty to do anything for victims or alleged victims except in a court proceeding. The CVRA itself only requires the court to “ensure” the victim rights “[i]n any court proceeding involving an offense against a crime victim.” 18 U.S.C. § 3771(a). Moreover, the Federal Rules of Criminal Procedure apply only in a court proceeding enumerated in Fed. R. Crim. P. 1(a). No court proceedings exist unless someone has been charged or convicted of a crime.

Third, the Committee acknowledged that victims have rights only in instances “in which a prosecution is pending.”⁸¹

Notwithstanding the clear limitations on the meaning of “victim,” the statutory phrase, “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia,” has suggested to some putative victims that anyone who claims to have been harmed by an “offense” has standing to assert rights under the CVRA, and bring mandamus actions, though no one has been charged, is being prosecuted, or has been convicted, of the “offense,” in federal court. Thus far, the courts have held that:

- Putative victims have no rights in criminal proceedings against persons who were not charged with any offense, were not charged (if before trial or plea) or convicted (if after trial or plea) of the offense that directly and proximately caused harm, or were acquitted.⁸²

⁸¹ See Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 3, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf.

⁸² See *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (rejecting petition for mandamus 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 who wished to speak at sentencing based on her claim that her boyfriend had mistreated her as a result of smoking marijuana he purchased from the defendant was not a “victim” within the meaning of the CVRA; “the CVRA only applies to [putative victim] if she was ‘directly and proximately harmed’ as a result of the commission of the Defendant’s federal offense.”); *United States v. Turner*, 367 F.Supp.2d 319, 326-27 (E.D.N.Y. 2005) (noting due process problems with designating a person as a victim of uncharged conduct, concluding CVRA does not mandate rights for such persons); *United States v. Hunter*, 2008 WL 53125 *4 (D. Utah Jan. 3, 2008) (woman shot by gunman on a rampage at a shopping mall and her parents were not “directly and proximately harmed” by the defendant’s offense of selling the gun to the gunman with reason to believe he was a minor, where no evidence defendant was aware of his intentions), *aff’d*, *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (upholding district court on mandamus, and adding that gunman was an adult at time of shooting); *United States v. Merkosky*, 2008 WL 1744762 (N.D. Ohio Apr. 11, 2008) (defendant cannot be deemed victim of uncharged crimes of government agents against him in his own criminal case); *Defending Against the Crime Victim Rights Act* at 8-9 (May 5, 2007) (discussing relevant legislative history and constitutional implications), http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf.

- Victims of prior offenses that are predicates of the instant offense do not appear to have rights under the CVRA.⁸³
- Alleged victims of an offense of conviction that is victimless have no rights, though an error in this regard can be harmless or subject to plain error review.⁸⁴
- If the harm alleged to have been directly and proximately caused is too factually attenuated from the elements of the offense charged, or the government’s theory of the offense, there is no victim status.⁸⁵
- Civil plaintiffs have no right under the CVRA to intervene in criminal proceedings to seek restitution, damages, or discovery.⁸⁶
- The CVRA is not a basis for lawsuits or mandamus actions demanding arrest, restraining orders, prosecution, sentencing, damages or injunctive relief.⁸⁷

⁸³ *United States v. Guevera-Toloso*, 2005 WL 1210982 (E.D.N.Y. 2005) (where defendant was charged with “illegally re-entering the United States after being convicted of a felony and subsequently deported,” victims of predicate offenses, if any, were not entitled to notice because the predicates were state offenses, and expressing doubt that a victim of a federal predicate would be entitled to notice).

⁸⁴ *United States v. Saferstein*, slip op., 2008 WL 4925016 *3 (E.D. Pa. Nov. 18, 2008) (no victims related to tax and perjury charges); *United States v. Kennedy*, slip op., 2008 WL 4107208 (4th Cir. Sept. 5, 2008) (where charges were false statement in applying to purchase a firearm and possession of a firearm by a user of marijuana, assuming it was error to admit impact statement from widow of officer the defendant’s mentally ill son shot with one of the firearms, it was harmless because sentence was at bottom of guideline range); *United States v. Poole*, 241 Fed. Appx. 153 (4th Cir. July 30, 2007) (where charge was felon in possession, suggesting it may have been error to admit victim impact statement of police officer whom defendant struck upon his arrest, but was not plain error because sentence was in middle of guideline range).

⁸⁵ *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 545 (D.N.J. 2009) (“the harm to the six named workers alleged by the government to have been ‘directly and proximately’ caused by the offenses of conviction is too factually attenuated, in relation to the offenses of conviction, for the Court to make a finding of CVRA or VWPA statutory crime victim status in this case. The conduct that allegedly harmed one or more of the six named workers may have been in violation of OSHA workplace standards (standards applicable to the employer only), and that appears to be the actual basis of the government’s argument in this motion. Such conduct, however, was not conduct proscribed by the obstruction and false statement substantive offenses and conspiracy objectives of which each of these defendants was convicted, and we perceive no ‘direct and proximate’ causal link between those offenses of conviction and the injuries sustained by the six named workers.”).

⁸⁶ See *United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007) (“The rights codified by the CVRA . . . are limited to the criminal justice process.”); *In re Searcy*, 202 Fed. Appx. 625 (4th Cir. Oct. 6, 2006) (CVRA has “no application . . . to these [civil] proceedings”).

⁸⁷ See *In re Rodriguez*, slip op., 2008 WL 5273515 (3d Cir. Dec. 10, 2008); *In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir., Sept. 25, 2006); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006).

- Putative victims have no right to discovery of the prosecution’s investigative files or grand jury transcripts to establish victim status.⁸⁸

The Committee Report states that the § 3771(e) definition of victim does not govern statutory “rights to obtain restitution, to bring civil actions, and so forth,” but that it does apply in all criminal rules that use the term “victim,” which are now Rules 12.1, 12.4, 17, 18, 32, 38 and 60.⁸⁹ However, the definition of “crime victim” in 18 U.S.C. § 3771(e) is limited in its application to “this chapter,” which consists of one statute, the CVRA. Rule 12.4(a)(2) (requiring the government to file a statement identifying an organizational victim) and Rule 38(e) (authorizing court to stay a sentence and require defendant to give notice and explain to victims fraud or deceptive practices) pre-existed and are not based on the CVRA. If the CVRA definition creates a problem under Rule 12.4 or Rule 38, argue that it cannot apply.

2. Who May “Assert” or “Assume” Victim Rights?

New Rule 60(b)(2) states that a victim’s rights “may be asserted by the victim, the victim’s lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e).” “The crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights described in subsection (a) [of the CVRA].” 18 U.S.C. § 3771(d)(1). The prosecutor must advise a victim that he or she “can seek the advice of an attorney with respect to the rights described in subsection (a) [of the CVRA].” 18 U.S.C. § 3771(c)(2). “In the case of a crime victim who is under 18 years of age, 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 [the CVRA], but in no event shall the defendant be named as such guardian or representative.” 18 U.S.C. § 3771(e).

Practice tip for child pornography cases. The government has on file a stock of victim impact letters for “known victims” for use at sentencing defendants convicted of possession or receipt of child pornography. Many of these letters were written by parents of the victim. If the victim is now an adult, and is neither incompetent, incapacitated nor deceased, the CVRA does not provide the parent with any ability to “assert” or “assume” the victim’s rights. The fact that the victim may have been a minor at the time of the alleged offense, or earlier, does not make the victim a minor under the CVRA. Victims’ rights do not arise until, at the earliest, a “complaint, information or indictment of conduct victimizing complainant” is filed. *See United States v. Rubin*, 558 F. Supp. 2d 411, 418-19, 429 (E.D.N.Y. 2008). *See also* 18 U.S.C. § 3771(a)(4) (right to be “reasonably heard” at sentencing does not arise until there is a “public proceeding in the district court involving . . . sentencing.”).

⁸⁸ *United States v. Hunter*, 2008 WL 110488 (D. Utah Jan. 8, 2008).

⁸⁹ *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 3, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf.

Beware of sharp practices by victim advocates who may misrepresent the victim's status in order to litigate claims for an adult victim without authorization from that victim. In a case in the Eastern District of California, the defendant was charged with sex trafficking, *i.e.*, running a prostitution ring. The alleged victim- prostitute was a minor at the time the offense allegedly occurred, but was an adult by the time the defendant was charged. She provided the government with a signed declaration stating that she did not want her juvenile records disclosed to "anyone." The government informed defense counsel that it did not have the records. Defense counsel filed an application for a Rule 17(c) subpoena for the records *ex parte*, but the government received notice via the CM/ECF system. The alleged victim took no action to contest the subpoena. The government did not attempt to contest the subpoena on her behalf either; it had an admitted conflict with her, the nature of which is not shown by the record. A victim advocate filed an appearance on behalf of the alleged victim's mother. The victim advocate made no claim that the adult victim had authorized her, or her mother, to assert or assume her rights. The CVRA does not permit such assertion or assumption for an adult victim. Indeed, that would permit estranged parents, unscrupulous lawyers, and others to act without regard to an adult victim's wishes or interests (*e.g.*, dignity and privacy) on into perpetuity.

Nonetheless, the victim advocate filed a petition for mandamus in the Ninth Circuit, in which she represented that the alleged victim was a "minor,"⁹⁰ seeking a stay of disclosure of the documents to the defense. She then appeared before the district court judge, who (unlike the Ninth Circuit) knew the alleged victim was an adult. There, the victim advocate argued that "the definition of victim attaches upon the commission of a crime," "[t]hat's why we believed it was appropriate to have KK's mother as the legal guardian," and "on a case of first impression," she "would hope" the Ninth Circuit (which had been told that the victim was a "minor") would agree. Over defense counsel's objections, but with no objection from the government, the judge allowed the victim advocate to review the records the adult victim had declared she did not want disclosed to "anyone," to assist the judge in his *in camera* review of which documents should be disclosed to defense counsel, and to prepare to file another petition for mandamus.⁹¹ After reviewing the documents, the advocate agreed not to file another petition. It is unclear why, but another petition would have exposed the fact that she had misled the court of appeals about the victim's age in her previous petition.

B. How Must Victim Rights Be Asserted and Decided?

A victim or alleged victim must "assert" any "right" by "motion." 18 U.S.C. § 3771(d)(3). Rule 60(b)(1), entitled "Time for Deciding a Motion," states that "[t]he court must promptly decide any motion asserting a victim's rights described in these rules."

Nonetheless, the defendant must be given notice and a full and fair opportunity to respond to any motion asserting a victim's rights. This is necessary to effectuate the defendant's

⁹⁰ See Petition for Mandamus, *In re: Vicki Zito on behalf of her minor daughter v. United States District Court*, No. 09-70554, available on PACER.

⁹¹ The transcript is docket number 56 on PACER, *United States v. Sanwal*, No. S-08-CR-0330 EJD (E.D. Cal.).

right to due process, to give the district court sufficient notice and information to rule appropriately, and to create an adequate factual and legal record for the court of appeals. A victim's motion must "be made on notice to all parties." *United States v. Eight Automobiles*, 356 F.Supp.2d 223, 227 n.4 (E.D.N.Y. 2005). Victims do not have a right to *ex parte* determinations, or to foreclose a defendant's ability to participate in the process, or to deprive the court of adequate time to review the positions of the parties and decide the issue. *United States v. Hunter*, 2008 WL 53125 *1 n.1 (D. Utah Jan. 3, 2008) (Kimball, J.). The defendant "certainly has the right to challenge the reliability" of any assertion by a victim "by argument or evidence." *United States v. Endsley*, slip op., 2009 WL 385864 at *2 & n.2 (D. Kan. Feb. 17, 2009).

Full development of the facts and legal arguments is crucial because of the potential adverse impact on the defendants' rights of a ruling for the victim, and because a ruling against the victim may result in a mandamus petition. Once a mandamus petition is filed, there is insufficient time to develop an effective opposing argument, and no time to develop or straighten out any facts.

C. Where May the Victim Assert Rights?

New Rule 60(b)(4), entitled "Where Rights May Be Asserted," states: "A victim's rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime." A victim may not "assert" rights in the first instance by seeking mandamus from a court of appeals. *In re Walsh*, 2007 WL 1156999 (3d Cir. Apr. 19, 2007).

Section 3771(d)(3) states that the "rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred." (emphasis supplied) The committee note to Rule 60(b)(4) mentions this provision, but does not explain it, perhaps because it is inexplicable. In any event, the rules apply only in "proceedings," Fed. R. Crim. P. 1(a)(1), and alleged victims have no right under the Constitution or the CVRA to insist that a prosecution be brought. *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005); *In re Rodriguez*, slip op., 2008 WL 5273515 (3d Cir. Dec. 10, 2008); *In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir., Sept. 25, 2006); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006).

D. Multiple Victims

Rule 60(b)(3), entitled, "Multiple Victims," incorporates § 3771(d)(2), and states: "If the court finds that the number of victims makes it impracticable to accord all of them their rights described in these rules, the court must fashion a reasonable procedure that gives effect to these rights without unduly complicating or prolonging the proceedings." This is likely to apply in white collar cases or the rare terrorist case with numerous victims or potential victims. *See In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555 (2d Cir. 2005); *United States v. Ingrassia*, 2005 WL 2875220 *4 (E.D.N.Y. 2005).

E. Mandamus Procedures

If the judge “denies the relief sought” in a “motion asserting a victim’s right,” “the movant may petition the court of appeals for a writ of mandamus,” 18 U.S.C. § 3771(d)(3), no matter how specious. The court of appeals must decide the petition “within 72 hours after the petition has been filed.” *Id.* The district court may, but need not, stay the proceedings or grant a continuance of no more than 5 days “for purposes of enforcing this chapter.” *Id.*

The defendant has the right to respond to the petition for mandamus. The district court judge, the defendant, and the government are “respondents” to the petition. The court of appeals must order them to respond unless it denies the petition without a response. Fed. R. App. P. 21. Thus, in *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008), the court of appeals ordered the defendant to respond, and denied the putative victims’ motion to strike the response. *Id.* at 1124. See also *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006) (treating defendant as respondent). However, confusion may be engendered by the Ninth Circuit’s inexplicable statement in *Kenna v. United States District Court*, 435 F.3d 1011 (9th Cir. 2006) that the defendant “is not a party to this mandamus action,” although it did correctly note that “reopening his sentence in a proceeding where he did not participate may well violate his right to due process.” *Id.* 1017.

Develop facts and arguments in advance. Since you must file a response almost instantaneously to receive any consideration, you should fully develop the facts and arguments in the district court.

Challenge the procedure under the Due Process Clause. In addition to challenging the substance of the petition, challenge the summary mandamus process itself under the Due Process Clause. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

Standard of Review on Mandamus. The Fifth and Tenth Circuits have held that the regular mandamus standard – “clear and indisputable right” to the writ -- applies. See *In re Antrobus*, 519 F.3d 1123, 1124-25, 1127-30 (10th Cir. 2008) (supported with statutory language and principles of statutory construction, suggesting sister circuits got it wrong because of time pressures under which they operated); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (mandamus standard applies for reasons stated in *Antrobus*).

The Second and Ninth Circuits have held that abuse of discretion is the standard. See *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 562 (2d Cir. 2005) (no support); *Kenna v. United States District Court*, 435 F.3d 1011, 1017 (9th Cir. 2006) (no support). The government may assert as error on appeal the district court’s denial of any crime victim’s right, 18 U.S.C. § 3771(d)(4), so the Second and Ninth Circuits in *Huff* and *Kenna* are not correct in saying that Congress chose mandamus as the vehicle for appellate review.

F. Relief for Victim if Mandamus Granted

If the right asserted and denied was *not* a right to be reasonably heard at a public proceeding involving a plea or sentencing, the relief can be anything the victim requests or anything else the court of appeals decides, except that a “failure to afford a victim any right described in these rules is not grounds for a new trial.” See 18 U.S.C. § 3771(d)(5); Rule

60(b)(6). Thus, neither a victim nor a defendant can rely on the CVRA to obtain a new trial, whether the defendant is convicted or acquitted of some or all charges.

G. Motion to Re-Open Plea or Sentence

If the right asserted and denied was a right to be reasonably heard at a public proceeding involving a plea or sentencing, the victim may “make a motion to re-open a plea or sentence” under certain circumstances.

The CVRA, § 3771(d)(5), entitled “Limitation on relief,” provides: “A victim may make a motion to re-open a plea or sentence only if --

- (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
- (B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and
- (C) in the case of a plea, the accused has not pleaded to the highest offense charged.”

Insist that the statute be followed. Rule 60(b)(5) misstates subpart (A) of § 3771(d)(5) by permitting the victim to merely “ask to be heard” rather than requiring the victim to “assert[] the right to be heard.” The difference in the language of the rule and the statute may cause confusion in two ways when the defendants’ rights are threatened by “reopening” a plea or sentence after a hastily decided mandamus petition.

First, unlike 18 U.S.C. § 3771(d)(3), 18 U.S.C. § 3771(d)(5), and Rule 60(b)(1), Rule 60(b)(5) replaces “motion” with “ask.” A “motion” denotes a level of formality including notice and a full and fair opportunity to respond. Rule 60(b)(5)(A) may suggest that a victim could “ask” the judge for something by phone or letter or email, without notice to anyone, and that the judge’s denial of this “request” would trigger a mandamus petition and potential “reopening” of a plea or sentence.

Second, the statutory section is entitled “limitation on relief” for a reason. It requires that the victim asserted “the right to be heard” and “such right was denied.” 18 U.S.C. § 3771(d)(5)(A). The “right to be heard” is defined in § 3771(a) as the “right to be reasonably heard at any public proceeding in the district court involving . . . plea [or] sentencing.” Thus, the statute clearly confines the grounds for “re-opening” a plea or sentence to denial of this “right to be heard” at a plea or sentencing proceeding. Rule 60(b)(5)(A), however, suggests that such “re-opening” might be allowed if the victim “asked” to be heard on any “request,” including “requests” to do something far attenuated from a public proceeding involving a plea or sentence, such as to confer with the government, to be reasonably protected from the accused, to be accorded dignity and privacy, etc. This makes no sense, violates the statute, and invites constitutional violations.

Insist that the statute be followed. As the Committee said, the rules cannot alter the self-executing provisions of the CVRA,⁹² and it “sought to incorporate, but not go beyond, the rights

⁹² See Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 23 (September 2007), <http://www.uscourts.gov/rules/Reports/ST09-2007.pdf>.

created by statute.”⁹³ The committee note states that subdivision (b) “*incorporates* the provisions of 18 U.S.C. § 3771 (d)(1), (2), (3), and (5).” Fed. R. Crim. P. 60, 2008 advisory committee note (emphasis supplied). The Due Process Clause requires that only an orderly process with notice and full opportunity to respond and adequate consideration by the judge can trigger a valid mandamus petition and potential “re-opening.” The grounds for any “re-opening” must be confined to a denial of a “right to be heard at any public proceeding in the district court involving” plea or sentencing.

“Re-opening” a Plea or Sentence Conflicts with Due Process. A defendant has due process rights to be accurately apprised of the consequences of a plea, *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), and to specific enforcement of a promise made in a plea bargain. *Santobello v. New York*, 404 U.S. 257, 262 (1971). These expectations are also grounded in the CVRA, which provides that “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.” 18 U.S.C. § 3771(d)(6). Even though victims have a right to be reasonably heard at public plea and sentencing proceedings, this “does not empower victims to [have] veto power over any prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing or parole.” *United States v. Rubin*, 558 F. Supp. 2d 411, 424 (E.D.N.Y. 2008). “Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.” *In re Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005).

No re-opening may occur if the district court lacks jurisdiction. No plea or sentence can be “reopened” by the district court if it lacks jurisdiction. The filing of a notice of appeal divests the district court of jurisdiction. See, e.g., *United States v. Garcia-Robles*, ___ F.3d ___, 2009 WL 937244 *4 (6th Cir. 2009); *United States v. Sadler*, 480 F.3d 932, 941 (9th Cir. 2001); *United States v. Todd*, 446 F.3d 1062, 1069 (10th Cir. 2006). The defendant must file a notice of appeal within 10 days of the later of the entry of judgment or the filing of the government’s notice of appeal, and the government must file a notice of appeal within 30 days of the later of the entry of judgment or the filing of the defendant’s notice of appeal. Fed. R. App. P. 4(b). The CVRA states: “In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter.” 18 U.S.C. § 3771(d)(3). Thus, the district may stay the proceedings without entering judgment for up to five days, thus delaying the filing of a notice of appeal, but it is not required to do so. See *United States v. Hunter*, 2008 WL 153785 (D. Utah Jan. 14, 2008) (rejecting motion to stay the sentencing hearing so that putative victims could litigate and re-litigate issues the judge and the court of appeals had already decided; CVRA does not allow putative victims to delay criminal proceedings). If judgment enters, file a notice of appeal immediately.

⁹³ See Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 6, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf; Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 2 (Aug. 1, 2006), http://www.uscourts.gov/rules/Excerpt_CRReport1205_Revised_01-06.pdf; Report of the Advisory Committee on Criminal Rules to the Standing Committee on Rules of Practice and procedure, December 8, 2005, <http://www.uscourts.gov/rules/Reports/CR12-2005.pdf>.

No re-opening may occur if the judgment is final. “Re-open” is not defined in the CVRA or in Rule 60, but if it means “vacate the sentence with the possibility of imposing a higher sentence,” or “vacate the plea and re-instate greater charges,” this provision has the potential to violate defendants’ constitutional rights under the Double Jeopardy Clause. A defendant has a right not to be sentenced to a higher sentence once the sentence has become final, *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980), and not to have a plea to a lesser offense vacated and a greater charge reinstated. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987).

A judgment is final when direct appeal is concluded and certiorari is denied or the 90-day period for filing a petition for certiorari has run. *See Clay v. United States*, 537 U.S. 522 (2003).

One of the reasons a victims’ constitutional amendment failed was that giving victims constitutional rights could result in a sentence being vacated and the defendant being re-sentenced, which, if the new sentence was more severe, would create a double jeopardy problem.⁹⁴ The CVRA does not contemplate a double jeopardy violation. *See* 150 Cong. Rec. S4275 (April 22, 2004) (CVRA “addresses my concerns regarding the rights of the accused,” including “the Fifth Amendment protection against double jeopardy”) (statement of Senator Durbin). It contemplates a maximum of 21 days between the district court’s denial of a motion asserting a victim’s right to be heard at a public proceeding involving plea or sentence and the court of appeals’ decision on a petition for mandamus: 10 days to file the petition; any intermediate Saturdays, Sundays and holiday; no more than 5 days for stay or continuance; 3 days for decision. 18 U.S.C. § 3771(d)(3), (5).

However, things do not always go as planned. In *Kenna v. United States District Court*, 435 F.3d 1011 (9th Cir. 2006), the Ninth Circuit did not issue its opinion until over six months after the petition for mandamus was filed. In the interim, the judgment became final. The panel posed this task for the district court: “In ruling on the motion [to re-open], the district court must avoid upsetting constitutionally protected rights, but it must also be cognizant that the only way to give effect to Kenna’s right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing.” *Id.* at 1017. The district court judge then held a new sentencing hearing, permitting Kenna and other victims to speak. Having received further information from defense counsel and the government, the court considered imposing a lower sentence, but ultimately imposed the same sentence. If the district court had imposed a higher sentence, the defendant’s Double Jeopardy rights would have been violated, and the procedures set forth in the CVRA violated as well.

H. Defendant’s Right to Relief

Section 3771(d)(1) provides that “[a] person accused of the crime may not obtain any form of relief under this chapter.” This does not mean that the defendant cannot rely on the procedures and substantive limitations of the statute in defending against any assertion of rights in the district court or a mandamus petition. It simply means that the defendant cannot “assert any of the victim’s rights to obtain relief.” 150 Cong. Rec. S10912 (Oct. 9, 2004). For example, if a victim who wished to urge the judge to impose a low sentence was not allowed to be heard at sentencing, the defendant could not seek re-sentencing as relief on appeal on the basis of the

⁹⁴ *See* S. Rep. 108-191 at 103 (Nov. 7, 2003) (minority views).

CVRA. The victim in such a case could petition for mandamus, and the defendant could appeal on another basis, *e.g.*, the district court failed to comply with 18 U.S.C. §§ 3553(a)(1) and 3661.

The defendant can, of course, raise any violation of his rights through the correct or incorrect application of the CVRA. For example, a defendant can object in the district court and appeal his conviction on the basis that a victim fabricated her trial testimony because the judge followed the CVRA in allowing her to be present for the testimony of others; or that the judge erred in permitting an alleged victim to be present during the testimony of others because there was clear and convincing evidence that her testimony would be materially altered; or that the judge failed to give the defendant an adequate opportunity to show that the testimony would be materially altered.

I. What Does “Rights Described in These Rules” Mean?

The phrase “rights described in these rules” in Rule 60(b)(1)-(4) and (6) means “rights” that are “provided by the statute *and* [by the] implementing rules.” Fed. R. Crim. P. 60, 2008 advisory committee note (emphasis supplied). It does not mean that the rules did or could create rights beyond those created by the CVRA.

VIII. Reach Out to Victims and Make Amends in a Constructive Way

Traditionally, defense counsel avoids victims, fearing that victim involvement makes things worse for clients, not better. Wholesale avoidance, however, is an outdated approach incompatible with counsel’s duties to represent his or her client. In part, this is due to a developing understanding that the needs of victims do not always collide with a defendant’s interests and a victim may actually assist the defense in many cases. In part, it reflects the increasing demands of victims who wish to participate in the criminal justice process and congressional action granting victim’s certain rights under the CVRA. Whether we like it or not, victims will be in court. Ignoring victims is simply not possible. Victim outreach can prevent their presence from dooming our clients.

Victims appreciate the opportunity to be heard, regardless of whether it is a prosecutor or defense lawyer who is listening. Sometimes, what victims have to tell us can help us ameliorate the harm they’ve experienced, diminishing their anger and even turning them into allies who want the same sentencing results we do, or at least a sentence that is not as harsh as they would want otherwise. Consider, for example, fraud cases, in which victims have an interest in being compensated for their loss. If the defendant can begin to make payments, the victim may be supportive of a non-prison sentence so that payments can continue uninterrupted.

Many victims are receptive to hearing our clients’ stories as well. Often victims come from the same communities as our clients and can relate to their backgrounds and experiences. For some victims, the knowledge that our clients are remorseful and that we are attempting to fashion a sentence that will achieve both punishment and rehabilitation, is comforting. It gives them reassurance that some benefit to their communities may come out of the trauma inflicted on them. Consider, for example, robbery cases in which the victims are from the clients’ own neighborhoods. Many victims have siblings or children who have been in our clients’ position.

If we help those victims relate to our clients, it will be harder for them to favor harsh prison sentences.

Victim outreach may also incorporate components that are directed at assisting the defendant make amends and repair the harm caused by his or her conduct, as well as help victims come to terms with what they've experienced. This concept is called "restorative justice," the idea being that victims are restored – emotionally and/or financially – through some action by the defense. Consider incorporating restorative justice options into your plea agreement or sentencing proposals. While not all cases lend themselves to restorative justice, the practice of seeking to meet the needs of victims has much to commend it. For more information on restorative justice, see Howard Zehr, *The Little Book of Restorative Justice* (2002). For an inspiring power point on the application of restorative justice principles in a case involving the desecration of a temple, see Denise Barrett, *Beyond Retribution: Restorative Justice Principles in Federal Criminal Cases*, <http://www.ussc.gov/SYMPO2008/Material/Barrett.pdf>; see also Benji McMurray, *The Mitigating Power of a Victim Focus at Sentencing*, 19 Fed. Sent. R. 125 (Dec. 2006).

Of course, victim outreach must be conducted with great caution and careful planning. Counsel may choose to consult with a specially-trained mitigation specialist to determine when and how to approach victims. Often, mitigation specialists or investigators approach the victim, creating a little distance between the client and defense counsel and the victim. In no event should the client contact victims directly.

APPENDIX
Rules and Committee Notes Effective December 1, 2008
Amendments to Existing Rules in Redline and Strikeout

Rule 1(b)(11). Scope; Definitions

“Victim” means a “crime victim” as defined in 18 U.S.C. § 3771(e).

Committee Note

This amendment incorporates the definition of the term “crime victim” found in the Crime Victims’ Rights Act, codified at 18 U.S.C. § 3771(e). It provides that “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.”

Upon occasion, disputes may arise over the question whether a particular person is a victim. Although the rule makes no special provision for such cases, the courts have authority to do any necessary fact finding and make any necessary legal rulings.

Rule 12.1. Notice of an Alibi Defense

(a) Government’s Request for Notice and Defendant’s Response.

(1) Government’s Request. An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.

(2) Defendant’s Response. Within 10 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant’s notice must state:

- (A) each specific place where the defendant claims to have been at the time of the alleged offense; and
- (B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(b) Disclosing Government Witnesses.

(1) Disclosure.

(A) In General. If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant’s attorney:

(i) the name of each witness – and the address and telephone number of each witness other than a victim – that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and
(ii) each government rebuttal witness to the defendant's alibi defense.

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(B) Victim's Address and Telephone Number. If the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or
(ii) fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests.

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

(c) Continuing Duty to Disclose.

(1) In General. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness – and the address and telephone number of each additional witness other than a victim -- if:

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(A) the disclosing party learns of the witness before or during trial; and
(B) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

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(2) Address and Telephone Number of an Additional Victim Witness. The address and telephone number of an additional victim witness must not be disclosed except as provided in Rule 12.1(b)(1)(B).

(d) Exceptions. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)--(c).

(e) Failure to Comply. If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.

(f) Inadmissibility of Withdrawn Intention. Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not,

in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

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.

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

(a) Content. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena--signed and sealed--to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) Defendant Unable to Pay. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) Producing Documents and Objects.

(1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(3) Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the

production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

[subsections (d)-h) omitted]

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 phrase "personal or confidential information," which may include such things as medical or school records, is left to case development.

The amendment 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) – or object by other means such as a letter – on the grounds that it is unreasonable or oppressive. The rule recognizes, however, that there may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided *ex parte* and authorize service of the third- party subpoena without notice to anyone.

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.

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim,

and the witnesses, and the prompt administration of justice.

Committee Note

The rule requires the court to consider the convenience of victims – as well as the defendant and witnesses – in setting the place for trial within the district. The Committee recognizes that the court has substantial discretion to balance competing interests.

Rule 32. Sentencing and Judgment

(a) ~~Reserved~~

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

- (i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
- (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) Restitution. If the law ~~permits~~ restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(d) Presentence Report.

(2) Additional Information. The presentence report must also contain the following:

- (A) the defendant's history and characteristics, including:
 - (i) any prior criminal record;
 - (ii) the defendant's financial condition; and
 - (iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;
- (B) information that assesses ~~any~~ financial, social, psychological, and medical impact on any ~~victim~~;

(i) Sentencing.

Deleted: Definitions. The following definitions apply under this rule:
(1) "Crime of violence or sexual abuse" means:
(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or
(B) a crime under 18 U.S.C. §§ 2241-2248 or §§ 2251-2257.
(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.

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(4) Opportunity to Speak.

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

- (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;
- (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and
- (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of ~~the crime who is present at sentencing and must permit the victim to be reasonably heard.~~

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Deleted: speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:[¶]

- (i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or[¶]
- (ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated

Committee Note

Subdivision (a). The Crime Victims' Rights Act, codified as 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 in 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 at 18 U.S.C. § 3771. The amendment 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 subparagraphs 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). The amended rule provides that the judge must speak to any victim present in the courtroom at sentencing. Absent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge.

Rule 60. Victim's Rights

- (a) In General.
 - (1) *Notice of a Proceeding.* The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.
 - (2) *Attending the Proceeding.* The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.
 - (3) *Right to Be Heard on Release, a Plea, or Sentencing.* The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.
- (b) Enforcement and Limitations.
 - (1) *Time for Deciding a Motion.* The court must promptly decide any motion asserting a victim's rights described in these rules.
 - (2) *Who May Assert the Rights.* A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e).
 - (3) *Multiple Victims.* If the court finds that the number of victims makes it impracticable to accord all of them their rights described in these rules, the court must fashion a reasonable procedure that gives effect to these rights without unduly complicating or prolonging the proceedings.
 - (4) *Where Rights May Be Asserted.* A victim's rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime.
 - (5) *Limitations on Relief.* A victim may move to reopen a plea or sentence only if:
 - (A) the victim asked to be heard before or during the proceeding at issue, and the request was denied;
 - (B) the victim petitions the court of appeals for a writ of mandamus within 10 days after the denial, and the writ is granted; and
 - (C) in the case of a plea, the accused has not pleaded to the highest offense charged.
 - (6) *No New Trial.* A failure to afford a victim any right described in these rules is not grounds for a new trial.

Committee Note

This rule implements several provisions of the Crime Victims' Rights Act, codified at 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 proceeding. . . .” 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 Rules of Evidence addresses 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, the victim’s lawful representative, and the attorney for the government, and any other person authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim’s rights. In referring to the victim and the victim’s lawful representative, the committee intends to include counsel. 18 U.S.C. § 3771(e) makes provision for the rights of victims who are incompetent, incapacitated, or deceased, and 18 U.S.C. § 3771(d)(1) provides that “[a] person accused of the crime may not obtain any form of relief under this chapter.”

The statute provides 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 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)(5)(B), and – in the case of a plea – the defendant did not plead guilty to the highest offense charged.