

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Airman First Class (E-3)
L.R.M.,
USAF,

Appellant,

v.

Lieutenant Colonel (O-5)
JOSHUA E. KASTENBERG, USAF,
Military Judge,

Appellee,

&

Airman First Class (E-3)
NICHOLAS E. DANIELS,
USAF,

Real Party in Interest

BRIEF OF *AMICUS CURIAE* OF
APPELLATE DEFENSE DIVISION FOR
THE NAVY-MARINE CORPS IN
OPPOSITION TO L.R.M.'S
PETITION FOR EXTRAORDINARY
RELIEF IN THE NATURE OF A WRIT
OF MANDAMUS

Crim. App. No. 2013-05

USCA Dkt. No. 13-5006/AF

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

JASON R. WAREHAM
Captain, USMC
Appellate Defense Counsel
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7394
Fax (202) 685-7426
CAAF Bar No: 35802

PAUL C. LEBLANC
CAPTAIN, JAGC, USN
CAAF Bar No: 28180
Director
Appellate Defense Division
1254 Charles Morris Street
SE, Suite 100
Washington, D.C. 20374
(202)685-7394

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**ISSUES PRESENTED AND STATEMENTS OF STATUTORY
JURISDICTION/CASE/FACTS**

Amicus adopts the Issues Presented and Statements as filed by Respondent. This brief is submitted pursuant to this Court's Rule

INTRODUCTION

A courts-martial is a unique and incomparable forum of justice to any other federal district court proceeding. By design, the power and authority over issues, persons, and remedies of a court-martial are exceedingly limited when compared to the federal courts of general jurisdiction. Further, a court-martial's power and authority, even when exercised over proper issues and parties, is temporally limited in existence. These substantive differences are distinct when compared to federal courts but serves the purpose of good order and discipline as intended.

Here, the Air Force Special Victim's Counsel ("SVC") for Appellant (and the National Crime Victim Law Institute ("NCVLI")¹, *Amicus Curiae*, in support thereof) seeks an

¹ Of note, the same *Amicus Curiae* party in support of the filings in the underlying case also appear in their heavily cited *Kenna v. U.S. District Court for C.D.Cal.*, 435 F.3d 1011 (2006). See Docket #218, MOTION of *Amicus Curiae*, The National Crime Victim Law Institute for Leave to Participate as *Amicus Curiae* in support of Victim's Motion for Disclosure of Presentence Report, *United States v. Leichner*, No. 03-00568-cr (9th Cir. Apr. 25, 2006) (Appendix #1).

unprecedented alteration of the narrow courts-martial system. Moreover, Appellant *et al.*, seeks an unequalled full application of the Crime Victim's Rights Acts (CVRA) and a wholesale imputation of CVRA federal circuit case law to military courts that is simply inapplicable to the military system. Finally, the Appellant *et al.*, stretches further than their own cited cases in support of this unprecedented action and asks this Court to extend third party intervener status to crime victims to litigate motions on substantive issues related to the admission of *prima facie* evidence akin to a private prosecutor in a criminal court.

The Appellant seeks too much and this Court cannot indulge such a loose and selective patchwork application of the CVRA and relevant case law to her peculiar claim. Even beyond the military justice system, the Appellant seeks more than what has been allowed by the whole of American jurisprudence since the cessation of the private prosecutor system in favor of our current Government led system. This Court cannot be the first of the entirety of military or federal circuits to countenance a third party intervener in a criminal prosecution.

ARGUMENT

JURISDICTION

I. This Court lacks jurisdiction over Appellant's mandamus.

A. A courts-martial is a court of exceedingly narrow temporal jurisdiction whose sole purpose is to adjudicate violations of the Uniform Code of Military Justice. Here, the Appellant seeks review and enforcement of a third party civil/administrative claim. This Court has no jurisdiction to decide this matter.

The current court-martial remains a temporary tribunal, convened by a commander to hear a specific case. It is not a part of the federal judiciary, nor is it subject to direct judicial review in that system. Instead, it is strictly a court of criminal jurisdiction, and its findings are binding on other federal courts.²

Courts-martial are solely disciplinary, or penal, in nature. They may try only criminal cases and adjudge only criminal sentences. They have no authority to adjudge civil remedies such as the payment of damages or the collection of private debt
. . . .

The courts, in referring to the nature of the court-martial, often label it as a "creature of statute," a phrase that sets the appropriate tone for any discussion of court-martial jurisdiction. Practitioners working within the system of military justice must be ever cognizant that, only after a variety of jurisdictional prerequisites have been satisfied may a court-martial properly hear a case and render a valid judgment. The opportunities for jurisdictional defects are many, and the effect of any such defect is the same: the court-martial is void.³

² David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 1-7 (8th ed. 2012) (citations omitted).

³ *Military Criminal Justice: Practice and Procedure* § 4-2.

This narrow statutory tool of commanders stands in stark contrast to the Article III district courts of general jurisdiction.⁴ It is this vital difference that confuses the parties in favor of this action.⁵

The nature of the claims contained in this mandamus, while arising from a criminal context, are civil/administrative in nature; the Appellant individually seeks enforcement of administrative⁶ provisions contained within the DOD Instruction

⁴ See 18 U.S.C. § 1331 (1980); 18 U.S.C. § 3231 (1948).

⁵ See, e.g., *United States v. Quintanilla*, 56 M.J. 37, 41 (C.A.A.F. 2001) ("There are important distinctions, however, between a military judge and a federal civilian judge, aside from the absence of tenure discussed in *Weiss*, *supra*. A federal civilian judge typically has jurisdiction over all cases arising under applicable federal law, but a military judge does not exercise general jurisdiction over cases arising under the UCMJ. A military judge may exercise authority only over the specific case to which he or she has been detailed.") (citing Art. 26, UCMJ; *Weiss v. United States*, 510 U.S. 163, 172, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994)). See also *Lawrence v. McCarthy*, 344 F.3d 467, 471 (5th Cir. 2003) citing *United States v. Boudreaux*, 35 M.J. 291, 293 (C.M.A. 1992) ("Courts-martial come into existence only upon the referral of specific charges.").

⁶ There is no textual support for the Appellant's, *et al.*, contention that the CVRA applies in total to the military courts. Especially considering there is a controlling DOD Directive on the matter incorporating much of the same provisions. See DOD Directive 1030.01, Victim and Witness Assistance, April 23, 2007. *Amicus* further reject the claim that Appellant is granted durable rights under this instruction vis-a-vis M.R.E. 412, 513 and 514. However, should this Court apply a rights theory to the DOD Instruction, it must agree that any enforcement thereof would be an action in civil or administrative realms as no other person but the accused is allowed to seek injunctive or legal remedy for infringing applications of DOD Instructions.

governing victims and witnesses.⁷ While it may be counterintuitive, the Appellant's claim, though touching and concerning a court-martial, is not at its core a criminal claim (in this case, an action to determine breach and liability of the punitive articles of the UCMJ). The *res* of Appellant's action, as an individual party, is best described as seeking injunctive relief for a civil/administrative right. As a non-party⁸ to the court-martial, the Appellant's claim must stand on its own merits and meet the jurisdictional requirements.⁹ This claim is beyond the reach of a court-martial for even the most meritorious of civil or administrative claims, of which the claim at bar is not. While the pleadings give examples of an alleged victim filing for relief internal to a federal criminal trial, the divergent enabling jurisdictional details cannot be overlooked. As a court of general jurisdiction, the district court is fully empowered independently hear such a third party civil claim. The fact that the claim is organized

⁷ DOD Directive 1030.01 §4.4.

⁸ Rules for Court-Martial Rule 103(16) (2012) (Defining court-martial parties as accused, trial and defense counsels and their agents).

⁹ This is not to suggest that a proper party to the court-martial cannot advocate ideals found within the victim protection directives. In fact, the Government and court are charged with "doing all that is possible . . . without infringing on the constitutional rights of the accused" to uphold the ideals. DOD Directive 1030.01 §4.2.

administratively under the connected court-martial does not change the *res* of the claim. A claim that a court-martial cannot not answer.

The Appellant individually, and not through the trial counsel, seeks enforcement of certain provisions of the CVRA court-martial under the CVRA and the applicable DOD Directive. No matter the eventual merit of the CVRA claim, a court-martial has no authority to hear her argument as a third party. The Appellant is not alone in being denied a particular form of relief from a court-martial. For example, a court-martial may not order restitution as a proper sentence.¹⁰ Or, by the temporal nature of the court-martial, even an accused cannot seek injunctive relief for unlawful confinement until referral of charges.

B. In addition to this Court's lack of jurisdiction to decide this matter, a mandamus is not proper to decide the trial court's issue.

The Service Courts have authority, as courts established by 10 U.S.C. § 866, to issue writs pursuant to 28 U.S.C. § 1651¹¹:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all

¹⁰ LtCol David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment Under Rule for Courts-Martial 1003(b)*, 52 Naval L. Rev. 1 (2005).

¹¹ *Dettinger v. United States*, 7 M.J. 216, 218 (C.M.A. 1979).

writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.¹²

Although writs of mandamus to government officials, compelling them to perform ministerial functions, are almost as old as our Nation¹³, the issue of such a writ to a presiding judicial officer is rare. "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'"¹⁴ "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."¹⁵ Furthermore, "the party seeking mandamus has 'the burden of showing that its right to issuance of the writ is 'clear and indisputable.'"¹⁶ That a ruling of a trial judge is erroneous is insufficient basis for issue of the writ.

¹² 28 U.S.C. § 1651 (2012).

¹³ See *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁴ *Will v. United States*, 389 U.S. 90, 95 (1967).

¹⁵ *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945).

¹⁶ *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953).

To justify issuance of mandamus, the ruling must be one that was outside the proper jurisdiction of the judge or court. "[T]he district judge's order upon the government to furnish names and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction."¹⁷ As noted in the statute itself, a writ is only properly issued if it is "in aid of their respective jurisdictions and agreeable to the usages and principles of law."¹⁸ The Air Force Court of Criminal Appeals has adopted this restrictive approach:

The Supreme Court has said: The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. As we have observed, the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."¹⁹

¹⁷ 389 U.S. at 95.

¹⁸ 28 U.S.C. § 1651.

¹⁹ *Schmidt v. Boone*, 59 M.J. 841, 843 (A.F. Ct. Crim. App. 2004), *rev'd. on other grounds sub nom., United States v. Schmidt*, 60 M.J. 1 (C.A.A.F. 2004).

This petition cannot satisfy the high burden to justify such a writ. As previously discussed, the military system does not have jurisdiction over the Appellant's claim. Thus, any writ arising therefrom is not in aid of this Court's jurisdiction.

THIRD PARTY STANDING

II. If this Court should decide that there is jurisdiction over the Appellant's claim, the CVRA applies and that mandamus is the proper procedure, the Appellant is not entitled to the relief sought as a non-party intervener to the court-martial.

A. There is no such position as a third-party intervener action in federal criminal law.

The Appellant *et al.*, seeks an expansion of the rights of alleged victims in criminal courts heretofore unequalled in military or American jurisprudence.²⁰ In essence, the Appellant

²⁰ While the arguments of Appellant and the Government have shifted and expanded through the process of litigation, looking at the record and filings as a whole, amicus' understands the Appellant and *amicus curiae* in favor of the mandamus to desire that this court establish:

- 1) Rights to discovery commensurate with an accused.
- 2) Rights to notice and service of all filings by either party.
- 3) A substantive right to privacy / due process right arising from M.R.E.s 412, 513, and 514.
- 4) The right for an SVC to represent the position of an alleged victim at her discretion before a court-martial no matter her adjudged level of competence or age.
- 5) Third party status for alleged victims in order to intervene in a court-martial and co-litigate with the Government hearings arising from M.R.E.s 412, 513, 514.

seeks admission to a court-martial as a third party intervener, a procedural action relegated to the civil courts. Much of this expansion is founded upon the concept that the M.R.E. rules of exclusion concerning victim-witness testimony somehow, through the blurred filter of the CVRA and other right to privacy cases, are the source of substantive rights (sometimes casted as due process rights) to be represented by an attorney in relevant hearings and testimony.²¹

While novel to this Court, this theory is not.²² However, this theory of granting third party status is unsupportable by case law and the rules.²³ While the origin of this view cannot

²¹ See Government's Answer to Order to Show Cause Br. at 16; NCVLI's Proposed Brief of *Amicus Curiae* Br. at 3-18.

²² "But if the feminist viewpoint does not demand special protection for female witnesses, it does suggest a different role for the trial judge. In the past, when witnesses were more closely identified with the party that called them, it was common to rely on that party to protect the witness from unfair cross-examination. But an examination of the realities of rape trials demonstrates that the interests of the victim-witness are not identical with the interests of the prosecutor. For this reason, it has been suggested that reform statutes **ought** to cast the exclusionary rule in the form of a privilege to refuse to disclose past sexual conduct and that the victim **ought** to have the assistance of appointed counsel to protect her interests when they conflict with the interests of the state. **Rule 412 did not incorporate these proposals; therefore, it is up to the judge to see that the rights of the victim are not sacrificed to the trial strategy of the prosecutor.**" 23 Alan Wright & Kenneth W. Graham, Jr., Fed. Prac. & Proc. Evid. § 5382, *Policy of Rule 412*, (1st ed. current through December 2012) (emphasis added).

²³ "On the issue of non-party appeals, there is an important distinction between civil and criminal cases. Civil cases often

be definitively identified, at least one author on the topic points to one of the CVRA's drafter's misunderstanding of the difference between private and public prosecutors in the

implicate the pecuniary rights of non-parties, such as the unnamed class member in *Devlin*. For instance, this court has allowed the children of a decedent to appeal from a wrongful death judgment obtained by the decedent's widow.

Criminal trials, on the other hand, place an individual citizen against the United States government. While non-parties may have an interest in aspects of the case, they do not have a tangible interest in the outcome. This distinction is evidenced by our procedural rules. The Federal Rules of Civil Procedure allow non-parties to intervene to assert their rights. The Federal Rules of Criminal Procedure contain no comparable provision. This distinction recognizes that non-parties often have a unique interest in civil cases. Because non-parties do not have a comparable unique interest in the outcome of criminal trials, we do not consider *Devlin* or *Plain* persuasive in this case . . . Congress neither explicitly nor implicitly provided in the VWPA a private right of action for victims." *United States v. Hunter*, 548 F.3d 1308, 1312-13 (10th Cir. 2008) (citations omitted). See also *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 53 (1st Cir. 2010) ("[n]otwithstanding the rights reflected in the restitution statutes, crime victims are not parties to a criminal sentencing proceeding.") See, e.g., *United States v. Palma*, 760 F.2d 475, 479 (3d Cir.1985) (under VWPA, "the victim . . . is not made a party to the sentencing proceeding"); *United States v. Brown*, 744 F.2d 905, 909-10 (2d Cir. 1984); see also *Ziskind*, 471 F.3d at 270. Thus, the baseline rule is that crime victims, as non-parties, may not appeal a defendant's criminal sentence. See *Hunter*, 548 F.3d at 1311; *United States v. Grundhoefer*, 916 F.2d 788, 793 (2d Cir. 1990) ("The victim as a non-party is accorded only a limited presence at a sentencing proceeding and has no right to appeal an inadequate remedy."); *United States v. Franklin*, 792 F.2d 998, 999-1000 (11th Cir. 1986) (dismissing appeal because "[a]ppellant cites no statute, including the [VWPA], and we find none, that would give us the authority to entertain an appeal by a victim . . . who was not a party to the sentencing proceeding in the district court."). See also 18 U.S.C. § 3742 (providing that the government and the defendant, under appropriate circumstances, may appeal a criminal sentence).

American Justice System.²⁴ No matter the origin, the Appellant's desires to have anything more than a factual voice in court-martial hearings on M.R.E.s 412, 513, 514 is misplaced.²⁵ To allow such an entry and dual litigation against an accused would undoubtedly cast grave doubts upon the actual and perceived fairness of a court-martial.

This does not suggest that an attorney could not represent an alleged victim's factual disclosures should the victim be unable to do so herself. Furthermore, the cases cited in support of this contention are limited 1) to federal courts of

²⁴ See Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 Duke L.J. 237, 246 n.48 (delineating and rebutting Senator Diane Feinstein's, co-author of the CVRA, unfounded perspective that she was somehow restoring rights of victims held during an era of law in United States where private prosecution was allowed. Rebutting with the fact that victims never had private prosecutorial duties in the federal system.).

²⁵ Much has been written on the CVRA and its application. Amicus' do not seek to fully regurgitate the scholarly work, but invite this Court to the publications to show that no court has allowed a victim as an intervener status as a co-litigant in a criminal court in order to oppose 412, 513, 514 motions. Rather, the rights enforced were right to be heard (personally), right to notice of proceedings, right to privacy in identification, qualified right to be present in courtroom, right to prevent undue delay. See Blondel, *supra* note 38; Fern L. Kletter, J.D., Annotation, *Validity, Construction, and Application of Crime Victims' Rights Act (CVRA)*, 18 U.S.C. 3771, 26 A.L.R. Fed. 2d 451 (2008); Amy Baron-Evans, *Rights and Procedures Under the Crime Victims' Rights Act and New Federal Rules of Criminal Procedure*, (April 30, 2009), <http://www.fd.org/docs/select-topics---rules/rights-and-procedures-under-the-crime-victims-rights-act-and-new-federal-rules-of-criminal-procedure-for-victims.pdf> (Attached in Appendix 1).

general jurisdiction, and 2) to the enumerated rights to be heard at sentencing, given notice of proceedings, consult with the prosecution, to be treated fairly and respectfully (with no testimonial privilege attached to such right), to be present in courtroom (at appropriate times), and to be protected from undue delay. There is no direction in these cases that this Court should take the unprecedented step to expand them to include a right to intervention at this court-martial; the first time a court would have allowed such an option according to a survey of the cases and academia on the topic.

B. A finding that Appellant has standing, would significantly prejudice the Sixth Amendment fair trial rights of service members facing courts-martial.

Should this Court find that alleged victims have standing to assert themselves through their SVCs or other counsel in court-martial proceedings, a serious blow would be dealt to the fair trial rights of service members facing courts-martial. First, allowing an SVC to represent and assert the rights of an alleged victim at court-martial would effectively double the prosecutorial efforts against the accused. In this instant case, the military judge recognized that "the government and the SVC are at least impliedly aligned, particularly in the opposition to the use of evidence under M.R.E. 412."²⁶ The

²⁶ (Military judge's first ruling) p. 10.

alignment of interests between the prosecution and the alleged victim occurs routinely in the prosecution of sex offenses in the military, as the trial counsel litigates to exclude evidence under M.R.E. 412. The CVRA recognizes this alignment and specifically charges the prosecution with ensuring that an alleged victim is afforded the rights assured to them under that Act.²⁷ As such, the interests that Appellant argues should be advanced through the SVC are already adequately represented through the trial counsel. A decision by this Court that would allow the SVC to duplicate the efforts already put forth by the prosecution would serve to unfairly stack litigants against an accused within the court-martial.

Further, the alignment between trial counsel and SVC raises complicated issues regarding the prosecution's obligations to disclose all favorable evidence to an accused under *Brady v. Maryland*.²⁸ Not only would SVC's not be bound by the same *Brady* obligations as the government, they would be precluded from disclosing most *Brady* material to the government or defense. Disclosure of such favorable defense evidence would almost certainly be antithetical to the alleged victim's interest in the court-martial, which in most cases would include ensuring

²⁷ 18 U.S.C. § 3771(c)(1).

²⁸ 373 U.S. 83 (1963).

conviction and affirming their victimhood. Thus, the alignment between the government and the SVC creates the opportunity for this *de facto* prosecution team to skirt the government's *Brady* obligations by strategically controlling the flow of information regarding a case.²⁹ This type of double-team prosecution has the dangerous potential to undermine an accused's due process rights.

An alliance between the SVC and trial counsel further creates an appearance of impropriety that would undermine the public's perception of fairness in the military justice system. The perceived alliance between SVC and trial counsel is a result of their aligned interests in both immediate evidentiary issues and in the larger goal of convicting the accused. Their bases for achieving these goals, however, are divergent and create perilous issues regarding a proceeding's actual and perceived fairness. A trial counsel, as a representative of the government, is not primarily concerned with the conviction of any one accused, but in the service of justice.³⁰ An SVC,

²⁹ See Jannice E. Joseph, *The New Russian Roulette: Brady Revisited*, 17 Cap. Def. J. 33, 54-58 (2004) (discussing complications arising under *Brady* between non-privileged communications between an alleged victim and his or her victim advocate, and suggesting that the way to avoid such conflicts is to separate the victim advocate program from the prosecution).

³⁰ See ABA Standards for Criminal Justice: Prosecution Function and Defense Function 3-1.2 (3rd ed. 1993) (describing the prosecutor as an "administrator of justice, an advocate, and an

however, as an attorney for alleged victim, is bound by a duty of loyalty to the client to protect her rights and lawfully assist her in her goal: the conviction of the alleged perpetrator. While both parties may align through their mutual interest in the conviction of the accused, their ethical bases for that position are divergent and cannot be reconciled. Therefore, the inevitable alignment of the government with the SVC would serve to impugn the quasi-judicial function of the prosecutor and undermine the actual and apparent fairness of the proceedings.³¹

The involvement of SVCs in the litigation of pre-trial motions is problematic even in scenarios in which their interests diverge from the prosecution's. For instance, one can envision a scenario in which both the trial counsel and defense counsel intend to introduce habit evidence of an alleged victim's sexual behavior when engaging in consensual sex to show conformity or non-conformity with that habit on a particular occasion. In such a scenario, an alleged victim "must be afforded a reasonable opportunity to attend [the pre-trial

officer of the court," whose duty "it is to seek justice, not merely to convict").

³¹ See Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/attorney Relationships*, 48 S. Tex. L. Rev. 695, 703-04 (2007) (distinguishing the prosecutor's ethical obligation to seek justice from the interests of an alleged sexual assault victim in criminal prosecutions).

hearing] and be heard.”³² However, the right for the alleged victim to attend and be heard regarding his or her privacy interest does not extend to advancing legal arguments regarding the admissibility of the evidence in question.

Further, allowing an SVC to advocate for the interests of an alleged victim at a pre-trial motions hearing opens the door to the SVC speaking on behalf of their client. In such a scenario, there is a serious danger that facts proffered by the SVC, rather than testified to by the alleged victim, may make their way into the military judge’s findings of fact and ultimately become determinative as to the admissibility or availability of evidence M.R.E. 412 or M.R.E. 513.

The SVC-victim relationship also creates issues regarding an accused’s Sixth Amendment right to confrontation. The inevitable alignment of the SVC with the prosecution in courts-martial has the potential to create an attorney-client relationship between the alleged victim and the prosecution, which would significantly diminish the amount of relevant impeachment testimony a defense counsel could elicit from an alleged victim during cross-examination. As an alleged victim is now represented by an attorney who is a quasi-member of the prosecution team, information that an accused may normally be

³² Mil. R. Evid. 412(c)(2).

able to elicit on cross-examination, such as pre-trial witness preparation efforts, may be privileged. Otherwise relevant information learned by the alleged victim through pre-trial preparation with counsel may likewise potentially be privileged.

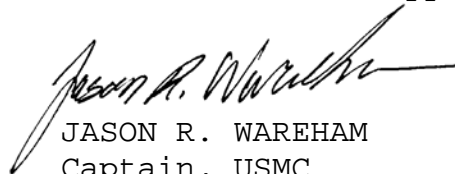
Further, an alleged victim's privacy interests would give standing to an SVC to argue the admissibility of evidence in pretrial motions hearings, or to object at trial to questions or evidence that would similarly pose a threat to the alleged victim's privacy interests. Such a scenario presents an erosion of an accused's right to confront the witnesses against him. It is also a scenario in which an SVC may be advocating for an alleged victim's legal interests in front of a members panel, effectively giving the victim an additional table in the courtroom. How would an SVC's role in a proceeding be explained to the member? Would they be referred to as the "Special Victim's Counsel"?

Allowing an SVC to advocate for an alleged victim's legal interests at court-martial presents a myriad of problems that create infringements upon a service member's constitutionally guaranteed rights to due process and a fair trial. SVC representation at courts-martial is not necessary to uphold the very clearly established rights of alleged victims to be present and heard in certain contexts. Those rights are currently recognized and upheld through the duties and responsibilities of

the trial counsel. The duplication of those efforts through an SVC would serve no other purpose than to open the veritable Pandora's Box of issues discussed above.

CONCLUSION

To support the Appellant, *et al.*, in this case would fundamentally alter the American criminal justice system as we know it. No longer would an accused be subject only to the constitutionally limited prosecution by the Government, but now an unregulated personal and private prosecution by an embittered party unbound by any such Constitutional limitations. The long reaching potential effect of this is almost impossible to see as it is diametrically foreign to the system emplaced by the Founders of our jurisprudence. There is no concrete legal support for this foundational shift of justice. This Court cannot be the first domino to this chaos. The Appellant must be denied.



JASON R. WAREHAM
Captain, USMC
Appellate Defense Counsel
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7394
Fax (202) 685-7426
CAAF Bar No. 35802

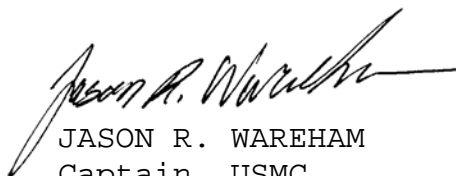
/s
PAUL C. LEBLANC
CAPTAIN, JAGC, USN
Director
Appellate Defense Division
1254 Charles Morris Street
SE, Suite 100
Washington, D.C. 20374
(202)685-7394
CAAF Bar No: 28180

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered electronically to the Court on May 23, 2013, that a copy was delivered electronically to the U.S. Air Force Court of Criminal Appeals, and to the Air Force Appellate Division and NCVLI as *amicus curiae*.

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 26(d) and the type-volume limitation of Rule 24(c) because it contains 4,709 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a mono-spaced typeface using Microsoft Word version 2003 with 12-point-Courier-New font.



JASON R. WAREHAM
Captain, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review
Activity
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7394
Fax (202) 685-7426
CAAF Bar No: 35802

Notes

**VICTIMS' RIGHTS IN AN ADVERSARY
SYSTEM**ERIN C. BLONDEL[†]

ABSTRACT

The victims' rights movement argues that because the outcome of criminal prosecutions affects crime victims, the justice system should consider their interests during proceedings. In 2004, Congress passed the Crime Victims' Rights Act (CVRA), giving victims some rights to participate in the federal criminal justice system. This Note probes both the theoretical assumptions and practical implications of the CVRA. It demonstrates that the victims' rights movement revisits a long-acknowledged tension between adversary adjudication and third-party interests. It shows, however, that American law has resolved this tension by conferring party or quasi-party status on third parties. Despite some pro-victims rhetoric, Congress reaffirmed the public-prosecution model when it passed the CVRA. Instead of making victims parties or intervenors in criminal prosecutions, the CVRA asks courts and prosecutors to vindicate victims' interests. This unusual posture creates substantial conflicts for courts and prosecutors and undermines defendants' rights. To avoid these consequences, this Note argues, courts can interpret the CVRA's substantive rights narrowly. Rather than reading the CVRA as conferring broad rights on crime victims, courts should interpret the statute to simply require institutional courtesy toward crime victims. This interpretation reflects victims' nonparty status and preserves the rights and responsibilities of courts, prosecutors, and defendants.

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[†] Duke University School of Law, J.D. expected 2009; Oxford University, M.St. 2006; University of Notre Dame, B.A. 2005. I thank Professors Sara Sun Beale and Ernest A. Young for their invaluable and generous assistance with this Note and the editors of the *Duke Law Journal* for patiently guiding it to publication. For reading early drafts of this Note, I thank Dan Berick, Jessica Brumley, Hannah Weiner, and Eric Wiener. Finally, I thank my family for everything.

INTRODUCTION

In *Marbury v. Madison*¹ Chief Justice Marshall wrote, “The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”² Two centuries later, in 2004, Congress disrupted that division of power when it passed the Crime Victims’ Rights Act (CVRA),³ forcing courts both to step beyond deciding the rights of individuals and to second-guess executive discretion. With this statute, Congress may have transformed federal criminal prosecutions.

Prior to the CVRA, for example, the prosecution of Dan Rubin for securities fraud would have been unremarkable. In March 2007, federal prosecutors and Rubin’s defense counsel negotiated a plea bargain, which the district court accepted.⁴ But two of Rubin’s victims, Dixie Chris Omni (Omni) and RJP Investment Company (RJP), did not like the plea agreement. Omni and RJP thought that Rubin should pay more restitution and prosecutors should provide more assistance with their civil suit against Rubin.⁵ In short, prosecutors wanted to resolve the case, but the victims wanted to recover their losses.

Over the objection of the government and Rubin’s defense counsel, Omni and RJP petitioned the district court based on the CVRA to vacate the plea agreement and modify Rubin’s restitution order.⁶ They also argued that prosecutors violated their statutory right to be treated with respect when the government contended that Omni and RJP filed the petition merely to improve their bargaining position in the civil lawsuit.⁷

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 170.

3. Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act, Pub. L. No. 108-405, tit. I, 118 Stat. 2260, 2261–65 (2004) (codified as amended at 18 U.S.C. § 3771 (2006) and to be codified at 42 U.S.C. §§ 10603(d)–(e)). This Note refers to the act simply as the Crime Victims’ Rights Act.

4. *United States v. Rubin*, 558 F. Supp. 2d 441, 416 (E.D.N.Y. 2008).

5. *Id.* at 412–13, 416–17.

6. *Id.* at 412–13, 425. Under the CVRA, victims may assert their statutory rights by petitioning the district court. 18 U.S.C. § 3771(d)(3).

7. *Rubin*, 558 F. Supp. 2d at 416–17, 428; *see also* 18 U.S.C. § 3771(a)(8) (granting victims “[t]he right to be treated with fairness and with respect for [their] dignity and privacy”).

The district judge chafed at the victims' request to second-guess the government and place their interests ahead of those of the parties. He refused to "prohibit[] the government from raising legitimate arguments . . . simply because the arguments may hurt a victim's feelings."⁸ The court also expressed concern that "such a dispute . . . potentially compromis[es] its ability to be impartial to the government and defendant, the only true parties to the trial."⁹

*United States v. Rubin*¹⁰ demonstrates the procedural and practical problems that the CVRA creates for participants in the federal criminal justice system. Traditionally, American courts have followed the adversary system of litigation, which grants parties broad autonomy to vindicate their rights and interests before an impartial court. The adversary system has informed the constitutional, procedural, and ethical rights and obligations of the system's three primary participants: courts, prosecutors, and defendants. But because an adversary system relies on the parties to assert their interests before the court, it necessarily excludes outsiders like crime victims.

The victims' rights movement¹¹ has argued that excluding victims from criminal proceedings is unjust because victims have a unique interest in the outcome of criminal cases and so deserve the opportunity to have those interests represented.¹² But the movement merely restates the point that both legal realists and public interest litigators have noted: the adversary system fails to consider others whose interests litigation may affect. This Note disagrees with the conclusion of victims' rights activists and other scholars that outside interests justify changing the adversary system. Congress and the courts can give third parties intervenor or party status, which allows

8. *Rubin*, 558 F. Supp. 2d at 428.

9. *Id.* The court continued,

As for actual clashes between victim and government over the best way to convict, punish and seek restitution from a criminal wrongdoer, how can the court presiding over the prosecution of the defendant referee any spat between government and victim about how best to make the accused pay for his, at that point, only charged criminal conduct?

Id. at 429.

10. *United States v. Rubin*, 558 F. Supp. 2d 441 (E.D.N.Y. 2008).

11. For a brief history of the victims' rights movement, see Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865–69.

12. See *infra* notes 64–65 and accompanying text.

third parties to adjudicate their rights without disrupting the adversary structure.

The CVRA does not confer party or intervenor status, however; it instead reaffirms prosecutors' responsibility to prosecute federal criminal proceedings. Yet it asks courts and prosecutors to vindicate the interests of victims, who remain nonparties under the statute. This unusual procedure places courts and prosecutors at odds with their constitutional and ethical obligations, and it undermines historic protections for criminal defendants inherent in the adversary system. Courts can and should interpret the CVRA narrowly to avoid these conflicts.

Part I of this Note outlines the cultural values that underlie adversary adjudication. It demonstrates that the adversary system—which privileges judicial independence and party autonomy—frames the federal criminal justice system, and it concludes that the system excludes third parties, including victims, by design. Part II challenges the victims' rights movement's assumption that the justice system should incorporate victims even at the expense of the adversary system. It shows that the movement has overlooked serious scholarly objections to considering third-party interests rather than focusing on the rights of the parties. And when it has crafted procedures to allow third parties to represent their interests, American law has consistently preferred to confer party status on third parties rather than abandon the adversary structure. Part III demonstrates that the CVRA fails to confer party status on victims. In an unprecedented disruption of the adversary structure, the CVRA instead compels courts and prosecutors to act as victims' advocates, a posture that undermines judicial independence, prosecutorial discretion, and defendants' rights. But courts can interpret the CVRA's substantive rights narrowly; by limiting the scope of victims' rights, courts can limit the burden on courts and prosecutors to advocate for victims and avoid many of these improprieties. This Note concludes that courts should interpret the CVRA as requiring institutional courtesy toward crime victims. But until Congress makes victims independent parties in criminal prosecutions, courts and prosecutors should not change their decisions based on the desires of victims.

I. THE AMERICAN ADVERSARY SYSTEM

A. *Adversary and Inquisitorial Cultures*

Western cultures resolve legal disputes through one of two basic approaches: the adversary model or the inquisitorial model.¹³ The models fundamentally differ in who controls the proceedings. In the inquisitorial model, the court actively directs the case.¹⁴ Judges in inquisitorial systems initiate proceedings, collect evidence, and determine how to construct and resolve the legal and factual issues in the case.¹⁵ In contrast, parties in adversary systems manage their own cases. They initiate proceedings, develop the evidence, and choose the best way to argue their position before the court.¹⁶ Judges in adversary systems act primarily as neutral “umpire[s].”¹⁷ Rather than undertaking independent investigations, they look at the evidence the parties bring before the court and rule on the law based on the facts and arguments before them.¹⁸

These procedural differences reflect cultural assumptions about the purpose of legal systems.¹⁹ In the inquisitorial model, social interests take primacy. These societies tend to view the legal system primarily as a tool to investigate and uncover the truth.²⁰ Unlike adversary systems, which prize rules of evidence and procedure, inquisitorial systems generally disfavor rules that might obstruct uncovering the truth.²¹ For example, inquisitorial courts admit

13. See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1183 (2005) (comparing the United States’ adversary system with the “dark inquisitorial world of continental Europe”). Although no system is completely inquisitorial or adversarial, legal systems usually emerge from one method or the other. *Id.* at 1187.

14. *Id.* at 1188.

15. *Id.*

16. *Id.*

17. *Id.*

18. Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313, 320–21 & n.23 (1991).

19. See Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 280 (2002) (arguing that the United States’ “cultural predilections are reflected in four important aspects of civil procedure that are peculiarly American”).

20. Felicity Nagorcka, Michael Stanton & Michael Wilson, *Stranded Between Partisanship and the Truth? A Comparative Analysis of the Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U. L. REV. 448, 462–63 (2005).

21. *Id.*

evidence even if authorities improperly collected it.²² Inquisitorial systems focus more on achieving the right result than on strictly enforcing procedures.²³

In contrast, adversary systems value parties' rights to have their disputes resolved through a fair process monitored by a judge.²⁴ Although adversary systems assume that the parties' self-interests drive them to uncover the truth for the jury,²⁵ these cultures ultimately show less desire to achieve the correct result. For example, these legal systems tend to develop firm procedural default rules that outsiders may view as unfairly harsh.²⁶ But protecting the process—and thereby protecting party autonomy—justifies sacrificing some accuracy in the outcome of the litigation.

22. *Id.*

23. See Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93, 124 n.170 (2007) (noting that under French law the "honor and conscience," C. PR. PÉN. art. 310(1), of judges binds them to discover the truth and that German law allows a court to, "upon its own motion, extend the taking of the evidence to all facts and evidence which are important for the [court's] decision," StPO § 244(2)).

24. Nagorcka et al., *supra* note 20, at 462–63.

25. *Id.* at 462.

26. *Id.* at 462–63. The Supreme Court's 2006 decision in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), illustrates the tension between adversarial and inquisitorial philosophies. One of the defendants in that case, Mario Bustillo, was a Honduran national who was prosecuted in Virginia state court without being afforded his right under the Vienna Convention to consult with the Honduran Consulate. *Id.* at 2676. Bustillo first raised this issue in a habeas corpus petition, however, and lower courts ruled that because he raised the issue on collateral rather than direct review, Bustillo was procedurally barred from litigating the claim. *Id.* at 2676–77, 2682. The International Court of Justice (ICJ) disagreed, holding that the Vienna Convention required American courts to permit defendants to raise this issue even on collateral appeal. *Id.* at 2683.

The Supreme Court rejected the ICJ's interpretation. Writing for the majority, Chief Justice John Roberts discussed at some length the difference between inquisitorial and adversary litigation. *Id.* at 2685–86. He reasoned that the ICJ overlooked the importance of procedural default rules in adversary systems. *Id.* at 2686. The ICJ's interpretation of the Vienna Convention would allow Convention claims to "trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication." *Id.* These rules are so critical to preserving the fairness of adversary litigation that adversary courts enforce them even at the expense of viable legal claims. See *id.* at 2687 ("[I]t is well established that where a defendant fails to raise a *Miranda* claim at trial, procedural default rules may bar him from raising the claim in a subsequent postconviction proceeding."). The Court concluded that Bustillo's claim was procedurally barred. *Id.*

B. *The Federal Justice System*

American legal culture generally follows the adversary tradition.²⁷ As one scholar has explained, “[t]he framers, reacting against the King’s autocratic judiciary, wanted both to ensure federal judicial independence from the Executive and to vest substantial adjudicatory power in the people.”²⁸ As a result, adversary philosophy has shaped the constitutional, procedural, and ethical structure of the federal criminal justice system.

1. *Federal Courts.* Article III of the U.S. Constitution vests judicial power in the federal courts to resolve the “Cases” and “Controversies” before them.²⁹ The cases-and-controversies principle lays the foundation for the limited, adversary nature of the federal justice system. As Chief Justice Marshall declared in *Marbury v. Madison*, the courts resolve the rights of individuals and should not intrude on the executive’s responsibility to enforce the law.³⁰ This limitation allows courts to make decisions based on “concrete legal issues, presented in actual cases, not abstractions,”³¹ and it grants parties autonomy to vindicate their rights.³²

The cases-and-controversies principle also preserves the separation of power between the branches of government.³³ The

27. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382 (1982). The American legal system is not purely adversarial. Courts of equity, for example, are rooted in inquisitorial procedure. Kessler, *supra* note 13, at 1193. But the American legal system “is considered more adversarial than most.” Resnik, *supra*, at 382. And criminal cases traditionally have proceeded in adversary common law courts, not courts of equity. Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 BYU L. REV. 259, 287–88; see also Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1368 (2005) (distinguishing the “inquisitorial model of the courts of equity” from “the adversarial mode of the common law courts”).

28. Resnik, *supra* note 27, at 381 (footnote omitted).

29. U.S. CONST. art. III, § 2, cl. 1.

30. See *supra* note 2 and accompanying text.

31. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947) (quoting *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423 (1940)). As Justice Scalia noted, rejecting a doctrine of hypothetical jurisdiction, “[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998).

32. See *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment) (“Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”).

33. *Morrison v. Olson*, 487 U.S. 654, 677–78 (1988). For example, the Court has long held that it cannot resolve political questions because those questions implicate the policy judgments

Supreme Court has prohibited judges from acting as policymakers rather than independent interpreters of the law: “executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.”³⁴ Not only does a limited judiciary protect the policymaking branches,³⁵ but it also frees the judiciary to focus its attention on allowing the parties to vindicate their rights before an impartial tribunal.

Ideally, the federal judiciary exhibits two key traits of adversary judges: it ensures that the proceedings give both parties a fair opportunity to present their cases, and it remains impartial toward parties.³⁶ First, judges bear responsibility for preserving a fair forum for litigation. The Constitution, for example, vests significant responsibility for protecting defendants’ constitutional rights in the judiciary.³⁷ Procedurally, judges manage the proceedings and regulate the relationship between the parties.³⁸ Second, federal judges refrain from acting as advocates.³⁹ Fundamental to the American ideal of a fair forum for adjudication is the concept of the “judge as an impartial guardian for the rule of law.”⁴⁰ The federal judiciary thus exhibits the adversary model’s emphasis on allowing individual parties the

of the other branches and are beyond courts’ Article III jurisdiction. *E.g.*, *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment) (“I am of the view that the basic question presented by the petitioners in this case is ‘political’ and therefore nonjusticiable because it involves the authority of the President in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.”).

34. *Morrison*, 487 U.S. at 677 (quoting *Buckley v. Valeo*, 424 U.S. 1, 123 (1976)).

35. Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 230 (1990).

36. *See supra* notes 17–18, 24–26 and accompanying text.

37. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1014–15 (2006).

38. For example, judges regulate discovery, FED. R. CRIM. P. 16(d), and rule on the parties’ pretrial motions, FED. R. CRIM. P. 12(b)–(d).

39. Resnik, *supra* note 27, at 382.

40. *Bush v. Gore*, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting). Federal law requires judges to recuse themselves from a case “in which [their] impartiality might reasonably be questioned.” 28 U.S.C. § 455(a) (2006). Federal judges sometimes do actively protect the rights of particularly vulnerable parties, such as pro se litigants. *E.g.*, *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007). The purpose of these interventions is not for courts to assume advocacy duties; the parties remain responsible for litigating their cases. *See id.* (asking courts to “liberally construe [a pro se litigant’s] pleadings” but not asking the court to litigate on the pro se plaintiff’s behalf). Courts show more leniency toward technical procedural issues to prevent unfairly excluding nonlawyers. *E.g.*, *id.* Courts act, then, to preserve the fairness of the proceedings—a quintessentially adversary duty.

freedom to vindicate their interests in a fair forum. As a result, though, the federal courts exclude outsiders to the litigation, including victims.⁴¹

2. *The Parties.* With a limited judiciary, primary responsibility for vindicating legal rights rests with the parties to litigation.⁴² With few exceptions,⁴³ federal courts still assume that “the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”⁴⁴

a. *The Prosecution.* The responsibility to enforce the United States’ laws rests with the executive branch. The Supreme Court has repeatedly protected the executive’s constitutional duties to prosecute criminal offenses. The Court has held that because prosecution is a core executive function, statutes may not “impermissibly interfere” with the executive’s prosecutorial powers.⁴⁵ Under the doctrine of prosecutorial discretion, prosecutors have near-absolute power to determine whether to bring criminal charges,⁴⁶ whether to pursue a prosecution, and how to negotiate a plea bargain.⁴⁷ Contrary to the suggestion of some victims’ rights

41. In France’s inquisitorial system, by contrast, the investigating judge may consider outside interests such as victims, animals, minority groups, or the environment and even permit those parties or their representatives to participate in the proceedings. Nagorcka et al., *supra* note 20, at 460–61.

42. *See* *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment) (“Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”).

43. *See infra* Part II.C.

44. *Castro*, 540 U.S. at 386 (Scalia, J., concurring in part and concurring in the judgment).

45. *Morrison v. Olson*, 487 U.S. 654, 660, 659–60, 695 (1988). In *Morrison*, the Court found that the statute was valid because it did not impermissibly interfere with the executive’s prosecutorial power. *Id.*

46. *See id.* at 710–11 (Scalia, J., dissenting) (observing that the executive is responsible for prosecuting criminal offenses, that the other branches have means to check that balance, and that Congress can “impeach the executive who willfully fails to enforce the laws . . . and the courts can dismiss malicious prosecutions” (citation omitted)); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973) (“[F]ederal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made.”).

47. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

advocates, including the CVRA's drafters,⁴⁸ federal prosecutors, not victims, have carried sole responsibility to prosecute federal offenses since the Judiciary Act of 1789.⁴⁹ Federal law continues to vest all prosecutorial responsibilities in United States attorneys.⁵⁰

Federal prosecutors represent the interests of the United States, not the interests of victims or other specific third parties. As the Supreme Court has observed, by representing the United States, federal prosecutors have a responsibility to vindicate the public's interest in justice.⁵¹ This obligation to seek justice, though, is "twofold": prosecutors must ensure "that guilt shall not escape or innocence suffer."⁵² As a result, prosecutors have a duty both to the public *and to the defendant* to make sure justice is done. Prosecutors' codes of ethics generally agree that prosecutors are "ministers of justice."⁵³ Additionally, prosecutors have a duty to remain impartial toward private interests.⁵⁴ Thus, federal prosecutors should consider

48. Senator Dianne Feinstein, for example, has repeatedly relied on an inaccurate history of public prosecution in American law to justify expanding victims' rights. Promoting a victims' rights amendment to the Constitution, she argued that "a constitutional amendment will restore rights that existed when the Constitution was written. It is a little known fact that at the time the Constitution was drafted, it was standard practice for victims, not public prosecutors, to prosecute criminal cases." *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. 4 (2003) (statement of Sen. Dianne Feinstein). Later, when sponsoring a federal statute recognizing victims' rights, Senator Feinstein argued that "[v]ictims had rights until about the mid-19th century, the 1850s, when the concept of the public prosecutor was developed in our Nation." 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). In fact, "the American system of public prosecution was fairly well established by the time of the American Revolution." Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 371 (1986). And victims never have prosecuted federal criminal cases. *See infra* note 49 and accompanying text.

49. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 700-01 (2004).

50. 28 U.S.C. § 547(1) (2006).

51. The Court has explained,

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).

52. *Id.*

53. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1999) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

54. *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 804 (1987). In *Young*, Louis Vuitton, S.A. (Louis Vuitton) settled a lawsuit against the defendants for trademark infringement. *Id.* at 790. Louis Vuitton's civil attorneys convinced the trial court to appoint

the interests of third parties, including victims, but only in the broader context of society's interest in justice. They should not elevate victims' interests over the interests of the public, the community, and the defendant.

b. Defendants. In criminal prosecutions, the defendant is the prosecution's adversary. The Constitution reflects this position: as one scholar notes, "[o]ne of the animating features of the Constitution is its preoccupation with the regulation of the government's criminal powers."⁵⁵ The number of amendments in the Bill of Rights devoted to protecting defendants from government authority demonstrates the Framers' concern for ensuring that the adversary process is fair.⁵⁶ Defendants have a right to due process of law;⁵⁷ notice of charges against them; assistance of counsel; confrontation of witnesses against them; and a fair, speedy, and public trial by a jury drawn from the community.⁵⁸

This framework protects defendants from government conduct, not the acts of private third parties outside the litigation.⁵⁹ Given the number of protections it affords to criminal defendants, the Bill of Rights appears to assume that the government is the defendant's adversary in criminal proceedings. It does not anticipate third parties such as crime victims presenting a challenge to the liberty of accused defendants. Victims' advocates therefore rightly observe that the

them to represent the United States in a later prosecution of the defendants for continuing to infringe Louis Vuitton's trademark. *Id.* at 791–92. The Supreme Court held that it was improper to appoint the beneficiary of the court order to prosecute a contempt action claiming a violation of the settlement agreement. *Id.* at 809 (Brennan, J., announcing the judgment of the Court). The Court observed that "[r]egardless of whether the appointment of private counsel in this case resulted in any prosecutorial impropriety . . . that appointment illustrates the *potential* for private interest to influence the discharge of public duty." *Id.* at 805 (majority opinion). This influence was improper because "[t]he prosecutor is appointed solely to pursue the public interest in vindication of the court's authority. A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804.

55. Barkow, *supra* note 37, at 1012.

56. *See id.* at 1016–17 (arguing that the Bill of Rights contains structural protections for defendants in the adversary process).

57. U.S. CONST. amend. V.

58. *Id.* amend. VI.

59. *See* John O. McGinnis & Michael B. Rappaport, Colloquy Essay, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 393 n.44 (2007) ("With the exception of the Thirteenth Amendment, the Constitution does not regulate private conduct at all.").

traditional justice system prevents victims from representing their interests in criminal cases,⁶⁰ but this exclusion is by design.

II. MULTIPLE INTERESTS IN THE CRIMINAL JUSTICE SYSTEM

Victims' rights proponents have joined a number of scholars arguing that fairness requires modifying the adversary system to consider interests beside those of the parties. Section B demonstrates that these critics overlook another problem: if litigation considers third-party interests, it loses focus on the rights of the actual parties. Section C argues that American law has resolved this conflict by conferring party-like status on third parties, allowing them to vindicate their interests without undermining the adversary structure.

A. *Criminal Justice in Adversary Proceedings*

Because it proceeds according to adversary principles, the federal criminal justice system, like all American criminal proceedings, prizes fair process and party autonomy even at the expense of a correct result.⁶¹ But in criminal prosecutions the stakes are particularly high. If the outcome is incorrect, either an innocent person loses that person's freedom, even life, or a guilty person escapes punishment, endangering society and leaving the victim's suffering unanswered.⁶² Criminal law is uniquely emotional as a result; ensuring procedural fairness may seem like a minor concern when discussing something as explosive as child rape or executing an innocent person.⁶³

Some scholars and advocates have promoted distorting adversary procedures to improve criminal prosecutions. The victims' rights

60. *E.g.*, Cardenas, *supra* note 48, at 372.

61. *See supra* notes 24–26 and accompanying text.

62. Interest groups devoted to reforming the system to achieve more accurate results demonstrate the significance of this issue. For example, the Innocence Project exists both to “free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment.” Innocence Project, Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Oct. 10, 2008). Similarly, victims' rights groups such as the National Organization for Victim Assistance have argued that victims have the right to protection and “reparations.” Nat'l Org. for Victim Assistance, Crime Victim & Witness Rights, <http://www.trynova.org/about/victimrights.html> (last visited Oct. 10, 2008).

63. The tension between process and the high-stakes nature of criminal proceedings probably in part explains the heated disagreement between the International Court of Justice and the Supreme Court in *Sanchez-Llamas v. Oregon*. *See supra* note 26.

movement contends that criminal cases should consider victims' interests in addition to the government's interests. These advocates argue that excluding victims from the justice system, especially in light of their suffering, is fundamentally unjust.⁶⁴ At least one victims' rights scholar has called for changing the adversary system to fully vindicate victims' interests.⁶⁵ Other scholars, concerned that too many defendants are wrongfully convicted, advocate greater inquisitorial proceedings to protect innocent defendants.⁶⁶

Victims' rights proponents, at least, have enjoyed enormous success persuading Congress and state legislatures to incorporate victims into criminal prosecutions.⁶⁷ But pro-victim scholars and legislators have assumed uncritically that the law should remedy the injustice of excluding victims by incorporating them into proceedings. In their concern for victims' suffering, however, victims' rights advocates have not addressed the theoretical and practical implications of their solution. In fact, commentators have long recognized a core conflict between the adversary model and third-party interests.⁶⁸ Section B shows that scholars already have raised important objections to undermining the adversary system to help third parties. And Section C demonstrates that American law has

64. See, e.g., 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (arguing, in support of the CVRA, that "[v]ictims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm"); William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System,"* 1999 UTAH L. REV. 349, 349 (noting that "victims of violent crime have a stake in the trial that is different from that of the general public or even the prosecutor" and calling for greater victim participation in criminal proceedings); Judith Rowland, *Illusions of Justice: Who Represents the Victim?*, 8 ST. JOHN'S J. LEGAL COMMENT. 177, 178 (1992) (observing that "a crime victim has an 'interest' in the criminal justice process" and lamenting that only the state and the defendant have standing to participate in criminal prosecutions).

65. Pizzi, *supra* note 64, at 349.

66. Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 550, 551 (2008) (urging "a fundamental restructuring of the adversarial system" to "minimize the number of convictions of innocent persons" and contending that after this change "the justice system would be more focused on achieving a correct result in cases where a criminal defendant knows he is truly innocent and formally pleads innocent").

67. In addition to the CVRA, every state has passed victims' rights legislation, and a majority of states have amended their constitutions to recognize victims' rights as well. Recent Development, *The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525, 526-27 (2005).

68. See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67-71 (5th ed. 2003) (describing the tension between the "private rights" and "public rights" model).

found a different solution, one which incorporates third parties without discarding the adversary system.

B. The Problem of Considering Nonparty Interests in Adversary Litigation

Classical legal scholars had no reason to question excluding victims from criminal proceedings. Adversary criminal proceedings between the government and the prosecution solidified in the nineteenth century,⁶⁹ an era that assumed that litigation could be divided into public and private law.⁷⁰ As early as the eighteenth century, William Blackstone declared that “[w]rongs are divisible into two sorts or species; *private wrongs*, and *public wrongs*.”⁷¹ For Blackstone, the quality of the wrong dictates the appropriate remedy. Because private law protects personal rights, private citizens are responsible for bringing civil suits to vindicate their interests.⁷² In contrast, criminal offenses injure public rights, and so the king, as the sovereign, bears responsibility for prosecuting public offenses.⁷³ This legal philosophy tended to view the law as rigid and rule based rather than as an instrument of public policy.⁷⁴ The public-private distinction therefore justified public prosecutions; because criminal law’s public nature necessitated a public remedy, the government, not victims, logically prosecuted criminal cases.

Beginning in the early twentieth century, legal realism challenged this assumption.⁷⁵ Legal realist theory rejects the public-

69. See Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1325–26 (2002) (“[P]rivate citizens continued to initiate and litigate criminal prosecutions in New York until the 1840s or 1850s . . .”).

70. See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (“The emergence of the market as a central legitimating institution brought the public/private distinction into the core of legal discourse during the nineteenth century.”).

71. 3 WILLIAM BLACKSTONE, COMMENTARIES *2.

72. *Id.* at *2–3.

73. 4 *id.* at *2.

74. See JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 31, 44 (1995) (explaining that nineteenth-century legal scholars viewed the law as founded on sharp dichotomies such as public-private that dictate the “essential character” of legal fields).

75. See Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005) (“The legal realist movement flourished back in the 1920s and 30s . . .”); Horwitz, *supra* note 70, at 1426 (tracing the legal realists’ assault on the public-private dichotomy to the 1905 Supreme Court opinion *Lochner v. New York*).

private distinction; it teaches that private law affects public interests, and public rules affect private life.⁷⁶ For example, public legislation regulating railroads, labor, and agriculture shapes the private contractual relationships of parties.⁷⁷ Public interests, such as the public's interest in avoiding nuisances, limit property owners' rights.⁷⁸ And even though the family represents one of the most private areas of an individual's life, the family also plays a central role in shaping civil society by raising future generations.⁷⁹ As a result, the state, often acting through a welfare agency, routinely intervenes in family life to make sure that families are performing this role to society's standards.⁸⁰ By showing the fallacy of the public-private distinction, legal realism undermines a key justification for public rather than private prosecutions.⁸¹ Legal realism agrees with victims' rights advocates: criminal prosecutions affect private as well as public interests.

This brand of legal realism is essentially descriptive. But since the 1960s and 1970s, many legal scholars have used aspects of legal realism prescriptively. Public interest scholarship argues that because litigation affects public interests, lawyers should use it to drive public policy.⁸² Rejecting court neutrality, this theory requires courts to act as regulatory agents, supervising complex and ongoing social policy efforts such as reforming prisons and mental hospitals, desegregating

76. James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371, 378–79 (1993).

77. Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 202–03 (1937).

78. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21–26 (1927).

79. See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1356 (1982) (“It has been common forever to speak of the public functions of the family in producing and socializing ‘the next generation.’”).

80. *Id.*

81. See *id.* at 1357 (arguing that one cannot “take the public/private distinction seriously as a description, as an explanation, or as a justification of anything”).

82. E.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 *passim* (1976). Professor Chayes argues that

just as the traditional concept reflected and related to a system in which social and economic arrangements were remitted to autonomous private action, so the new model reflects and relates to a regulatory system where these arrangements are the product of positive enactment. In such a system, enforcement and application of law is necessarily implementation of regulatory policy. Litigation inevitably becomes an explicitly political forum and the court a visible arm of the political process.

Id. at 1304.

schools, and improving public housing.⁸³ The idea that litigation can effect social change for group interests remains popular in American legal culture; for example, the gay community has combated social discrimination by litigating against the military's "don't-ask-don't-tell" policy and for judicial recognition of gay marriage.⁸⁴ Victims' rights advocacy, which also emerged in the 1960s and 1970s,⁸⁵ mirrors public interest scholarship. Rather than using private litigation to achieve public goals, it argues that public prosecutions should consider private interests.

But public interest litigation has proven difficult to square with the structural and especially the ethical culture of the adversary system.⁸⁶ Professor Derrick A. Bell, in his classic treatment of the issue, demonstrates that lawyers litigating school desegregation cases after *Brown v. Board of Education*⁸⁷ often failed their ethical obligations to their clients.⁸⁸ Adversary attorneys owe their loyalty to best vindicating their clients' rights *and interests*⁸⁹—but when litigating post-*Brown* desegregation cases, attorneys generally considered long-term social policy goals rather than the client's immediate needs.⁹⁰ For example, the NAACP's attorneys and donors saw litigation as a vehicle to obtain widespread racial desegregation.⁹¹ But by the 1970s, some clients began to want more immediate concerns addressed instead, such as improving educational quality or minimizing busing to violent white neighborhoods.⁹² When the lawyers acted to promote desegregation even at the expense of their clients' interests, Bell

83. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1266–67.

84. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1635–42 (1997).

85. Indeed, some commentators have linked the victims' rights movement to larger social rights' movements of the era. *E.g.*, Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 825 (1995) (book review).

86. *See* Rubenstein, *supra* note 84, at 1626 (observing that group litigation creates conflicts within the group and arguing that "our current procedural and ethical rules too heavily favor individualism alone").

87. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

88. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 472 (1976).

89. MODEL RULES OF PROF'L CONDUCT pmb1., ¶ 2 (1999).

90. Bell, *supra* note 88, at 482–93.

91. *Id.* at 488–93.

92. *Id.* at 482.

argues, they violated their fundamental responsibility to act as adversary advocates.⁹³

Professor Bell's article demonstrates that public interest litigation forgets legal realism's other lesson: just as private litigation affects public interests, public litigation affects private interests. The NAACP lawyers Bell critiques had noble intentions, but their ultimate aim—to promote desegregation as educational and social policy—did not always match the interests of their actual clients. Because these lawyers chose to act through the adversary process rather than by lobbying legislators or the executive branch, they placed themselves in an impossible ethical situation. Victims' rights scholars have failed to acknowledge that asking the justice system to vindicate private rather than public interests could create similar ethical problems. As Chief Justice Marshall observed,⁹⁴ adversary litigation is designed to vindicate the rights of the parties. It becomes difficult to do so when lawyers and the courts are representing other interests instead.

C. Representing Multiple Interests in Adversary Proceedings

The adversary system thus creates conflict between the rights of litigants and the interests of third parties. Victims' rights proponents and other scholars have proposed ignoring inconvenient aspects of the adversary process. Although this approach is tempting, particularly in light of the consequences of criminal prosecutions, Professor Bell's observations demonstrate that it overlooks important counterarguments. This Section demonstrates that American law has resolved the conflict between litigants and third parties differently than these scholars have proposed. Rather than undermining adversary litigation, American law has created a variety of procedural devices that confer party or quasi-party status on interested third parties or allow them to present their position to the court without litigating the case's merits. These solutions allow third parties to litigate their interests without disrupting two key features of the adversary system: party autonomy and court neutrality.

93. See *id.* at 472 (“[I]t is difficult to provide standards for the attorney and protection for the client where the source of the conflict is the attorney’s ideals. . . . ‘No servant can serve two masters’” (quoting *Luke* 16:13 (King James))).

94. See *supra* note 2 and accompanying text.

The amicus curiae device allows outsiders to present legal arguments to appellate courts without having party status. A third party with an interest in an appellate case may ask the court or the parties for permission to file a brief presenting relevant and useful additional arguments to the court.⁹⁵ The broadness of the standards for filing an amicus brief is balanced by the narrowness of an amicus curiae's formal power. An amicus curiae only has the right, after permission, to file a brief;⁹⁶ it cannot litigate the merits of a legal claim.⁹⁷ The court retains total discretion whether and how to consider the amicus brief,⁹⁸ and the parties remain responsible for shaping the issues and arguments for appeal.⁹⁹ This device allows third parties to share their perspective with the court without requiring the court or the parties to change their behavior or decisions.

Third parties may obtain permission to litigate the merits of a claim related to a civil case by intervening in the proceedings. The Federal Rules of Civil Procedure authorize two kinds of intervention. Parties with a "cognizable legal interest" in the subject of the case have a right to intervene¹⁰⁰ unless one of the parties already "adequately" represents that interest.¹⁰¹ Permissive intervention allows third parties to adjudicate additional claims they have that share "common questions of law and fact" with the main case.¹⁰²

95. See SUP. CT. R. 37 (requiring permission either from the Court or the parties to file an amicus curiae brief and stating that "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court"); FED. R. APP. P. 29(a)–(b) (requiring an amicus curiae to obtain permission either from the court or the parties and to file a motion with the proposed brief stating "the movant's interest" and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case").

96. 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3975.1 (3d ed. 1999).

97. *United States v. Michigan*, 940 F.2d 143, 165–66 (6th Cir. 1991).

98. See *id.* at 165 ("[P]articipation as an amicus . . . continues to be[] a privilege within the sound discretion of the courts . . ." (internal quotation marks omitted)).

99. See *Bano v. Union Carbide Corp.*, 273 F.3d 120, 127 n.5 (2d Cir. 2001) ("[A]n amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (quoting *Resident Council v. U.S. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1049 (5th Cir. 1993))).

100. *Brody ex rel. Sugzdis v. Spang*, 957 F.2d 1108, 1116 (3d Cir. 1992); see also FED. R. CIV. P. 24(a)(2) (granting third parties a right to intervene if the litigation ultimately would injure the third party's interest in the "property or transaction that is the subject of the action").

101. FED. R. CIV. P. 24(a)(2).

102. *Id.* 24(b)(1)(B); *United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 78 Fed. Cl. 303, 304, 306 (2007).

Intervenors are treated like the original parties and may litigate the merits of their claims.¹⁰³ The intervenor device therefore preserves the adversary structure by treating intervenors as parties, which avoids distorting the role of the original parties or the judge.

Some statutes simply confer party status on outsiders to litigation. Qui tam statutes, for example, allow private citizens to bring civil claims in the government's name.¹⁰⁴ The most commonly litigated qui tam statute is the federal False Claims Act,¹⁰⁵ under which citizens may bring civil fraud claims in the name of the United States.¹⁰⁶ Once a citizen, called a "relator,"¹⁰⁷ brings a qui tam suit, the government may intervene.¹⁰⁸ If the government does not intervene, the relator prosecutes the case on the government's behalf.¹⁰⁹ Even if the government does intervene, the relator remains a party to the action.¹¹⁰ But the government and the relator litigate their cases separately and then share in the recovery,¹¹¹ much like coplaintiffs in any civil proceeding.

Other procedures permit a litigant to stand in the shoes of a third party that, for some reason, cannot vindicate its own interests. The derivative suit allows shareholders to bring claims on behalf of a corporation when the corporation's officers and directors will not.¹¹² Because only the corporation is a party, not the shareholder as an individual, the basic adversary structure remains. A series of Supreme Court decisions also have relaxed the standing requirement and permitted a litigant to vindicate the rights and interests of a third party that cannot join an action if the litigant shares a relationship with the third party.¹¹³ For example, defendants may raise equal protection claims on behalf of jurors excluded from the defendant's

103. *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985).

104. Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 949 (2007).

105. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 (2000).

106. 31 U.S.C. § 3730(b)(1) (2000); *Vt. Agency of Natural Res.*, 529 U.S. at 769.

107. Broderick, *supra* note 104, at 952.

108. 31 U.S.C. § 3730(b)(2).

109. *Id.* § 3730(b)(4)(B).

110. *Id.* § 3730(c)(1).

111. *Id.* §§ 3730(c), (d)(1).

112. DEBORAH A. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE* § 1:1 (2003).

113. FALLON ET AL., *supra* note 68, at 175–76.

trial through race-based peremptory challenges.¹¹⁴ This procedure preserves the litigant's autonomy because the litigant chooses whether and how to vindicate the third party's interests. Neither the court nor the party has a duty to litigate on the third party's behalf.

Congress and the courts have developed a variety of methods to permit third parties to represent their interests in Article III litigation. Procedural rules and statutes may allow the third party to act as an *amicus curiae*, intervene in the case, or simply obtain party status. They also may allow litigants to bring a claim on behalf of a third party. None of these devices imposes a duty on a litigant to represent a third party's interests even if those interests are at odds with the litigant's own. And none requires courts to vindicate the rights of outsiders to the litigation without first conferring party status. These devices therefore preserve party autonomy and judicial independence—two critical traits of the federal justice system that the CVRA ignores.

III. THE CRIME VICTIMS' RIGHTS ACT IN THE FEDERAL JUSTICE SYSTEM

The CVRA provides little guidance to courts and prosecutors incorporating the statute into federal prosecutions; as a result, the statute's impact on the federal justice system is uncertain. This Part examines the statute's text, particularly its enforcement provisions, and concludes that the CVRA really asks for institutional courtesy toward victims, not sweeping changes to federal prosecutions. Section A shows that the statute's vague rights and conflicted legislative history leave room for interpretation. Section B argues that the statute's enforcement provisions fail to confer party or intervenor status on victims, indicating that the CVRA gives victims little real power. Instead, the CVRA requires courts and prosecutors to vindicate victims' interests. This procedural posture forces courts to act as advocates—even against the accused—and forces prosecutors to promote interests that may conflict with the government's own. But Section C demonstrates that many of the CVRA's provisions permit a much narrower interpretation. Because Congress has not rejected the public prosecution model, and because a broad interpretation of the CVRA could present real conflicts for courts

114. *Powers v. Ohio*, 499 U.S. 400, 415 (1991).

and prosecutors, courts should narrowly interpret the statute to require institutional courtesy rather than sweeping new rights.

A. *The Crime Victims' Rights Act: Statutory History and Text*

Congress passed the CVRA as a compromise between victims' rights advocates, who had fought for nearly a decade to pass a constitutional victims' rights amendment, and congressional opponents of the proposed amendment.¹¹⁵ Because Congress rushed to pass the statute, the legislative history supporting the CVRA is sparse, consisting only of two floor statements by the statute's sponsors, Senators Dianne Feinstein and Jon Kyl.¹¹⁶ These floor statements support multiple interpretations of the CVRA's purpose, reflecting the statute's history as a compromise. On one hand, its drafters took pains to stress that the rights in the CVRA "do not come at the expense of defendant's [*sic*] rights."¹¹⁷ But they also demanded that courts and prosecutors avoid "whittl[ing] down or marginaliz[ing]" victims' rights and "treat victims of crime with the respect they deserve and . . . afford them due process."¹¹⁸ Overall the floor statements appear designed to appease both victims' proponents and skeptics of victims' rights; as a result, the statute's legislative history and purpose leave considerable room for interpretation.¹¹⁹

The CVRA's ambiguous statutory text exacerbates the confusion that this conflicted legislative history may create. The CVRA developed from a proposed constitutional amendment.¹²⁰ When it became clear that Congress would not approve the amendment,

115. See 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (discussing the victims' rights amendment's authors' struggles to garner support for a federal constitutional amendment); Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 588–91 (2005) (reciting the history of the failed proposed victims' rights amendment).

116. *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1015–16 (9th Cir. 2006); *United States v. Turner*, 367 F. Supp. 2d 319, 323 n.3 (E.D.N.Y. 2005) (mem.).

117. 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

118. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

119. Compare *United States v. Holland*, 380 F. Supp. 2d 1264, 1279 (N.D. Ala. 2005) (mem.) (calling the CVRA "the new, mushy, 'feel good statute'"), with *United States v. Heaton*, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (mem.) ("Congress plainly intended to give victims broad rights to fair treatment.").

120. See *Turner*, 367 F. Supp. 2d at 323 n.3 (describing the CVRA's origins in a proposed victims' rights amendment).

victims' rights proponents passed the measure as a statute instead.¹²¹ As a result, the CVRA reads more like an amendment than a statute, with sweeping statements of rights and no discussion of how those rights should be implemented. It grants victims eight substantive and procedural rights: the right to be reasonably protected from the accused, the right to be notified of public proceedings, the right not to be excluded from public proceedings, the right to be heard at designated proceedings, the right to proceedings free from unreasonable delay, the right to confer with the prosecution, the right to restitution as permitted by law, and the right to be treated with fairness and respect for their dignity and privacy.¹²² Nowhere does the statute state how these rights should affect courts' and prosecutors' decisions during criminal proceedings.

The CVRA also fails to explain another important detail: how courts and prosecutors should recognize victims' rights when prosecutors have not yet brought criminal charges. It defines "victim" as a person who is "directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."¹²³ Although the statute does not define "offense," its legislative history and plain language appear to confer victim status even if the government has not brought charges.¹²⁴

It is odd that a statute with such broad language and expansive application provides no guidance to the courts and prosecutors who actually apply it to federal prosecutions. The explanation for this omission is probably political: passing the CVRA presented an opportunity to help crime victims, a broadly sympathetic group. In its

121. *Id.*

122. 18 U.S.C. § 3771(a) (2006).

123. *Id.* § 3771(e). For a discussion of the difficulty of determining who is a "victim" within the meaning of the statute, see *United States v. Sharp*, 463 F. Supp. 2d 556, 561–67 (E.D. Va. 2006) (mem.).

124. See 18 U.S.C. § 3771(d)(3) (allowing a victim to seek a writ of mandamus for denial of any statutory rights "if no prosecution is underway, in the district court in the district in which the crime occurred"); 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (claiming to have written "an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged"). The practical difficulties of this interpretation have led the Department of Justice to apply the CVRA only to charged conduct. See OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 9 (2005), available at <http://www.usdoj.gov/olp/final.pdf> ("[A] victim is 'a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia' . . . if the offense is charged in federal district court." (quoting 18 U.S.C. § 3771(e)).

haste to pass popular legislation, however, Congress did not bother considering the CVRA's practical implications. As a result, Congress passed a statute that—probably unintentionally—conflicts with the basic structure of the federal criminal justice system.

B. Enforcing the CVRA in an Adversary System

1. *The CVRA's Enforcement Provisions.* Its drafters claimed that the CVRA “mak[es] victims independent participants in the criminal justice process”¹²⁵ and gives victims the chance to enforce their participation rights.¹²⁶ But the CVRA does not change federal prosecutors’ constitutional and statutory responsibilities to enforce federal criminal law. The statute expressly states that it does not infringe prosecutorial discretion.¹²⁷ And nowhere does the CVRA suggest that it confers party or even intervenor status on victims.¹²⁸ The government and the defendant thus remain the sole parties to criminal prosecutions.

Because victims have no formal status under the CVRA, courts and prosecutors ultimately bear responsibility to vindicate victims’ interests. Under the CVRA, trial courts must ensure that victims are afforded their statutory rights.¹²⁹ Government officials, including prosecutors, must “make their best efforts to see that crime victims are notified of, and accorded,” their rights under the CVRA.¹³⁰ Victims and their legal representatives may petition a district court and then an appellate court if they are not being accorded their rights.¹³¹ But the plain language of the statute requires courts and prosecutors to protect victims’ rights before the victim files a petition—the victim may petition for enforcement if courts and prosecutors fail their obligations. The CVRA thus turns courts and prosecutors into victims’ advocates. In contrast, victims only have indirect power to influence the system. They cannot seek party or

125. *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1013 (9th Cir. 2006).

126. The CVRA is the first enforceable victims’ rights statute in the federal system. 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

127. 18 U.S.C. § 3771(d)(6).

128. *See United States v. Rubin*, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008) (“So far as the Court can divine, however, victims in this posture are not accorded formal party status, nor are they even accorded intervenor status as in a civil action.”).

129. 18 U.S.C. § 3771(b)(1).

130. *Id.* § 3771(c)(1).

131. *Id.* §§ 3771(d)(1), (3).

intervenor status; only the court, prosecutors, and defendants remain direct participants.

Congress could have made victims substantial participants to criminal proceedings. The CVRA could have made victims coparties with the government, like *qui tam* plaintiffs, or it could have created an intervenor posture in criminal cases, as it did in civil cases. More radically, Congress could have abandoned the public prosecution system and asked victims to prosecute criminal cases, or it could have made prosecutors representatives of the victim rather than the public, similar to plaintiffs in derivative suits. At best, by giving victims the right “to be heard” on limited subjects, Congress probably made victims little more than *amici curiae*. Like *amici curiae*, then, victims remain nonparties to criminal proceedings with no right to litigate the merits of a criminal case.

Victims’ proponents might argue that Congress would not draft such a narrow statute. But the CVRA suggests why Congress created an enforcement provision that fundamentally gives victims very little power: perhaps Congress simply was unwilling to abandon the existing public prosecution model. By restricting victim participation and reaffirming prosecutorial discretion, Congress expressed its preference that the executive, not victims, prosecute criminal cases. But as the rest of this Section indicates, placing the burden instead on courts and prosecutors to vindicate victims’ rights may upset the basic structure of the federal criminal justice system.

2. *Courts*. Enforcing victims’ interests can place courts at odds with the parties. For example, in *In re Dean*,¹³² prosecutors were investigating whether to bring criminal charges against BP Products North America (BP) after an explosion at a refinery that BP owned killed fifteen people.¹³³ The government and the district court agreed that given the publicity surrounding the case and the possibility of prejudicing BP, the government did not need to confer with the victims.¹³⁴ Prosecutors argued that communicating with victims would “impair the plea negotiation process.”¹³⁵ The Court of Appeals for the Fifth Circuit held that prosecutors had to confer with victims,

132. *In re Dean*, 527 F.3d 391 (5th Cir. 2008) (per curiam).

133. *Id.* at 392.

134. *Id.*

135. *Id.* (quoting federal prosecutors).

although it refused to compel the trial court to reject the plea agreement.¹³⁶ Under the Fifth Circuit's interpretation, a trial court would have to force victim participation in plea negotiations over the objections of the parties and despite concerns that victim participation would prejudice the defendant. And by the plain terms of the CVRA, the court would have to do so even if the victim did not first object. Thus the CVRA disrupts the most fundamental division of responsibility in adversary litigation: it does not rely on a party to the litigation to vindicate that party's rights (or even to vindicate an outsider's rights on the outsider's behalf); instead, it asks courts to vindicate the rights and interests of a nonparty.

The CVRA also places courts in conflict with prosecutors' statutory and constitutional discretion. The core of the *Rubin* case¹³⁷ was a dispute between prosecutors, who wanted to resolve the case, and the victims, who wanted to recover as much of their loss through restitution and civil damages as possible.¹³⁸ Because Omni and RJP were not parties, they demanded that the court vindicate their interest in recovery at the expense of the government's right, as a party, to litigate its case. The *Rubin* victims therefore asked the court to infringe an adversary party's autonomy. And because the party was the government exercising an executive function, the *Rubin* victims were fundamentally asking the court to overlook prosecutors' statutory and constitutional responsibilities to prosecute federal crimes. Federal courts, generally reluctant to interfere with prosecutorial discretion, have an obligation under the CVRA to second-guess prosecutors' decisions on behalf of a nonparty with no right to adjudicate the case.

The *Rubin* decision highlighted another problem for courts enforcing victims' rights: victims' interests often conflict with the rights and interests of the accused, placing courts in the uncomfortable position of vindicating a victim's rights while the

136. *Id.* at 395. The appellate court stated that the trial court could decide what weight, if any, to give the victims' absence from negotiations when deciding whether to accept the plea agreement. *Id.* In July 2008, the Supreme Court refused to stay enforcement of the plea agreement. *Dean v. U.S. Dist. Court*, 128 S. Ct. 2996, 2996 (2008).

137. *See supra* notes 4–9 and accompanying text.

138. *United States v. Rubin*, 558 F. Supp. 2d 411, 425–26 (E.D.N.Y. 2008) (reporting that Omni and RJP argued that “the government has not provided information with which to pursue restitution in this case and in their civil suit” and that “the government submitted on behalf of victims a restitution claim . . . that significantly undervalues their loss”).

accused continues to enjoy the presumption of innocence.¹³⁹ This duty clashes with a court's responsibility to protect defendants' rights during criminal proceedings.¹⁴⁰ In *Rubin*, for example, the victims wanted the court to increase restitution over the objection of the prosecution and the defense.¹⁴¹ Their petition created two problems for the court. First, when asked to vindicate *victims'* rights, the court had to assume that the victims had suffered at the hands of the defendant—an assumption that directly conflicts with the presumption of innocence.¹⁴² Second, the victims wanted the court to step beyond its neutrality, a core aspect of adversary judging, and encourage the prosecution to make the plea agreement harsher for the defendant. As the *Rubin* court aptly summarized, “[i]t is hard to comprehend, in any case, how a court presiding over the prosecution of a defendant could engage in sidebar dispute resolution between a victim and the government regarding the strategic decisions of the government about the very prosecution the Court is to try impartially.”¹⁴³

3. *Prosecutors.* Prosecutors have an ethical responsibility to vindicate the public's interest in ensuring just enforcement of the United States' criminal laws.¹⁴⁴ But the CVRA asks prosecutors to make their “best efforts” to enforce victims' rights.¹⁴⁵ Although the statute disclaims any infringement on prosecutorial discretion,¹⁴⁶ it

139. One district court explained the conundrum:

The CVRA defines a “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.” At this stage of the case, however, the defendant continues to enjoy a presumption that he is innocent of the charge that he committed a Federal offense. Strictly speaking, then, I might be constrained to presume that there is no person who meets the definition of “crime victim” in this case. That syllogism—which renders the CVRA inapplicable to this or any other criminal case unless and until the defendant is proved guilty beyond a reasonable doubt—produces an absurd result that I must presume Congress did not intend. Nevertheless, I cannot ignore the possibility that by requiring me to afford rights to “crime victims” in this case, the CVRA may impermissibly infringe upon the presumption of Turner's innocence.

United States v. Turner, 367 F. Supp. 2d 319, 325–26 (E.D.N.Y. 2005) (mem.) (citation omitted) (quoting 18 U.S.C. § 3771(e)(2006)).

140. See *supra* note 58 and accompanying text.

141. *Rubin*, 558 F. Supp. 2d at 412–13.

142. *Turner*, 367 F. Supp. 2d at 325–26.

143. *Rubin*, 558 F. Supp. 2d at 427–28.

144. See *supra* Part I.B.2.a.

145. 18 U.S.C. § 3771(c)(1) (2006).

146. *Id.* § 3771(d)(6).

does give victims the “reasonable right to confer” with the prosecution.¹⁴⁷ The CVRA also allows prosecutors to petition the district and appellate courts for relief if victims are not afforded their rights.¹⁴⁸

Representing victims’ private interests creates an ethical conflict for prosecutors as soon as the victims’ interests diverge from those of the public. In *Young v. United States ex rel. Vuitton et Fils S. A.*,¹⁴⁹ the Supreme Court discussed the conflict that prosecutors face when representing private interests during a criminal proceeding:

A prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.¹⁵⁰

Young addressed the appointment of a private attorney whose client had a financial stake in the outcome of the proceedings to prosecute a criminal contempt case.¹⁵¹ Although the CVRA does not make victims the clients of federal prosecutors, as was the situation in *Young*, it does appear to ask prosecutors to consider victims’ interests in a new or more significant light. And as *Rubin* demonstrated, victims may have financial interests—or even simply emotional interests—that drive them to demand harsher treatment of defendants than the prosecutor may consider wise. Had the prosecutors in *Rubin* assisted Omni and RJP with their efforts to recover their financial losses criminally and civilly, the prosecutors would have verged on committing the very improprieties the *Young* Court denounced.

And like the courts, prosecutors’ ethical responsibilities include seeking justice for all parties, including the accused.¹⁵² For example, in *Dean*, the trial court granted an ex parte order for the government relieving it of its responsibilities to notify and confer with the victims of the BP explosion because, given the high-profile nature of the case, “any public notification of a potential criminal disposition resulting

147. *Id.* § 3771(a)(5).

148. *Id.* § 3771(d)(1).

149. *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787 (1987).

150. *Id.* at 805.

151. For a discussion of the facts in the *Young* case, see *supra* note 54.

152. See *supra* Part I.B.2.a.

from the government's investigation . . . would prejudice BP."¹⁵³ The Fifth Circuit rejected the lower court's conclusion that ordering the government to disclose the existence of its investigation would infringe prosecutorial discretion.¹⁵⁴ But the Fifth Circuit did not address the ethical problem prosecutors faced—by acting cautiously to protect BP's rights, the government was fulfilling its duty to the public interest. When prosecutors place the rights of victims, who are not even parties to the litigation, before the rights of defendants, who enjoy substantial constitutional protections, they appear to violate—or at least undermine—their ethical duty to defendants.

Because the CVRA does not infringe or modify prosecutors' statutory and constitutional duties to enforce criminal law, the statute forces prosecutors to vindicate victim's interests while representing the government's interests—even if they conflict. None of the devices discussed in Part II.C asked a party to litigate interests that conflicted with its own goals. Unless the CVRA is nothing more than a reminder that prosecutors should consider victims' interests when deciding how the government should proceed,¹⁵⁵ it is an unprecedented infringement of party autonomy and prosecutorial discretion.

4. *Defendants.* Finally, the CVRA places defendants in the difficult position of combating a nonparty whose interests are generally opposed to their own. For example, in *United States v. Tobin*,¹⁵⁶ the New Hampshire Democratic Party (NHDP) claimed that it was a victim of the defendant's efforts to jam phone lines set up to facilitate NHDP's "get out the vote" campaign.¹⁵⁷ The government and defense jointly moved to continue the trial until December, 2005¹⁵⁸—after November elections. The NHDP argued that the extension violated its rights under the CVRA and asked the court to

153. *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008) (per curiam) (alteration in original) (quoting *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 WL 501321, at *2 (S.D. Tex. Feb. 21, 2008)).

154. *Id.*

155. For a discussion of how prosecutors may consider victims' interests, see *supra* Part I.B.2.a.

156. *United States v. Tobin*, No. 04-cr-216-01-SM, slip op. (D.N.H. July 22, 2005).

157. *Id.* at 2.

158. *Id.* at 1.

reject the extension.¹⁵⁹ The court observed that it could not “deprive either criminal defendants or the government of a full an [*sic*] adequate opportunity to prepare for trial. The defendant’s right to adequate preparation is, of course, of constitutional significance as well.”¹⁶⁰ The court prioritized the parties’ rights over the victim’s desire to proceed to trial prior to election day. But under the CVRA, which grants victims both the right to proceedings free from unreasonable delay¹⁶¹ and quasi–due process rights,¹⁶² courts could accelerate proceedings to the detriment of the defendant’s right to prepare a case.

This posture conflicts with the defendant’s position as an adversary to the government, which even the Bill of Rights recognizes as a particularly delicate position.¹⁶³ Although prosecutors have an ethical responsibility to defendants, the courts remain primarily responsible for protecting defendants’ statutory and constitutional rights during criminal proceedings.¹⁶⁴ And because the CVRA does not make victims parties to the proceedings, courts must step in and represent victims’ interests even when they conflict with defendants’ interests. But courts are not litigants—they are responsible for ruling on legal questions, including whether the government’s conduct has violated the defendant’s constitutional rights. Defendants therefore have no way to challenge the court’s representation of the victims’ interests during the proceedings. The CVRA therefore not only conflicts with courts’ responsibilities to protect defendants’ rights; it also makes the court, responsible for ensuring fairness to both parties, the adversary of the defendant.

C. *Interpreting the CVRA*

Congress may have tried to protect prosecutorial discretion by refusing to confer party status on victims, but it created other problems for courts and prosecutors by forcing them to advocate for victims’ interests. This Section argues that a careful, narrow reading of the CVRA’s rights provisions could avoid many of these conflicts.

159. *Id.* at 2.

160. *Id.* at 4.

161. 18 U.S.C. § 3771(a)(7) (2006).

162. *See infra* note 168 and accompanying text.

163. *See supra* Part I.B.2.b.

164. *See supra* note 58 and accompanying text.

This Section presents six¹⁶⁵ statutory provisions that could either give the victim a substantial voice in prosecutions or simply ask courts and prosecutors to show courtesy toward victims without changing their decisionmaking processes. Courts should adopt this narrower reading to preserve the public prosecution model that Congress refused to abandon.

First, the provision giving victims the right “to be treated with fairness and with respect for the victim’s dignity and privacy” could justify giving victims broad rights to influence many stages of the criminal prosecution.¹⁶⁶ The CVRA’s drafters asked courts and prosecutors to read this right expansively.¹⁶⁷ The drafters explained that “[t]he broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational,” and they argued that “the right to be treated with fairness” includes “the notion of due process,” but they did not explain how they intended the right to operate in practice.¹⁶⁸ As some commentators have already contended, loose language like “fairness” and “respect” could confer sweeping new rights throughout the federal criminal justice system.¹⁶⁹

But this right also could simply ask courts and prosecutors to show consideration to victims as long as doing so does not come at

165. This Section does not discuss a victim’s right to notification of public proceedings, 18 U.S.C. § 3771(a)(2), and not to be excluded from public proceedings, *id.* § 3771(a)(3), because those rights are relatively straightforward and present fewer ethical problems for courts and prosecutors.

166. *Id.* § 3771(a)(8).

167. Senator Kyl argued that “[i]t is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch.” 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

168. *Id.* at S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl); *see also id.* (statement of Senator Feinstein) (agreeing with Senator Kyl).

169. For example, Professor Paul Cassell has argued that

[t]he CVRA requires fundamental changes in the Federal Rules of Criminal Procedure. The CVRA makes crime victims participants in the criminal justice process and commands in sweeping terms that the courts must treat victims “with fairness and with respect for the victim’s dignity and privacy.” To faithfully implement that directive, it is necessary to assess each of the existing rules against a fairness standard and then make changes and additions where the Rules do not guarantee fair treatment to victims.

Cassell, *supra* note 11, at 872 (emphasis omitted) (footnote omitted) (quoting 18 U.S.C. § 3771(a)(8)).

the expense of the participants' rights and duties.¹⁷⁰ This interpretation would make more sense in light of the CVRA's failure to create anything approaching party status for victims.¹⁷¹ If Congress wanted to preserve prosecutorial discretion but also incorporate victims into the system,¹⁷² perhaps reading this right as a reminder to courts and prosecutors that they should treat victims thoughtfully best reflects the compromise that led to the statute's enactment.

Another potentially groundbreaking provision grants victims "[t]he right to proceedings free from unreasonable delay,"¹⁷³ recognizing that victims have an interest in rapid proceedings independent from prosecutors and the accused. The CVRA's drafters claimed that this provision "does not curtail the government's need for reasonable time to organize and prosecute its case" or "infringe on the defendant's due process right to prepare a defense."¹⁷⁴ Instead, this right was intended to require courts to reject motions to continue proceedings made only for the convenience of the parties that go beyond either party's need to prepare.¹⁷⁵ The statute provides no further guidance explaining when proceedings are unreasonably delayed.

Courts could read this statute strictly and accelerate the case over the objection of the parties, or courts could rely on the drafters' acknowledgement that the parties have a right to fully prepare their cases and rarely, if ever, hasten the proceedings on the victim's behalf.¹⁷⁶ To avoid interfering with the parties' rights to choose how to litigate their cases, courts should follow the latter approach. The CVRA does not make victims parties, and so victims should not have

170. See, e.g., *United States v. Rubin*, 558 F. Supp. 2d 411, 427–28 (E.D.N.Y. 2008) (refusing to "prohibit[] the government from raising legitimate arguments in support of its opposition to a motion simply because the arguments may hurt a victim's feelings or reputation").

171. See *supra* Part III.B.1.

172. See *supra* Parts III.A–B.

173. 18 U.S.C. § 3771(a)(7). The purpose of this provision was to vindicate the victim's interest in repose. See 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) ("It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court.").

174. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

175. *Id.*

176. See *United States v. Tobin*, No. 04-cr-216-01-SM, slip op. at 4 (D.N.H. July 22, 2005) ("Although the [victim's] interest in having this case proceed forthwith is important, of equal importance is the court's duty to ensure that both the defendant and government receive due process and a fair trial.").

a real voice in determining the pace of litigation; nor should courts represent that voice against the government and the accused. One court observed,

This litigation may be proceeding with less speed than the [victim] would prefer, given its own discrete interests, but it is worthwhile to reflect on the old adage that the wheels of justice grind slowly, but they grind exceedingly fine. The alternative – precipitous spinning of the powerful wheels of justice merely to satisfy popular demand – runs the unacceptable risk of those wheels running over the rights of both the accused and the government, and in the end, the people themselves.¹⁷⁷

The victim's "reasonable right to confer with the attorney for the Government in the case"¹⁷⁸ also may threaten the government's autonomy. Although the CVRA preserves prosecutorial discretion, this provision has led many victims to ask courts to reject plea agreements or vacate guilty pleas on the ground that the victims did not sufficiently confer with the prosecution regarding the plea.¹⁷⁹ Confronted with this situation, the Fifth Circuit proposed reading the statute to ask prosecutors to converse with victims "before ultimately exercising [their] broad discretion."¹⁸⁰ Although the CVRA's drafters claimed that "[t]his right is intended to be expansive,"¹⁸¹ the Fifth Circuit's interpretation conforms to the drafters' floor statements on the issue.¹⁸² By asking prosecutors to communicate with victims without necessarily changing their decisionmaking based on the victim's interests, the Fifth Circuit's approach avoids forcing prosecutors to represent conflicting interests and avoids placing courts in the awkward position of second-guessing prosecutors'

177. *Id.*

178. 18 U.S.C. § 3771(a)(5).

179. *E.g., In re Dean*, 527 F.3d 391, 394–95 (5th Cir. 2008) (per curiam).

180. *Id.* at 395. The Fifth Circuit decided that the district court should not have exempted prosecutors from this requirement, but it concluded that the injury to victims was not sufficient to warrant mandamus relief. *Id.*

181. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

182. Senator Feinstein explained that this right is expansive in the sense that it applies at "any critical stage or disposition of the case." 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). Prosecutors merely "should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions." *Id.* at S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

decisions. This provision should encourage prosecutors to act courteously toward victims while continuing to represent the United States' interests.

Some CVRA provisions ultimately reinforce existing law without creating new rights. "The right to be reasonably protected from the accused"¹⁸³ is a particularly ambiguous provision. Although even Senator Kyl recognized that "the government cannot protect the crime victim in all circumstances," he did not explain in what circumstances the right should apply.¹⁸⁴ Victims could demand federal protection based on this provision. The *Rubin* victims argued that because the government investigated, arrested, and placed Rubin on bond while he was defrauding them, Omni and RJP were denied their rights under this provision.¹⁸⁵ But the *Rubin* court found a limiting principle in the statutory text: it concluded that because Rubin had not been "accused" of defrauding Omni and RJP at that time, they had no rights under the CVRA "beyond that of general law to be protected from criminal conduct by Rubin or anyone else."¹⁸⁶

Even once the defendant is formally charged, however, it is not clear what responsibilities this provision creates. The CVRA's drafters argued it requires protection for victims when courts place defendants on release.¹⁸⁷ Yet existing federal release law already considers victim safety, and so this provision does not appear to contribute new rights.¹⁸⁸ Courts could grant release less often or with harsher terms based on this right, particularly if they considered it with the victim's right to be heard on the issue of release.¹⁸⁹ But the CVRA's plain text does not require them to do so, and forcing a court to change its decision about whether to grant freedom to the accused based on the interests of a nonparty would conflict with the court's

183. 18 U.S.C. § 3771(a)(1).

184. 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

185. *United States v. Rubin*, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).

186. *Id.* at 420.

187. 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

188. One district court interpreting the CVRA observed as much:

Regardless of what this right might entail outside the bail context, it appears to add no new substance to the protection of crime victims afforded by the Bail Reform Act, which already allows a court to order reasonable conditions of release or the detention of an accused defendant to "assure . . . the safety of any other person."

United States v. Turner, 367 F. Supp. 2d 319, 332 (E.D.N.Y. 2005) (mem.) (alteration in original) (quoting 18 U.S.C. § 3142(c)(1) (2000)).

189. 18 U.S.C. § 3771(a)(4) (2006).

role as protector of a defendant's rights. The drafters' other statements about this provision counsel a more limited reading. Aside from the release issue, Senator Kyl simply asked courts to reasonably "provide[] accommodations such as a secure waiting area, away from the defendant."¹⁹⁰ Senator Kyl appears to ask courts to be courteous. This reading allows courts to remain impartial, particularly toward the defendant, and it prevents imposing on courts general responsibility to ensure that federal law enforcement and federal prosecutors are providing protection for victims.

Another provision that fundamentally restates existing law is "[t]he right to full and timely restitution as provided in law."¹⁹¹ The CVRA's drafters endorsed a definition of restitution that includes compensating the victim's family for the victim's lost future income in homicide cases.¹⁹² This provision contributes to criminal proceedings, then, by clarifying existing law.¹⁹³ But because the CVRA recognizes the right to restitution "as provided in law,"¹⁹⁴ courts uniformly have concluded that the CVRA does not change victims' access to restitution.¹⁹⁵

Many of these interpretations appear to give victims no real right to participate in the proceedings, which the CVRA's drafters claimed was the statute's purpose.¹⁹⁶ But one provision could give victims an opportunity to participate without upsetting the role of the court or the rights of the parties. The CVRA gives victims the right to be "reasonably heard at any public proceeding in the district court

190. 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

191. 18 U.S.C. § 3771(a)(6).

192. See 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (endorsing two decisions by Judge Cassell, then on the District Court of Utah, that interpreted federal restitution statutes to include lost future income).

193. See *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1302-04 (D. Utah, 2004) (mem.) (interpreting the language and legislative intent of existing federal restitution statutes to authorize lost income restitution in homicide cases).

194. 18 U.S.C. § 3771(a)(6).

195. *E.g., In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563-64 (2d Cir. 2005) (affirming the establishment of a restitution fund that did not fully compensate all victims because the Mandatory Victim Restitution Act allows courts to limit restitution when the number of victims makes full compensation difficult); *United States v. Lay*, 456 F. Supp. 2d 869, 871-72, 875 (S.D. Tex. 2006) (mem.) (concluding that the CVRA could not overcome the abatement doctrine, which required vacation of Kenneth Lay's conviction because he could not appeal his conviction after his death).

196. See *supra* notes 125-26 and accompanying text.

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involving release, plea, sentencing, or any parole proceeding.”¹⁹⁷ Senator Kyl argued that it makes victims “independent participant[s]” and ensures that they may give victim impact statements.¹⁹⁸ Federal statutes already permit victim impact evidence during some sentencing proceedings,¹⁹⁹ and the Federal Rules of Criminal Procedure allow victims of violent or sexual crimes to address the court.²⁰⁰ But the CVRA appears to be the first federal statute to confer a general right on victims of all federal crimes to speak to the court at sentencing,²⁰¹ expanding the role of controversial victim impact evidence in federal criminal proceedings.²⁰²

The CVRA does not explain how much weight, if any, courts should give victims' opinions. Courts could use this provision to justify imposing harsher release terms or sentences. On the other hand, as the Sixth Circuit observed, it is not clear “why the particular desires of [the] victim should affect the legal analysis necessary for sentencing” the defendant.²⁰³ Courts could treat victims essentially like *amici curiae*, because, like *amici curiae*, victims have no clear

197. 18 U.S.C. § 3771(a)(4).

198. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

199. *E.g.*, 18 U.S.C. § 2319A(d) (2006) (copyright infringement); 18 U.S.C. § 3593(a) (2006) (capital sentencing).

200. FED. R. CRIM. P. 32(i)(4)(B).

201. Lower courts disagree whether the CVRA gives victims the right to speak or to simply present their perspective in writing. *Compare* United States v. Marcello, 370 F. Supp. 2d 745, 748 (N.D. Ill. 2005) (mem.) (“[T]he statute requires only that a victim be reasonably heard, and . . . Congress’s use of that term of art does not require that a trial court accept oral statements in all situations.”), *with* Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006) (“The statements of the sponsors of the CVRA and the committee report for the proposed constitutional amendment disclose a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA.”). The CVRA’s drafters, however, intended for victims to have the right to speak. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

202. Many commentators have criticized victim impact evidence as inflammatory and prejudicial. *E.g.*, Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 395 (1996) (“Victim impact statements evoke . . . a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger.” (footnote omitted)); Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 426 (2003) (arguing that victim impact evidence “diverts the jury’s attention away from the crime and the defendant and toward the character of the victim and the crime’s effect on his family”).

203. United States v. Hughes, No. 06-6461, 2008 WL 2604249, at *7 n.7 (6th Cir. June 26, 2008).

statutory right to have their arguments considered. Victims still could have the satisfaction of expressing their feelings without necessarily affecting the court's decisionmaking, avoiding conflicts for the judges and prosecutors who otherwise would have to treat the defendant more harshly. And if Congress has not given victims the right to adjudicate their interest in harsher treatment of defendants, then courts should not use vague language about a right *to be heard* to create it.

Some might object that interpreting the CVRA this narrowly eviscerates the statute. But this reading still requires the federal justice system to incorporate victims; it simply avoids making them independent parties. After the CVRA, victims may express their opinions to prosecutors and, during some proceedings, to the court.²⁰⁴ The CVRA also makes it more difficult for courts to exclude victims from public court proceedings,²⁰⁵ and it requires prosecutors to notify victims of those public proceedings in advance.²⁰⁶ In short, the CVRA allows victims to witness some proceedings, talk to prosecutors, and communicate with the court. These rights still respect victims' unique investment in the proceedings. But narrowly interpreting the CVRA makes sense in light of Congress's refusal to replace the public-prosecution model. Limiting victims' influence over the prosecution matches their lack of formal party status, and it generally avoids many problems that forcing courts and prosecutors to advocate for crime victims creates. If Congress wishes to make victims parties, it may do so. Until then, courts should tread carefully before reading the CVRA too broadly.

CONCLUSION

This Note probes whether some ends justify the means necessary to achieve them. Victims' rights scholars have argued, with considerable political success, that it is worth changing the means of criminal justice—the traditional adversary process between the

204. See *supra* notes 178–82, 196–202 and accompanying text.

205. See 18 U.S.C. § 3771(a)(3) (2006) (requiring courts to find, by clear and convincing evidence, that a victim's presence at a public proceeding would "materially alter[]" the victim's testimony before excluding the victim from the courtroom). This provision contrasts with the Federal Rules of Evidence, which generally allow courts total discretion to exclude witnesses from the courtroom. FED. R. EVID. 615.

206. 18 U.S.C. § 3771(a)(2).

government and the defendant—to promote the victim's well-being. Their arguments echo an old debate among legal scholars about the adversary system's effect on third-party interests. It also probes one of the most vexing problems of criminal justice: with so much at stake, why not manipulate procedure to ensure a better outcome for victims, defendants, or the public at large?

But valuing the right result over the right process has consequences. Because American law continues to follow the adversary tradition, promoting essentially inquisitorial values undermines the way American procedure actually operates. The CVRA's potential effect on the federal criminal justice system illustrates this problem. It places courts in the awkward position of second-guessing prosecutorial discretion and vindicating victims' interests against the rights of criminal defendants. Prosecutors also must represent victims in criminal proceedings, undermining prosecutors' traditional role as ministers of justice and forcing them to vindicate interests that may conflict with the government's own. And defendants rely on courts and, to a lesser extent, prosecutors to protect their constitutional rights, a protection that the CVRA may enervate.

American law has developed a number of solutions for the conflict between the adversary process and third-party interests. Some devices, like the amicus curiae devices, allow third parties to present their position without giving third parties power to vindicate their rights vis-à-vis the real parties. Otherwise, American law has either conferred some kind of party or intervenor status on third parties or asked a litigant to stand in the third party's shoes before the court. None of the devices presented in this Note requires the court to vindicate the interests of nonparties or forces litigants to represent interests contrary to their own.

The CVRA does not confer party or intervenor status on crime victims. Despite some pro-victim rhetoric, Congress explicitly preserved the public-prosecution model and claimed that the statute did not affect defendants' rights. In short, even Congress was unwilling to change the fundamental structure of the justice system to promote victims' interests. Both victims' nonparty status and the limited nature of many of the CVRA's substantive rights demonstrate Congress's reluctance to upset the status quo.

This Note proposes a way to interpret the CVRA that remains true to the statute's text and generally avoids disrupting the basic

structure of the federal adversary process. Rather than conferring broad rights on crime victims, courts and others should simply show courtesy and respect toward crime victims. They should allow victims to attend public proceedings and share their thoughts. They should communicate with victims and remember them when release or restitution law requires it. But courts and prosecutors should not change their decisionmaking for victims. By observing this distinction, they can implement the statute that Congress crafted and the justice system demands.

**UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF
CALIFORNIA (Western Division – Los Angeles)
CRIMINAL DOCKET FOR CASE #: 2:03-cr-00568-JFW All Defendants**

Case title: USA v. Leichner
Related Case: 2:07-cv-04128-JFW
Magistrate judge case number: 2:03-mj-00282

Date Filed: 06/12/2003
Date Terminated: 05/23/2005

Assigned to: Judge John F. Walter

Appeals court case number:
10-56087 9th CCA

Defendant (1)

Moshe Leichner
TERMINATED: 03/04/2005

represented by **Peter William Scalisi**
Peter W Scalisi Law Offices
3877 Twelfth Street
Riverside, CA 92501
949-274-1166
Fax: 951-686-8401
Email: lawoffps@aol.com
TERMINATED: 09/11/2006
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Philip Deitch
Law Office of Philip Deitch
1717 Fourth Street, Third Floor
Santa Monica, CA 90401
310-899-9600
Fax: 310-899-9609
Email: philip.deitch4@gmail.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

William L O'Bryan
William L O'Bryan Law Offices
322 West Third Street
P O Box 206
Santa Ana, CA 92701
714-836-6031
TERMINATED: 02/10/2004
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Pending Counts

18:1343, 2 WIRE FRAUD,
AIDING AND ABETTING AND
CAUSING AN ACT TO BE
DONE
(1-2)

Disposition

Committed to the Bureau of Prisons for 240 months on counts 1,3 of the Information, 60 months on count 1, 60 months on count 2 & 120 months on count 3, consecutively. Supervised Release for 5 years, 5 years on count 2 & 3 years on counts 1 & 3, con currently under the terms & conditions of USPO,

18:1957, 2 MONEY
LAUNDERING, AIDING AND
ABETTING AND CAUSING AN
ACT TO BE DONE
(3)

18:981(a)(1)(C), 21:853,
28:2461(c) CRIMINAL
FORFEITURE
(4)

General Order 318 &01-05. Special Assessment of
\$300. Restitution of \$94,796,530.44. Fine of
\$250,000.

Committed to the Bureau of Prisons for 240 months
on counts 1,3 of the Information, 60 months on
count 1, 60 months on count 2 & 120 months on
count 3, consecutively. Supervised Release for 5
years, 5 years on count 2 & 3 years on counts 1 & 3,
con currently under the terms & conditions of USPO,
General Order 318 &01-05. Special Assessment of
\$300. Restitution of \$94,796,530.44. Fine of
\$250,000.

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

None

Disposition

Assigned to: Judge John F. Walter

Defendant (2)

Zvi Leichner
TERMINATED: 05/23/2005

represented by **John Allen Case, Jr**
John A Case Jr Law Offices
1880 Century Park East Ste 516
Los Angeles, CA 90067
310-203-3911
Fax: 310-203-3915
Email: jcase@casewebllaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Keli Branch Luther
Crime Victim Legal Assistance Project
1850 N. Central Ave #1440
P O Box 877906
Phoenix, AZ 85004
602-416-6780
Email: kluther@voiceforvictims.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Michael Roger McDonnell
Law Offices of McDonnell and Kent Inc.
418 East La Habra Boulevard

La Habra, CA 90631
562-694-3827
Fax: 562-694-4280
Email: mike@mcdonnellandkent.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

William L O'Bryan
(See above for address)
TERMINATED: 05/23/2005
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Pending Counts

18:1343: WIRE FRAUD
(1s-2s)

18:1957: MONEY
LAUNDERING
(3s)

Disposition

Committed on counts 1-3 of the Superseding Information for 135 months, 60 months on counts 1 and 2, concurrently to each other, and 120 months on count 3, partially consecutively (75 months) and partially concurrently (45 months) to counts 1 and 2. Supervised Release for 3 years on counts 1-3 concurrently under the terms and conditions of US Probation office, General Order 318 and 01-05. Special Assessment of \$300. Restitution of \$94,796,530.44. Fine waived. **RESENTENCING:** Defendant is committed to the custody of the Bureau of Prisons for One Hundred Thirty Five (135) months. Supervised release for Three (3) years under the terms and conditions of the US Probation Office, General Order 318 & 01-05. Fines waived, pay special assessment of \$300, restitution in the total amount of \$94,796,530.04

Committed on counts 1-3 of the Superseding Information for 135 months, 60 months on counts 1 and 2, concurrently to each other, and 120 months on count 3, partially consecutively (75 months) and partially concurrently (45 months) to counts 1 and 2. Supervised Release for 3 years on counts 1-3 concurrently under the terms and conditions of US Probation office, General Order 318 and 01-05. Special Assessment of \$300. Restitution of \$94,796,530.44. Fine waived. **RESENTENCING:** Defendant is committed to the custody of the Bureau of Prisons for One Hundred Thirty Five (135) months. Supervised release for Three (3) years under the terms and conditions of the US Probation Office, General Order 318 & 01-05. Fines waived, pay special assessment of \$300, restitution in the total amount of \$94,796,530.04

Highest Offense Level (Opening)

Felony

Terminated Counts

18:1343, 2 WIRE FRAUD,
AIDING AND ABETTING AND
CAUSING AN ACT TO BE
DONE
(1-2)

Disposition

The Original Information is dismissed.

18:1957, 2 MONEY
LAUNDERING, AIDING AND
ABETTING AND CAUSING AN
ACT TO BE DONE
(3)

The Original Information is dismissed.

18:981(a)(1)(C), 21:853,
28:2461(c) CRIMINAL
FORFEITURE
(4)

The Original Information is dismissed.

18:981 &28:2461: CRIMINAL
FORFEITURE AND 18:2:
AIDING AND ABETTING AND
CAUSING AN ACT TO BE
DONE
(4s)

The Original Informatin is dismissed.

**Highest Offense Level
(Terminated)**

Felony

Complaints

None

Disposition

Plaintiff

USA

represented by **Assistant 2241–2255 US Attorney
LA–CR**
AUSA – Office of US Attorney
Criminal Div – US Courthouse
312 N Spring St
Los Angeles, CA 90012–4700
213–894–2434
Email: USACAC.Criminal@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Derik Fettig
AUSA – Office of US Attorney
Criminal Division
312 North Spring Street, 13th Floor
Los Angeles, CA 90012
213–894–2434
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

R Stephen Kramer
FBI – Federal Bureau of Investigation
Associate Division Counsel
11000 Wilshire Blvd, Rm 1700
Los Angeles, CA 90024
310–477–6565
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/07/2003	1	COMPLAINT filed against Moshe Leichner, Zvi Leichner in violation of 18:1343. Approved by Magistrate Judge Margaret A. Nagle. [2:03–m –282] (dmap) (Entered: 02/11/2003)

02/07/2003		BENCH WARRANT issued for Moshe Leichner by Magistrate Judge Margaret A. Nagle. Bail to be fixed at Initial Appearance. [2:03-m -282] (dmap) (Entered: 02/11/2003)
02/07/2003	2	NOTICE OF REQUEST FOR DETENTION filed by USA as to Moshe Leichner . [2:03-m -282] (dmap) (Entered: 02/11/2003)
02/07/2003		BENCH WARRANT issued for Zvi Leichner by Magistrate Judge Margaret A. Nagle. Bail to be set at the Initial Appearance. [2:03-m -282] (dmap) (Entered: 02/11/2003)
02/07/2003	3	NOTICE OF REQUEST FOR DETENTION filed by USA as to Zvi Leichner . [2:03-m -282] (dmap) (Entered: 02/11/2003)
02/10/2003	4	REPORT COMMENCING CRIMINAL ACTION as to Moshe Leichner arrested on 2/8/03. Defendant's date of birth: 12/6/48. [2:03-m -282] (dmap) (Entered: 02/11/2003)
02/10/2003	5	MINUTES OF ARRAIGNMENT ON MAGISTRATE COMPLAINT held before Magistrate Judge Victor B. Kenton as to Moshe Leichner : Defendant arraigned and states true name as charged. First appearance of Moshe Leichner entered. Retained Attorney Willian O'Bryan present. Defendant committed to the custody of the U. S. Marshal. Case is continued to 10:00 a.m. on 2/14/03 for further processing. Tape No.: 03-03 [2:03-m -282] (dmap) (Entered: 02/11/2003)
02/10/2003	6	REPORT COMMENCING CRIMINAL ACTION as to Zvi Leichner arrested on 2/8/03. Defendant's date of birth: 7/27/71. [2:03-m -282] (dmap) (Entered: 02/11/2003)
02/10/2003	7	MINUTES OF ARRAIGNMENT ON MAGISTRATE COMPLAINT held before Magistrate Judge Victor B. Kenton as to Zvi Leichner : Defendant arraigned and states true name as charged. First appearance of Zvi Leichner entered. Retained Attorney Willian O'Bryan present. Court orders Zvi Leichner temporarily detained. Defendant committed to the custody of the U. S. Marshal. Case is continued to 10:00 a.m. on 2/14/03 for further processing. Tape No.: 03-03 [2:03-m -282] (dmap) (Entered: 02/11/2003)
02/10/2003	8	WAIVER OF PRELIMINARY HEARING filed by Moshe Leichner . [2:03-m -282] (dmap) (Entered: 02/18/2003)
02/10/2003	11	NOTICE DIRECTING Defendant To Appear for Preliminary Hearing and for Arraignment on Indictment/Information filed as to Moshe Leichner [2:03-m -282] (dmap) (Entered: 02/18/2003)
02/10/2003	16	WAIVER OF PRELIMINARY HEARING filed by Zvi Leichner [2:03-m -282] (dmap) (Entered: 02/18/2003)
02/10/2003	17	NOTICE DIRECTING Defendant To Appear for Preliminary Hearing and for Arraignment on Indictment/Information filed as to Zvi Leichner. [2:03-m -282] (dmap) (Entered: 02/18/2003)
02/12/2003	9	BENCH WARRANT returned executed as to Moshe Leichner on 2/10/03 [2:03-m -282] (dmap) (Entered: 02/12/2003)
02/12/2003	10	BENCH WARRANT returned executed as to Zvi Leichner on 2/10/03 [2:03-m -282] (dmap) (Entered: 02/12/2003)
02/14/2003	12	MINUTES OF DETENTION HEARING held before Magistrate Judge Victor B. Kenton as to Moshe Leichner : Court orders Moshe Leichner permanently detained. Case continued to 3/10/03 at 8:30 a.m. for PIA. Court ords MDC to allow counsel to meet with defendants jointly. Tape No.: 03-04 [2:03-m -282] (dmap) (Entered: 02/18/2003)
02/14/2003	13	WAIVER OF PRELIMINARY HEARING filed by Moshe Leichner [2:03-m -282] (dmap) (Entered: 02/18/2003)
02/14/2003	14	ORDER filed by Magistrate Judge Victor B. Kenton as to Moshe Leichner : It is orderd counsel Brian A. Newman & Bill O'Brien are to be allowed to visit with their clients Moshe Leichner & Avi Leichner at MDC jointly & with both

		defendants present Court recommends defendants to be placed in the same facility to incorporate visitation jointly for purposes of the case preparation. (cc: all counsel) [2:03-m -282] (dmap) (Entered: 02/18/2003)
02/14/2003	15	ORDER OF DETENTION by Magistrate Judge Victor B. Kenton as to Moshe Leichner (cc: all counsel) [2:03-m -282] (dmap) (Entered: 02/18/2003)
02/14/2003	18	MINUTES OF DETENTION HEARING held before Magistrate Judge Victor B. Kenton as to Zvi Leichner : Court orders Zvi Leichner permanently detained. Post-indictment arraignment set for 8:30 a.m. on 3/10/03. Court orders MDC to allow counsel to meet with both defendants jointly. Tape No.: 03-04 [2:03-m -282] (dmap) (Entered: 02/18/2003)
02/14/2003	19	ORDER OF DETENTION by Magistrate Judge Victor B. Kenton as to Zvi Leichner (cc: all counsel) [2:03-m -282] (dmap) (Entered: 02/18/2003)
02/14/2003	20	ORDER filed by Magistrate Judge Victor B. Kenton as to Zvi Leichner : It is ordered that counsel Brian A. Newman & Bill O'Brien are to be allowed to visit with their clients Moshe Leichner & Zvi Leichner at the MDC jointly & with both defendants present. The Court recommends defendants be placed in the same facility to incorporate visitations jointly for purposes of case preparation. (cc: all counsel) [2:03-m -282] (dmap) (Entered: 02/18/2003)
02/14/2003	21	WAIVER OF PRELIMINARY HEARING filed by Zvi Leichner . [2:03-m -282] (dmap) (Entered: 02/19/2003)
02/28/2003	22	STIPULATION AND ORDER filed by Magistrate Judge Carolyn Turchin as to Moshe Leichner : It is order the period from 3/10/03 through 4/10/03, inclusive, is excludable under 18:3161(h)(8)(A), from the time within which & indictment or information in this action must be filed. [2:03-m -282] (dmap) (Entered: 02/28/2003)
02/28/2003		EXCLUDABLE DELAY FORM as to Moshe Leichner [2:03-m -282] (dmap) (Entered: 02/28/2003)
02/28/2003	23	STIPULATION AND ORDER filed by Magistrate Judge Carolyn Turchin as to Zvi Leichner : It is ordered the period from 3/10/03 through 4/10/03, inclusive, is excludable under 18:3161(h)(8)(A), from the time within which & indictment or information in this action must be filed. [2:03-m -282] (dmap) (Entered: 02/28/2003)
02/28/2003		EXCLUDABLE DELAY FORM as to Zvi Leichner [2:03-m -282] (dmap) (Entered: 02/28/2003)
03/11/2003	25	EX PARTE APPLICATION filed by Moshe Leichner, Zvi Leichner to quash Grand Jury Subpoena [2:03-m -282] (es) (Entered: 03/27/2003)
03/19/2003	26	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner in Opposition to ex parte application motion to quash Grand Jury Subpoena [25-1] [2:03-m -282] (es) (Entered: 03/27/2003)
03/19/2003	27	STIPULATION AND ORDER filed by Magistrate Judge Jeffrey W. Johnson as to Moshe Leichner, Zvi Leichner: Continuing the Hearing on Dfts Ex Parte Application to Quash Grand Jury Subpeona to 3/20/03 @ 2:00pm. [2:03-m -282] (es) (Entered: 03/27/2003)
03/19/2003	28	MINUTES OF IN CHAMBERS Re Ex Parte Application to Quash Grand Jury Subpoena, filed March 11, 2003 held before Magistrate Judge Jeffrey W. Johnson as to Moshe Leichner, Zvi Leichner: The Court gives notice to counsel that the hearing date of March 20, 2003 for the above-entitled application is hereby Vacated. This matter is referred to the Criminal Duty District Judge. C/R: None Appearing [2:03-m -282] (es) Modified on 04/01/2003 (Entered: 03/27/2003)
03/21/2003	24	SUBSTITUTION OF ATTORNEY filed as to Zvi Leichner . Attorney Michael R McDonnell substituting William L O'Bryan for Zvi Leichner Approved by Magistrate Judge Suzanne H. Segal. [2:03-m -282] (es) (Entered: 03/25/2003)

03/26/2003	29	STIPULATION AND ORDER filed by Judge Terry J. Hatter Jr. as to Zvi Leichner: Extending the Time to file Information or Indictment; Excludable Time Findings [2:03-m -282] (es) Modified on 04/21/2003 (Entered: 03/27/2003)
03/26/2003	30	ORDER filed by Judge Terry J. Hatter Jr. as to Moshe Leichner, Zvi Leichner: DENYING ex parte application motion to quash Grand Jury Subpoena [25-1] (cc: all counsel) [2:03-m -282] (es) (Entered: 04/21/2003)
03/26/2003	31	STIPULATION AND ORDER filed by Judge Terry J. Hatter Jr. as to Moshe Leichner: Extending the Time to File Information or Indictment; Excludable Time Findings [2:03-m -282] (es) (Entered: 04/21/2003)
04/17/2003	32	STIPULATION AND ORDER filed by Magistrate Judge Andrew J. Wistrich as to Moshe Leichner: Extending the Time to File Information/Indictment; Excludable Time Findings [2:03-m -282] (es) (Entered: 04/21/2003)
04/17/2003	33	STIPULATION AND ORDER filed by Magistrate Judge Andrew J. Wistrich as to Zvi Leichner: Extending of Time to File Information or Indictment ; Excludable Time Findings [2:03-m -282] (es) (Entered: 04/21/2003)
05/07/2003	34	STIPULATION AND ORDER filed by Magistrate Judge Andrew J. Wistrich as to Zvi Leichner : extending the time to file information or indictment; excludable time findings [2:03-m -282] (es) (Entered: 05/08/2003)
06/12/2003	35	INFORMATION filed against Moshe Leichner (1) count(s) 1-2, 3, 4, Zvi Leichner (2) count(s) 1-2, 3, 4. Offense occurred in LA. (sb) (Entered: 06/13/2003)
06/12/2003	36	CASE SUMMARY filed by AUSA R Stephen Kramer, attorney for USA, as to Moshe Leichner. Defendant's date of birth: 12/6/48. (sb) Modified on 06/13/2003 (Entered: 06/13/2003)
06/12/2003	37	CASE SUMMARY filed by AUSA R Stephen Kramer, attorney for USA, as to Zvi Leichner. Defendant's date of birth: 8/27/71. (sb) (Entered: 06/13/2003)
06/12/2003	38	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner. This criminal action, being filed on 12/22/98, WAS NOT pending in the U.S. Attorney's Office before 12/22/98, the date on which U.S. District Judge Nora M. Manella began receiving criminal matters. (sb) (Entered: 06/13/2003)
06/12/2003	39	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner. This criminal action, being filed on 6/12/03, WAS NOT pending in the U.S. Attorney's Office before 11/2/92, the date on which U.S. District Judge Lourdes G. Baird began receiving criminal matters. (sb) (Entered: 06/13/2003)
06/12/2003	40	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner seeking authority for an investigative action and being filed on 6/12/03, DOES NOT RELATE TO, a mtr in which Magistrate Judge Patrick J. Walsh was personally involved or on which he was personally consulted while employed in the US Atty's Ofc. (sb) (Entered: 06/13/2003)
06/12/2003	41	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner seeking authority for an investigative action and being filed on 6/12/03, DOES NOT RELATE TO, a mtr pending in the Major Frauds Section of the US Atty's Ofc before 6/30/01, the date on which Magistrate Judge Jennifer T. Lum resigned her appt in that ofc; or was personally involved or on which she was personally consulted while employed in the US Atty's Ofc. (sb) (Entered: 06/13/2003)
06/12/2003	42	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner seeking authority for an investigative action and being filed on 6/12/03, DOES NOT RELATE TO, a mtr pending in the Organized Crime Section of the US Atty's Ofc before 9/29/00, the date on which Magistrate Judge Stephen G. Larson resigned his appt in that ofc; or was personally involved or on which he was personally consulted while employed in the US Atty's Ofc. (sb) (Entered: 06/13/2003)
06/12/2003	43	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner seeking authority for an investigative action and being filed on 6/12/03, DOES NOT RELATE TO, a mtr pending in the Narcotic Section of the US Atty's Ofc before April 20, 1999, the date on which Magistrate Judge Jeffrey W. Johnson resigned his appt in that ofc; or was personally involved or on which he was personally

		consulted while employed in the US Atty's Ofc. (sb) (Entered: 06/13/2003)
06/12/2003	44	CONFLICT OF INTEREST CERTIFICATION filed as to Moshe Leichner, Zvi Leichner. (sb) (Entered: 06/13/2003)
06/12/2003	45	WAIVER OF INDICTMENT filed as to Moshe Leichner. (sb) (Entered: 06/13/2003)
06/12/2003	46	WAIVER OF INDICTMENT filed as to Zvi Leichner. (sb) (Entered: 06/13/2003)
06/12/2003	47	PLEA AGREEMENT filed by USA as to Moshe Leichner. (sb) (Entered: 06/13/2003)
06/12/2003	48	PLEA AGREEMENT filed by USA as to Zvi Leichner. (sb) (Entered: 06/13/2003)
06/30/2003	49	STATEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHTS filed as to Moshe Leichner. (sv) (Entered: 07/02/2003)
06/30/2003	50	DESIGNATION AND APPEARANCE of Attorney for Moshe Leichner by George Buehler. (sv) (Entered: 07/02/2003)
06/30/2003	51	DESIGNATION AND APPEARANCE of Attorney for Moshe Leichner by William O'Bryan. (sv) (Entered: 07/02/2003)
06/30/2003	52	STATEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHTS filed as to Zvi Leichner. (sv) (Entered: 07/02/2003)
06/30/2003	53	DESIGNATION AND APPEARANCE of Attorney for Zvi Leichner by Mike McDonnell and Victor Sherman. (sv) (Entered: 07/02/2003)
06/30/2003	54	MINUTES OF POST-INDICTMENT ARRAIGNMENT HEARING held before Magistrate Judge Paul Game Jr. as to Moshe Leichner and Zvi Leichner: Reassigning case to Judge John F. Walter. Plea and trial setting set 10:00 7/7/03 for Moshe Leichner and Zvi Leichner. Tape No.: CS 6/30/03. (sv) (Entered: 07/07/2003)
07/02/2003	<u>55</u>	MINUTES OF PLEA AND TRIAL SETTING HEARING held before Judge John F. Walter as to Zvi Leichner: Continuing guilty plea and sentencing date for 1:30 7/10/03 for Zvi Leichner. C/R: Cheshire. (sv) (Entered: 07/07/2003)
07/02/2003	<u>56</u>	MINUTES OF PLEA AND TRIAL SETTING HEARING held before Judge John F. Walter as to Moshe Leichner: Continuing plea and trial setting for 1:30 7/10/03 for Moshe Leichner, for Zvi Leichner. Tape No.: C/R: Cheshire. (sv) (Entered: 07/07/2003)
07/09/2003	57	MEMORANDUM re procedures for criminal forfeiture of case filed by USA as to Moshe Leichner and Zvi Leichner. (sv) (Entered: 07/10/2003)
07/10/2003	<u>58</u>	MINUTES OF CHANGE OF PLEA HEARING held before Judge John F. Walter as to Moshe Leichner: Defendant moves to change plea to the Information. Plea of guilty entered by Moshe Leichner (1) count(s) 1-2, 3. The Court questions the defendant regarding plea of guilty and finds it knowledgeable and voluntary and orders the plea accepted entered. The Court refers Moshe Leichner to the Probation Office for investigation and report. Sentencing hearing set for 9:00 4/12/04 for Moshe Leichner. C/R: Smith-Wells. (sv) (Entered: 07/14/2003)
07/10/2003	<u>59</u>	MINUTES OF CHANGE OF PLEA HEARING held before Judge John F. Walter as to Zvi Leichner: Defendant moves to change plea to the Information. Plea of guilty entered by Zvi Leichner (2) count(s) 1-2, 3. The Court questions the defendant regarding plea of guilty and finds it knowledgeable and voluntary and orders the plea accepted and entered. The Court refers Zvi Leichner to the Probation Office for investigation and report. Sentencing hearing set for 9:00 4/12/04 for Zvi Leichner. C/R: Smith-Wells. (sv) (Entered: 07/14/2003)
09/17/2003	60	NOTICE OF UNDER SEAL FILING by Zvi Leichner. (sv) (Entered: 09/18/2003)
09/18/2003	61	APPLICATION filed by Zvi Leichner for order to file document under seal. (sv) (Entered: 09/19/2003)

09/18/2003	62	ORDER filed by Judge John F. Walter as to Zvi Leichner: granting document sealed. (cc: all counsel) (sv) (Entered: 09/19/2003)
02/10/2004	<u>64</u>	SUBSTITUTION OF ATTORNEY filed as to Moshe Leichner. Attorney Peter William Scalisi substituting for attorney George Buehler for Moshe Leichner. Approved by Judge John F. Walter. (sv) Modified on 02/12/2004 (Entered: 02/12/2004)
03/03/2004	<u>65</u>	STIPULATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner: Continuing sentence hearing for 9:00 5/24/04 for Moshe Leichner . (sv) (Entered: 03/05/2004)
03/03/2004	<u>66</u>	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner: Continuing sentence hearing for 9:00 8/23/04 for Zvi Leichner. (sv) (Entered: 03/05/2004)
03/12/2004	67	NOTICE OF MOTION AND MOTION filed by Moshe Leichner for release on bond pending sentencing and to set conditions of bond. Returnable on: 3/22/04 – 1:30pm. Lodged order. (sv) (Entered: 03/15/2004)
03/15/2004	<u>68</u>	MINUTES REFERAL OF DEFENDANT'S MOTION FOR RELEASE ON BOND PENDING SENTENCING HEARING held before Judge John F. Walter as to Moshe Leichner: This matter is hereby referred to Magistrate Game, or the duty Magistrate if Magistrate Game is unavailable, for review and determination. C/R: Smith–Wells. (sv) (Entered: 03/18/2004)
03/18/2004	<u>69</u>	MINUTES OF MOTION HEARING held before Magistrate Judge Victor B. Kenton as to Moshe Leichner: On 3/12/04, defendant filed a motion for release on bond pending sentencing. The matter was referred to Magistrate Judge Kenton, who makes the following orders: A hearing on said motion set for 1:30 3/26/04; Pending the heaing, defendant will be forthwith transferred to and housed at MDC Unless space is unavailable or if Marshal cannot accomodate this transfer. Within 24 hours of defendant's arrival at MDC, he is to be examined by a physician. The Warden will provide a report to Court as to the results prior to 3/26/04 hearing. Pretrial will provie updated report responding to issues set forth in the motion by 3pm 3/25/04. Government to file it's position with court by 3pm 3/25/04. C/R: None. (sv) (Entered: 03/22/2004)
03/25/2004	70	MEMORANDUM filed by USA as to Moshe Leichner in opposition to motion for release on bond pending sentencing and to set conditions of bond. [67–1] (sv) (Entered: 03/26/2004)
03/25/2004	71	MEMORANDUM filed by Moshe Leichner in opposition to motion for release on bond pending sentencing and to set conditions of bond. [67–1] (vc) (Entered: 03/29/2004)
03/26/2004	<u>72</u>	MINUTES OF MOTION HEARING held before Magistrate Judge Victor B. Kenton as to Moshe Leichner: denying motion for release on bond pending sentencing and to set conditions of bond. [67–1] Tape No.: 04–03. (sv) (Entered: 03/29/2004)
04/22/2004	73	EX PARTE APPLICATION filed by USA as to Moshe Leichner, Zvi Leichner for order of forfeiture and authorization to conduct discovery. Lodged order. (sv) (Entered: 04/23/2004)
04/26/2004	74	ORDER filed by Judge John F. Walter as to Moshe Leichner and Zvi Leichner: granting ex parte application for order of forfeiture and authorization to conduct discovery. [73–1] (cc: all counsel) (sv) (Entered: 04/29/2004)
05/03/2004	75	NOTICE of FORFEITURE filed by USA as to Moshe Leichner and Zvi Leichner. (sv) (Entered: 05/05/2004)
05/12/2004	<u>76</u>	STIPULATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner: Regarding Continuance of Sentencing Hearing. Sentence hearing continued to 9:00am on 8/23/04. (roz) (Entered: 05/13/2004)
05/20/2004	77	Verified Peition claiming interes in forfeited assets filed by Moshe Leichner, Zvi Leichner (ca) (Entered: 05/21/2004)

06/04/2004	78	Petition by Israel Schwarts For Adjudication of Interest Under 21 Section 853(n)(Filed in Conjunction With Petition of Sagi Leichner; Request for Hearing and Opportunity to Conduct Discovery filed as to Moshe Leichner, Zvi Leichner (es) (Entered: 06/07/2004)
06/04/2004	79	Petition by Sagi Leichner For Adjudication of Interest Under 21 Section 853(n)(Filed in Conjunction with Petition of Israel Schwarts); Request for Hearing and Opportunity to Conduct Discovery filed as to Moshe Leichner, Zvi Leichner (es) (Entered: 06/07/2004)
06/04/2004	80	Petition by Vered Leichner For Adjudication of Interest Under 21 Section 853(n); Request For Hearing and Opportunity to Conduct Discovery filed as to Moshe Leichner, Zvi Leichner (es) (Entered: 06/07/2004)
06/08/2004	<u>81</u>	NOTICE OF DISCREPANCY AND ORDER by Judge John F. Walter as to Moshe Leichner Striking Letter Regarding: Notification of Discovery Dispute and Request for Judicial Intervention in United States V. Moshe Leichner, Docket No. CR 03-568-JFW. (roz) (Entered: 06/18/2004)
07/08/2004	82	NOTICE OF MOTION AND MOTION filed by Moshe Leichner to withdraw plea of guilty as to Moshe Leichner. Returnable on: 8/2/04, 9:00 a.m.. (ca) (Entered: 07/09/2004)
07/13/2004	83	AMENDED PROOF OF SERVICE filed by Moshe Leichner of motion to withdraw plea of guilty as to Moshe Leichner [82-1]. (ca) (Entered: 07/15/2004)
07/20/2004	84	Notice of filing of reporter's transcripts of the entry of the plea on July 10, 2003 filed by Moshe Leichner (vc) (Entered: 07/21/2004)
07/22/2004	85	RECEIPT for Transcripts of proceedings held on: 7/10/04 C/R: Nancy Smith-Wells (weap) (Entered: 07/26/2004)
07/22/2004		TRANSCRIPT filed for proceedings held on 7/10/04 as to Moshe Leichner. (weap) (Entered: 07/26/2004)
07/26/2004	<u>86</u>	ORDER AND STIPULATION filed by Judge John F. Walter as to Moshe Leichner : Motion to withdraw plea of guilty as to Moshe Leichner [82-1] is continued to 9:00 a.m., on 8/16/04 (cc: all counsel) (ca) (Entered: 07/26/2004)
08/05/2004	87	OPPOSITION filed by USA as to Moshe Leichner to motion to withdraw plea of guilty as to Moshe Leichner [82-1]. (ca) (Entered: 08/06/2004)
08/09/2004	88	Filing of page nine to opposition to defendant Moshe Leichner's motion to withdraw plea of guilty filed by USA as to Moshe Leichner (ca) (Entered: 08/10/2004)
08/11/2004	<u>89</u>	MINUTES OF IN CHAMBERS HEARING held before Judge John F. Walter as to Moshe Leichner, Zvi Leichner : On June 4, 2004, the Court received a Petition by Sagi Leichner for Adjudication of Interest Under 21 U.S.C. Section 853(n), a Petition by Vered Leichner for Adjudication of Interest Under 21 U.S.C. Section 853(n), and a petition by Israel Schwarts for Adjudication of Interest Under 21:853(n) (collectively the "Petitions"). The Court hereby sets a hearing on the Petitions at 9:00 a.m., on 8/13/04. The Government shall file its oppositions to the petitions on or before 8/23/04. Petitioners Sagi Leichner, Vered Leichner and Israel Schwarts shall file any replies in support of their Petitions on or before 9/1/04. IT IS SO ORDERED. C/R: None Present (ca) (Entered: 08/13/2004)
08/12/2004	90	DECLARATION of Counsel for Mr. Leichner FILED by Moshe Leichner regarding the status of discovery (ca) (Entered: 08/13/2004)
08/12/2004	91	MINUTES OF ORDER SETTING BRIEFING SCHEDULE AND HEARING ON VERIFIED PETITION OF CHRISTOPHER R. BARCLAY, AS TRUSTEE OF THE SUBSTANTIVELY CONSOLIDATED BANKRUPTCY ESTATES OF MIDLAND EURO EXCHANGE, INC., MIDLAND EURO, INC., MIDLAND GROUP, INC., MOSE LEICHNER, AND ZVI LEICHNER, CLAIMING INTEREST IN FORFEITED ASSETS [filed 5/20/04] HEARING held before Judge John F. Walter as to Moshe Leichner, Zvi Leichner : On May 20, 2004, the Court received a Verified Petition of Christopher R. Barclay, as Trustee of the Substantively Consolidated Bankruptcy Estates of Midland Euro Exchange, Inc., Midland Euro, Inc., Midland Group, Inc., Moshe Leichner, and Zvi Leichner,

		Claiming Interest in Forfeited Assets (The "Petition"). The Court hereby sets a hearing on the Petition. Petition hearing set for 9:00 a.m., on 9/13/04 for Moshe Leichner, for Zvi Leichner. The Government shall file its Opposition to the Petition on or before 8/23/04. Petitioner shall file any Reply in support of his Peittion on or before September 1, 2004. IT IS SO ORDERED. C/R: None Present (ca) (Entered: 08/16/2004)
08/16/2004	<u>92</u>	MINUTES OF MOTION HEARING held before Judge John F. Walter as to Moshe Leichner : Denying motion to withdraw plea of guilty as to Moshe Leichner [82-1]. The Court orders counsel to submit a joint statement re: production of documents by Thursday, August 19, 2004. The Court schedules a status conference to discuss any issues re: production of documents. Status hearing set for 9:00 a.m., on 8/23/04 for Moshe Leichner. C/R: Nancy Smith-Wells (ca) (Entered: 08/17/2004)
08/16/2004		PLACED IN FILE – NOT USED: Proposed Order to allow the withdrawal of the plea of guilty to all counts by Moshe Leichner. (ca) (Entered: 08/17/2004)
08/18/2004	<u>93</u>	MINUTES OF ARRAIGNMENT ON FIRST SUPERSEDING INFORMATION, CHANGE OF PLEA AND SETTING OF SENTENCING DATE HEARING held before Judge John F. Walter as to Zvi Leichner : Court continues the change of plea hearing set for 10:30 a.m., on 8/19/04 for Zvi Leichner. C/R: Jennifer Cheshire (ca) (Entered: 08/19/2004)
08/18/2004	94	STIPULATION filed by USA as to Moshe Leichner Re: production and review of discovery materials (ca) (Entered: 08/19/2004)
08/18/2004	95	FIRST SUPERSEDING INFORMATION filed against Zvi Leichner (2) count(s) 1s-2s, 3s, 4s. (ca) (Entered: 08/19/2004)
08/19/2004	<u>96</u>	MINUTES OF ARRAIGNMENT ON FIRST SUPERSEDING INFORMATION, WAIVER OF INDICTMENT, GUILTY PLEA AND SETTING OF SENTENCING DATE HEARING held before Judge John F. Walter as to Zvi Leichner : Supplemental agreement is filed. Waiver of indictment executed by defendant is filed. Plea of guilty entered by Zvi Leichner (2) count(s) 1s-2s, 3s, 4s. The Court questions the defendant regarding plea of guilty and finds it knowledgeable and voluntary and orders the plea accepted and entered. The Court refers Zvi Leichner to the Probation Office for investigation and report. Sentencing hearing set for 9:00 a.m., on 11/1/04 for Zvi Leichner. C/R: Jennifer Cheshire (ca) (Entered: 08/20/2004)
08/19/2004	<u>97</u>	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner : Sentence hearing set for 9:00 a.m., on 11/1/04 for Zvi Leichner (ca) (Entered: 08/20/2004)
08/19/2004	<u>98</u>	STIPULATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner : Sentence hearing set for 9:00 a.m., on 11/1/04 for Moshe Leichner (ca) (Entered: 08/20/2004)
08/19/2004	99	SUPPLEMENTAL PLEA AGREEMENT filed by USA as to Zvi Leichner (ca) (Entered: 08/20/2004)
08/19/2004	101	WAIVER OF INDICTMENT filed as to Zvi Leichner. Approved by Judge John F. Walter. (ca) (Entered: 08/24/2004)
08/23/2004	<u>100</u>	STIPULATION AND ORDER TO CONTINUE HEARING ON PEITITONS OF SAGI LEICHNER; VERED LEICHNER; ISRAEL SCHWARTS; AND CHRISTOPHER BARCLAY AS TRUSTEE OF THE BANKRUPTCY ESTATES OF MIDLAND EURO EXCHANGE, INC., MIDLAND EURO, INC., MIDLAND GROUP, INC., MOSHE LEICHNER AND ZVI LEICHNER filed by Judge John F. Walter as to Moshe Leichner, Zvi Leichner : The due date for the government's opposition to the Petitions is continued from 8/23/04 to 9/27/04; The due date for peitioners replies in support of their peittions is ocntinued from 9/1/04 to 10/6/04. Petition hearing set for 9:00 a.m., on 10/18/04 for Moshe Leichner, for Zvi Leichner (ca) (Entered: 08/24/2004)
09/28/2004	<u>102</u>	STIPULATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner, Zvi Leichner : withdrawing Leichner and Schwarts forfeiture peititons

		and transfer forfeited assets to bankruptcy trustee. The petitions for the adjudication of interest in the forfeited assets, filed by the Vered Parties on June 4, 2004 are hereby deemed withdrawn; withdrawing petition [80-1], withdrawing petition [79-1], withdrawing petition [78-1]. The United States shall not seek to forfeit the personal property exempted by Vered Leichner or Moshe Leichner as listed in Exhibit A attached to this Stipulation. This Order dispose of all petitions related to the "Notice of Forfeiture" filed by the government and the hearing presently set for 9:00 a.m. on October 18, 2004 shall be taken of calendar. IT IS SO ORDERED. (ca) (Entered: 09/29/2004)
10/01/2004	103	RECEIPT for Transcripts of proceedings held on: 8/19/04. C/R: Jennifer Cheshire. (sb) (Entered: 10/01/2004)
10/01/2004	104	TRANSCRIPT filed for proceedings held on 8/19/04 as to Zvi Leichner. (sb) (Entered: 10/01/2004)
10/14/2004	106	POSITION RE: SENTENCING filed by USA as to Moshe Leichner (ca) (Entered: 10/18/2004)
10/15/2004	<u>105</u>	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner : Sentence hearing set for 9:00 a.m., on 2/28/05 for Zvi Leichner. (ca) (Entered: 10/18/2004)
10/19/2004	107	POSITION REGARDING SENTENCING FACTORS filed by Moshe Leichner (ca) (Entered: 10/20/2004)
10/20/2004	<u>108</u>	NOTICE OF DISCREPANCY AND ORDER by Judge John F. Walter as to Zvi Leichner Document Motion to continue & order ordered filed and processed. (ca) (Entered: 10/21/2004)
10/20/2004	109	NOTICE OF MOTION filed by Moshe Leichner to continue sentencing hearing as to Moshe Leichner Returnable on: 11/1/04, at 9:00 a.m.. (ca) (Entered: 10/21/2004)
10/20/2004	<u>110</u>	ORDER filed by Judge John F. Walter as to Moshe Leichner : Granting motion to continue sentencing hearing as to Moshe Leichner [109-1]. Sentence hearing set for 9:00 a.m., on 2/28/05 for Moshe Leichner (cc: all counsel) (ca) (Entered: 10/21/2004)
02/07/2005	111	MEMORANDUM filed by USA as to Moshe Leichner in opposition to Defendant's Position Regarding Sentencing (dmap) (Entered: 02/14/2005)
02/14/2005	<u>112</u>	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner : Sentencing is continued to 9:00 am on 4/4/05. (dmap) (Entered: 02/14/2005)
02/18/2005	113	REPLY by Moshe Leichner to Government's Opposition to Defendant's Position RE: Sentencing [111-1] (dmap) (Entered: 02/22/2005)
02/28/2005	<u>114</u>	MINUTES OF SENTENCING held before Judge John F. Walter as to Moshe Leichner (1) count(s) 1-2, 3. Committed to the Bureau of Prisons for 240 monhts on counts 1,3 of the Information, 60 months on count 1, 60 months on count 2 & 120 monhts on count 3, consecutivvely. Supervised Release for 5 years, 5 years on count 2 & 3 years on counts 1 & 3, concurrently under the terms & conditions of USPO, General Order 318 & 01-05. Special Assessment of \$300. Restitution of \$94,796,530.44. Fine of \$250,000. Court advises Moshe Leichner of right to appeal. C/R: Nancy Smith-Wells (dmap) (Entered: 03/04/2005)
02/28/2005	116	NOTICE OF APPEAL to USCA filed by Moshe Leichner from sen minutes [114-3], filed on: 02/28/05 and entered on: 03/04/05. Fee status: Billed, forms given: Transcript Designation and Ordering Form. (cc: Peter Scalisi, Retained Counsel; Assistant U.S. Attorney) (cbr) (Entered: 03/08/2005)
03/04/2005	<u>115</u>	JUDGMENT AND COMMITMENT issued to U.S. Marshal for Moshe Leichner. Approved by Judge John F. Walter. (dmap) (Entered: 03/07/2005)
03/08/2005	117	AMENDED NOTICE OF APPEAL to USCA filed by Moshe Leichner from sen minutes [114-3], filed on: 2/28/05 and entered on: 3/4/05. Fee status: Waived. (cc: Philip Deitch, retained; Assistant United States Attorney) (ghap) (Entered: 03/09/2005)

03/10/2005	118	ORDER FOR TIME SCHEDULE filed as to Moshe Leichner for [116-1]. Transcript designation due: 3/29/05; C/R transcripts due: 4/28/05; Appellant's briefs & excerpts due: 6/7/05; Appellee's reply brief due: 7/7/05; Appellant's reply brief due by: 7/21/05. (cc: all counsel) (ghap) (Entered: 03/10/2005)
03/14/2005	119	MOTION filed by USA as to Zvi Leichner pursuant to USSG 5K1.1 to impose sentencing guidelines; Memorandum of points and authorities; Returnable on: 4/4/05 at 9:00 a.m. (vc) (Entered: 03/15/2005)
03/14/2005	120	Government's Position Re Sentencing filed by USA as to Zvi Leichner (es) (Entered: 03/15/2005)
03/16/2005	121	NOTIFICATION by United States Court of Appeals as to Moshe Leichner, designating USCA Appeal No. 05-50164 assigned to appeal [116-1]. (ghap) (Entered: 03/16/2005)
03/22/2005	122	STIPULATION filed by Zvi Leichner for continuance of sentencing; declaration of Michael R. McDonnel proposed Lodged order (vc) (Entered: 03/22/2005)
03/22/2005	<u>123</u>	ORDER to continue sentencing date filed by Judge John F. Walter as to Zvi Leichner : Sentence hearing is hereby ordered continued from 4/4/05 to 5/9/05 at 9:00 a.m. (cc: all counsel) (vc) (Entered: 03/23/2005)
03/23/2005	124	RECEIPT for Transcripts of proceedings held on: 2/28/05, C/R: Nancy Smith-Wells. (ghap) (Entered: 03/24/2005)
03/23/2005	125	TRANSCRIPT filed for proceedings held on 2/28/05 as to Moshe Leichner. (ghap) (Entered: 03/24/2005)
04/01/2005	<u>126</u>	ORDER filed by Judge John F. Walter as to Moshe Leichner, Zvi Leichner : It is ordered that the Preliminary Order of Forfeiture entered on 4/26/04 is amended to allow the interests of the United States in the Specific Property be transferred to Christopher R. Barclay. (cc: all counsel) (dmap) (Entered: 04/04/2005)
04/04/2005	127	NOTICE OF MOTION filed by USA as to Moshe Leichner for order Compelling Defendant to Execute Consents for Release of Foreign Bank Records Returnable on: 5/2/05 at 9:00 am.. (dmap) (Entered: 04/05/2005)
04/11/2005	128	ORDER from USCA, received in District Court 04/13/05 Motion of Peter Scalisi to withdraw as appellant retained counsel is denied without prejudice to renewal within 21 days after the filing date of this order. (05-50164) (cbr) (Entered: 04/15/2005)
04/15/2005	129	APPLICATION AND ORDER for Writ of Habeas Corpus Ad Testificandum ordered by Judge John F. Walter and issued to Warden, MDC for production of Moshe Leichner, to testify on 5/2/05 at 9:00 a.m., as to Moshe Leichner. Writ issued. (ca) (Entered: 04/22/2005)
04/19/2005		RECEIVED fee from Moshe Leichner [117-1] re [117-1] in amount of \$ 255.00 (Receipt # 22949) (ghap) (Entered: 04/19/2005)
04/21/2005	<u>130</u>	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner : Sentencing is continued to 9:00 am on 5/23/05. (dmap) (Entered: 04/22/2005)
04/22/2005	134	RESPONSE filed by Moshe Leichner to motion for order Compelling Defendant to Execute Consents for Release of Foreign Bank Records. [127-1] (sv) (Entered: 04/29/2005)
04/25/2005	133	EX PARTE APPLICATION filed by Zvi Leichner for an order sealing documents . Lodged order. (vdr) (Entered: 04/29/2005)
04/25/2005	135	NOTICE OF UNDER SEAL FILING by Zvi Leichner (sv) (Entered: 05/02/2005)
04/26/2005	<u>131</u>	ORDER filed by Judge John F. Walter as to Zvi Leichner : It is ordered that the document sought to be filed under seal and the defendnat's ex parte application fro sealed filing shall both be filed under seal. (cc: all counsel) (dmap) (Entered: 04/27/2005)
04/27/2005	142	PROCESS RECIEPT AND RETURN executed as to Moshe Leichner, Zvi Leichner on 4/19/05 (dmap) (Entered: 05/12/2005)

04/29/2005	139	NOTICE OF MOTION filed by USA as to Moshe Leichner and motion for order compelling defendant to execute consents for release of foreign bank records (dmap) (Entered: 05/05/2005)
05/02/2005	<u>136</u>	MINUTES OF HEARING held before Judge John F. Walter as to Moshe Leichner : The Court denies the motion for order Compelling Defendant to Execute Consents for Release of Foreign Bank Records [127-1]. C/R: Nancy Smith-Wells (dmap) (Entered: 05/03/2005)
05/02/2005	137	ORDER filed by Judge John F. Walter as to Moshe Leichner, Zvi Leichner : It is ordered that the motion for order Compelling Defendant to Execute Consents for Release of Foreign Bank Records [127-1] is DENIED. (cc: all counsel) (dmap) (Entered: 05/03/2005)
05/02/2005	<u>138</u>	EX PARTE APPLICATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner. It is orderdd the defendant Ex Parte Application to Continue Hearing on Motion to Compel Execution of Consents is DENIED. (dmap) (Entered: 05/03/2005)
05/04/2005	140	NOTICE OF MOTION filed by USA as to Moshe Leichner & motion for reconsideration of order Denying Motion to Compelling Defendant to Execute Consents for Release of Foreign Bank Records (dmap) (Entered: 05/11/2005)
05/10/2005	141	RESPONSE filed by USA as to Zvi Leichner to defendant's Position regarding sentencing [106-1] (dmap) (Entered: 05/12/2005)
05/17/2005	143	POSITION RE: SENTENCING FACTORS filed by Zvi Leichner (dmap) (Entered: 05/19/2005)
05/23/2005	<u>144</u>	MINUTES OF SENTENCING held before Judge John F. Walter as to Zvi Leichner (2) count(s) 1s-2s, 3s. Committed on counts 1-3 of the Superseding Information for 135 months, 60 months on counts 1 and 2, concurrently to each other, and 120 months on count 3, partially consecutively (75 months) and partially concurrently (45 months) to counts 1 and 2. Supervised Release for 3 years on counts 1-3 concurrently under the terms and conditions of US Probation office, General Order 318 and 01-05. Special Assessment of \$300. Restitution of \$94,796,530.44. Fine waived. Court advises Zvi Leichner of right to appeal. Dismissing count(s) as to Zvi Leichner (2) count(s) 1-2, 3, 4s, 4. The Original Informatin is dismissed. C/R: Nancy Smith-Wells (dmap) (Entered: 05/26/2005)
05/25/2005	<u>145</u>	JUDGMENT AND COMMITMENT issued to U.S. Marshal for Zvi Leichner. Approved by Judge John F. Walter. (dmap) (Entered: 05/26/2005)
06/15/2005	155	WAIVER OF DEFENDANT'S PRESENCE filed by Moshe Leichner. (vc) (Entered: 07/20/2005)
06/20/2005	<u>146</u>	MINUTES OF HEARING held before Judge John F. Walter as to Moshe Leichner : It is ordered that the Court grants the Government's Motion for Reconsideration of Order Denying Motion Compelling Defendant to Execute Consents for Release of Foreign Bank Records. The Court grants the Government's Motion for Order Denying Motion Compelling Defendant to Execute Consents for Release of Foreign Bank Records. C/R: Nancy Smith-Wells (dmap) (Entered: 06/21/2005)
06/21/2005	<u>147</u>	ORDER filed by Judge John F. Walter as to Moshe Leichner : It is ordered that defendant execute twenty originals of the form of bank record consent attached to the motion. The documents shall be executed before a notary public. Defendant shall execute the documents and deliver them to the United States not later than 7/5/05. (cc: all counsel) (dmap) (Entered: 06/22/2005)
06/30/2005	148	NOTICE OF APPEAL to USCA filed by Moshe Leichner from minutes [146-2], filed on: 6/20/05 and entered on: 6/21/05. Fee status: Billed, Forms Given: Transcript Designation and Ordering Form. (cc: Philip Deitch, retained counsel; Brent Whittlesey, Assistant United States Attorney) (ghap) (Entered: 06/30/2005)
07/05/2005	149	ORDER FOR TIME SCHEDULE filed as to Moshe Leichner for [148-1]. Transcript designation due: 07/21/05; C/R transcripts due: 08/22/05; Appellant's briefs & excerpts due: 09/29/05; Appellee's reply brief due: 10/31/05; Appellant's reply brief due by: 11/14/05. (cc: all counsel) (cbr) (Entered: 07/05/2005)

07/07/2005	150	RECEIPT for Transcripts of proceedings held on: 05/23/05, C/R: Nancy Smith–Wells. (cbr) (Entered: 07/08/2005)
07/07/2005	151	TRANSCRIPT filed for proceedings held on 05/23/05 as to Zvi Leichner. (cbr) (Entered: 07/08/2005)
07/11/2005	152	EX PARTE APPLICATION filed by Moshe Leichner for order to show cause re: criminal contempt Lodged Order (dmap) (Entered: 07/13/2005)
07/13/2005	<u>153</u>	ORDER filed by Judge John F. Walter as to Moshe Leichner : granting ex parte application for order to show cause re: criminal contempt [152–1]. Motions hearing set for 1:30 pm on 8/8/05. Motions due by 7/25/05. Reply to response not later than 8/1/05. (cc: all counsel) (dmap) (Entered: 07/14/2005)
07/15/2005	159	PROOF OF SERVICE OF ORDER TO SHOW CAUSE RE: CRIMINAL CONTEMPT filed by Moshe Leichner of (dmap) (Entered: 09/13/2005)
07/18/2005	154	NOTIFICATION by United States Court of Appeals as to Moshe Leichner, designating USCA Appeal No. 05–50516 assigned to appeal [148–1]. (cbr) (Entered: 07/18/2005)
07/22/2005	156	PROOF OF SERVICE filed as to Moshe Leichner, Zvi Leichner. Order to Show Cause Re: Criminal Contempt (dmap) (Entered: 07/25/2005)
08/02/2005		PLACED IN FILE – NOT USED: EX PARTE APPLICATION TO CONTINUE CRIMINAL CONTEMPT HEARING; MOTION TO CONDUCT HEARING BY VIDEO CONFERENCING; (Proposed) Order by Moshe Leichner (dmap) (Entered: 08/04/2005)
08/03/2005	<u>157</u>	STIPULATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner : Motions Hearing is set for 1:30 pm on 10/3/05. Motions may be filed on or before 9/12/05, and any reply by 9/19/05. (dmap) (Entered: 08/04/2005)
08/08/2005	158	ORDER from USCA in re: W. Patrick Kenna, received in District Court 08/10/05 This petition for writ of mandamus raises issues that warrant a response. Accordingly, within 14 days after the filing date of this order, the district court shall file a response. (05–73467) (cbr) (Entered: 08/15/2005)
08/26/2005		RECEIVED fee from Moshe Leichner re Appeal to Circuit Court [148–1] in amount of \$ 255.00 (Receipt # 77480) (cbr) (Entered: 09/07/2005)
09/08/2005	160	ORDER from USCA, received in District Court 09/13/05 Appellant's motion for an extension of time until 09/29/05 to file the opening brief is appeal no. 05–50164 is also construed as motion for relief from default. So construed, the motion is granted. Court ordered appellant to pay the docketing fees for appeal no. 05–50516. Appellant's retained counsel, Philip Deitch shall have one final opportunity to prosecute appeal no. 05–50516. Within 14 days after the date of this order, counsel Deitch shall pay the docketing and filing fees of \$255. to District Court. (05–50164, 05–50516) (cbr) (Entered: 09/20/2005)
09/23/2005	166	MEMORANDUM filed by USA as to Moshe Leichner in opposition to Motion for Stay of Enforcement of Judgment (dmap) (Entered: 09/29/2005)
09/23/2005	167	MEMORANDUM filed by USA as to Moshe Leichner in opposition to Ex Parte Application for Order either Appointing Counsel or Directing former Counsel to Represent Defendant (dmap) (Entered: 09/29/2005)
09/26/2005	<u>161</u>	EX PARTE APPLICATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner It is ordered defendants application for appointment of counsel or compelling former counsel to represent the defendant is set for hearing on 10/3/05 at 1:30 pm.. It is further ordered that the defendant application to permit the late filing of his opposition to the contempt proceeding is granted. (dmap) (Entered: 09/27/2005)
09/26/2005	162	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A STAY OF PROCEEDINGS filed by Moshe Leichner (dmap) (Entered: 09/28/2005)

09/26/2005	163	MOTION filed by Moshe Leichner to stay Execution of Judgement Pursuant to Rule 38(c) and Reply in Re: Contempt and Order to Show Cause (dmap) (Entered: 09/28/2005)
09/28/2005	164	RECEIPT for Transcripts of proceedings held on: 8/16/04. C/R: Nancy Smith-Wells. (sb) (Entered: 09/29/2005)
09/28/2005	165	TRANSCRIPT filed for proceedings held on 8/16/04 as to Moshe Leichner. (sb) (Entered: 09/29/2005)
10/03/2005	<u>168</u>	MINUTES OF HEARING held before Judge John F. Walter as to Moshe Leichner : It is ordered the motion stay Execution of Judgement Pursuant to Rule 38(c) and Reply in Re: Contempt and Order to Show Cause is denied [163-1] Order to Show Cause Re: Criminal Contempt is continued to 9:00 am on 11/7/05. C/R: Nancy Smith-Wells (dmap) (Entered: 10/05/2005)
10/03/2005	169	ORDER from USCA received in the district court 10/5/05, appellant's motion to consolidate appeal numbers 05-50164 and 05-50516 and for a 30 day extension of time to file the consolidated opening brief is granted. Appeal numbers 05-50164 and 05-50516 are hereby consolidated. The briefing schedule is set. (05-50164, 05-50516) (ghap) (Entered: 10/07/2005)
10/11/2005	170	APPLICATION AND ORDER For Writ of Habeas Corpus Ad Prosequendum for production of defendant for hearing on 11/7/05 as to Moshe Leichner. Ordered by Judge John F. Walter. Writ issued. (seal) (Entered: 10/17/2005)
10/24/2005	171	TRIAL MEMORANDUM filed by USA as to Moshe Leichner (dmap) (Entered: 10/25/2005)
10/28/2005	172	GOVERNMENT'S PROPOSED JURY INSTRUCTIONS filed by USA as to Moshe Leichner (Unannotated Set). (es) (Entered: 11/01/2005)
10/28/2005	173	GOVERNMENT'S PROPOSED JURY INSTRUCTIONS filed by USA as to Moshe Leichner (Annotated Set). (es) (Entered: 11/01/2005)
11/02/2005	<u>174</u>	EX PARTE APPLICATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner For An Order Re Housing at MDCLA (es) (Entered: 11/03/2005)
11/03/2005	<u>175</u>	EX PARTE APPLICATION AND ORDER filed by Judge John F. Walter Case is continued for trial set for 9:00 am on 1/24/06. (dmap) (Entered: 11/04/2005)
11/03/2005	<u>176</u>	MINUTES OF IN CHAMBERS HEARING held before Judge John F. Walter as to Moshe Leichner : Case is contineud for trial set for 9:00 am on 1/24/06. C/R: Nancy Smith-Wells (dmap) (Entered: 11/04/2005)
01/09/2006	<u>177</u>	MINUTES OF (IN CHAMBERS): FINAL STATUS CONFERENCE HEARING held before Judge John F. Walter as to Moshe Leichner: The Court will conduct a Final Status Conference in connection with the Order to Show Cause regarding: Criminal Contempt on 1/20/06 at 9:00am. C/R: Nancy Smith-Wells (roz) (Entered: 01/10/2006)
01/18/2006	178	RECORD ON APPEAL FORWARDED TO USCA 1 through 4 volumes original clerks file, 5 volumes C/R transcripts. (05-73467) (ghap) (Entered: 01/18/2006)
01/18/2006	179	RECORD ON APPEAL FORWARDED TO USCA 2 sealed documents 63 and 132. (05-73467) (ghap) (Entered: 01/18/2006)
01/20/2006	<u>180</u>	MINUTES OF HEARING held before Judge John F. Walter as to Moshe Leichner : Case is continued for status conference 9:00 am on 1/24/06. C/R: Nancy Smith-Wells (dmap) (Entered: 01/20/2006)
01/20/2006	<u>181</u>	WAIVER OF TRIAL BY JURY and WAIVER OF SPECIAL FINDINGS OF FACT (F.R.Cr.P. RULE 23 (a) AND (c) filed by Moshe Leichner. Approved by Judge John F. Walter (dmap) (Entered: 01/23/2006)
01/23/2006	182	TRIAL MEMORANDUM filed by Moshe Leichner (dmap) (Entered: 01/24/2006)
01/23/2006	183	MOTION filed by Moshe Leichner for reconsideration to stay execution of judgement pursuant to rule 38(e) and reply in re: contempt and order to show cause . Returnable on 1/24/06 at 9:00 am.. (dmap) Modified on 02/21/2006 (Entered: 01/23/2006)

		01/24/2006)
01/23/2006	184	GOVERNMENT'S MEMORANDUM REGARDING PROSECUION OF CRIMINAL CONTEMPT BY ODER TO SHOW CAUSE filed by USA as to Moshe Leichner (dmap) Modified on 02/02/2006 (Entered: 01/24/2006)
01/24/2006	<u>185</u>	MINUTES OF HEARING held before Judge John F. Walter as to Moshe Leichner : The Cout sets the briefing schedule: Government's opening brief due 2/7/06, Defendants opposition brief due 2/21/06, Government's reply brief due 2/24/06. The Court defers its ruling on he defendant's Motion for reconsideration to Stay filed on 1/23/06. Government's counsel shall file a Brief in opposition to the pending Motion for Reconsideration to Stay by 2/7/06. C/R: Leslie King (dmap) (Entered: 01/25/2006)
01/27/2006	188	RESPONSE to Court's inquiry re response to mandamus petition filed by USA as to Zvi Leichner (sm) (Entered: 02/08/2006)
01/31/2006	186	APPLICATION filed by Zvi Leichner of Non-Resident Attorney to appear in a specific case . Lodged Order (roz) (Entered: 02/07/2006)
01/31/2006	<u>187</u>	ORDER filed by Judge John F. Walter as to Zvi Leichner: granting application of Non-Resident Attorney to appear in a specific case [186-1]. (cc: all counsel) (roz) (Entered: 02/07/2006)
01/31/2006	189	CRIME VICTIM W PATRICK KENA'S NOTICE OF MOTION AND MOTION filed by Zvi Leichner to reopen sentence as authorized by Court of Appeals; Memorandum of points and authorities in support thereof; proposed order Returnable on: 2/27/06 at 9:00 a.m. Lodged Order (sm) (Entered: 02/08/2006)
01/31/2006	190	MEMORANDUM filed by Zvi Leichner in support of motion to reopen sentence as authorized by Court of Appeals; [189-1] (sm) (Entered: 02/08/2006)
02/03/2006	191	Government's memorandum regarding waiver of privilege against self incrimination filed by USA as to Moshe Leichner (vc) (Entered: 02/09/2006)
02/10/2006	192	RECEIPT for Transcripts of proceedings held on: 7/10/03. C/R: Nancy Smith-Wells. (sb) (Entered: 02/13/2006)
02/10/2006	193	TRANSCRIPT filed for proceedings held on 7/10/03 as to Moshe Leichner. (sb) (Entered: 02/13/2006)
02/15/2006	195	OPPOSITION filed by Zvi Leichner to motion of W. Patrick Kenna to reopen sentencing [189-1]. (ca) (Entered: 02/27/2006)
02/16/2006	194	RESPONSE to crime victime W. Patrick Kenna's filed by USA as to Zvi Leichner to motion to reopen sentence as authorized by Court of Appeal [189-1]. (ca) (Entered: 02/27/2006)
02/24/2006	197	MEMORANDUM filed by Moshe Leichner in opposition in re governments psotion on waiver of fifth amendment privilege. (am) (Entered: 02/28/2006)
02/27/2006	<u>196</u>	EX PARTE APPLICATION AND ORDER TO PERMIT LATE FILING OF RESPONSE TO GOVERNMENTS MEMORANDUM RE WAIVER OF 5th AMENDMENT PREIVILEGE TO RESCHEDULE DATE OF REPLY BRIEF; DECLARATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner. It is ordered that the defendants Fifth amendment memorandum, filed on 2/24/06 may be late filed on that date. The government may file its reply on or before 3/1/06. (vc) (Entered: 02/28/2006)
02/27/2006	<u>198</u>	MINUTES OF CRIME VICTIM W. PATRICK KENNA'S MOTION TO REOPEN SENTENCE. AS AUTHORIZED BY COURT OF APPEALS (1/31/06) HEARING held before Judge John F. Walter as to Zvi Leichner : Defendant Zui Leichner is not present. The Court continues that matter to 2:30 p.m. and orders the Marshals to produce the defendant at that time. motions hearing set for 2:30 2/27/06 for Zvi Leichner C/R: Smith-Wells (vc) (Entered: 02/28/2006)
02/27/2006	<u>199</u>	MINUTES OF MOTION HEARING held before Judge John F. Walter as to Zvi Leichner: granting motion to reopen sentence as authorized by Court of Appeals. [189-1] The court vacates sentence imposed on 5/23/05. Sentence hearing set for

		9:00 3/27/06 with the following briefing schedule: (1) Defense sentencing papers due 3/17/06; (2) Government's sentencing papers due 3/22/06. Defendant to remain at MDC pending sentencing by the court. C/R: Smith-Wells. (sv) (Entered: 03/01/2006)
02/27/2006		PLACED IN FILE – NOT USED: proposed order granting crime victim W. Patrick Kenna's motion to reopen sentence, as authorized by court of appeals as to Zvi Leichner (ab) (Entered: 03/01/2006)
02/27/2006		***Procedural Interval start as to Zvi Leichner moving counts to P5 (es) (Entered: 09/05/2006)
03/02/2006	<u>200</u>	MINUTES (IN CHAMBERS) held before Judge John F. Walter as to Moshe Leichner : VACATING Order directing defendnt to execute foreign bank record [147-1], [147-2]; ORDER DISCHARGING Order to Show Cause Re Ciminal Contempt [153-1], [153-2]. VACATING [174-1] Order Re Housing of defendant at Metropolitan Detention Center. C/R: No Court Reporter (ca) (Entered: 03/06/2006)
03/07/2006	202	AMENDED JUDGMENT/ORDER from USCA in Re: W. Patrick Kenna, received in District Court on 8/10/05. Petition for Writ of Mandamus to the US District Court for the Central District of California. The Court has GRANTED the petition for Writ of Mandamus filed by petitioner. Now, therefore, you are directed to take such actions as is consistent with the opinion of the Court filed 1/20/06. (05-73467) (dmap) Modified on 03/13/2006 (Entered: 03/13/2006)
03/08/2006	201	STIPULATION filed by Zvi Leichner for continuance of sentencing as to Zvi Leichner. Lodged order. (sv) (Entered: 03/10/2006)
03/10/2006		PLACED IN FILE – NOT USED: [PROPOSED] ORDER TO CONTINUE RE-SENTENCING DATE by Zvi Leichner. (roz) (Entered: 03/13/2006)
03/10/2006	<u>203</u>	MINUTES OF (IN CHAMBERS): CONDITIONAL ORDER GRANTING STIPULATION TO CONTINUE SENTENCING [FILED 3/8/06] HEARING held before Judge John F. Walter as to Zvi Leichner: On 3/8/06, the Government and Defendant Zvi Leichner filed a Stipulation to continue the sentencing of Defendant, currently scheduled for 3/27/06, to 4/10/06 at 9:00am or 4/24/06 at 9:00am. Upon review of the Stipulation, the Court hereby grants the Stipulation to continue the sentencing to 4/24/06 at 9:00am on the condition that counsel for the Government personally notify counsel for crime victim Patrick Kenna of the new sentencing date. Mr. Kramer shall then file with the Court, no later than 3/20/06, a declaration that he has conferred with Mr. Kennas counsel and that the 4/24/06 sentencing date is acceptable to both Mr. Kenna and his counsel. In the event Mr. Kenna or his counsel are unaviable for the sentencing on 4/24/06, Mr. Kramer, counsel for Defendant and counsel for Mr. Kenna shall meet and confer and stipulate to a mutually acceptabl edate for the sentencing of Defendant. Such stipulation shall be filed with the Court no later than 3/27/06. granting stipulation for continuance of sentencing as to Zvi Leichner [201-1] Sentence hearing set for 4/24/06 at 9:00am. C/R: No Court Reporter (roz) (Entered: 03/14/2006)
03/15/2006	208	RECORD on Appeal returned from 9th CCA 1 thru 4 volumes original clerks file, 5 volumes C/R transcripts, and 2 sealed documents. (cbr) (Entered: 03/22/2006)
03/17/2006	204	NOTICE OF UNDER SEAL FILING by Zvi Leichner (es) Modified on 03/21/2006 (Entered: 03/21/2006)
03/17/2006	205	SEALED DOCUMENT-EX PARTE APPLICATION for an order sealing docments ; Declaration of Michael R McDonnell (es) Modified on 03/21/2006 (Entered: 03/21/2006)
03/17/2006	206	SEALED DOCUMENT-Defendant's Position Paper At His Re-Sentencing (es) (Entered: 03/21/2006)
03/17/2006	207	ORDER Sealing Document filed by Judge John F. Walter as to Zvi Leichner : (cc: all counsel) (es) (Entered: 03/21/2006)
03/23/2006	<u>209</u>	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner: Sentence hearing continued to 5/1/06 at 9:00am. (roz) (Entered: 03/24/2006)

03/23/2006	210	Renewed Motion filed by USA as to Zvi Leichner Pursuant to USSG 5K1.1 to Impose Sentence Below Sentencing Guidelines (es) (Entered: 03/28/2006)
03/23/2006	211	RESPONSE filed by USA as to Zvi Leichner to Defendant's Position Regarding Re-Sentencing [206-1] . (es) (Entered: 03/28/2006)
04/04/2006	212	NOTICE OF DOCUMENT DISCREPANCIES AND ORDER ORDERING Ex Parte Application: Amicus Curiae Christopher Lemoine Seeks Permission of the Court to File Amicus Brief Regarding submitted by Defendant Moshe Leichner, received on 3/13/06 to be filed and processed. (es) (Entered: 04/14/2006)
04/04/2006	213	EX PARTE APPLICATION Amicus Curiae Christopher Lemoine Seeks Permission of the Court to File Amicus Brief regarding (CVRA) 18 U.S.C. 3771 filed by Christopher Lemoine. (jp,) (Entered: 04/24/2006)
04/04/2006	214	AMICUS BRIEF Filed by Amicus Curiae Christopher Lemoine(ab,) (Entered: 04/24/2006)
04/25/2006	215	CRIME VICTIM'S EX PARTE APPLICATION for Disclosure of Presentence Report. Filed by Crime Victim and Moving Party W. Patrick Kenna. Lodged Order. (jp,) (Entered: 04/25/2006)
04/25/2006	218	MOTION of Amicus Curiae, The National Crime Victim Law Institute for Leave to Participate as Amicus Curiae in support of Victim's Motion for Disclosure of Presentence Report. (jp,) (Entered: 05/01/2006)
04/26/2006	<u>216</u>	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter: Court denies ex parte application for disclosure of presentence report 215 without prejudice. Mr. Kenna shall file his motion for disclosure of defendant's presentence report by 5/15/06 and shall set the matter for hearong on 6/19/06, 9AM. Court grants motion of Amicus Curiae for leave to participate as amicus curiae in support of victim's motion for disclosure of presentence report. 213 The government is ordered to file a response to Mr. Kenna's motion and NCVLI's Brief in support of Mr. Kenna's motion by 5/30/06. Defendant shall also file any opposition to Mr. Kenna's motion by 5/30/06. Mr. Kenna shall file any reply in support of his brief by 6/12/06. On court's own motion, it continues Sentencing for 6/26/2006 09:00 AM before Judge John F. Walter. Probation Office shall prepare an addendum to defendant's presentence report to be provided to the court by 6/12/06. Counsel for government shall personally contact via telephone counsel for defendant, Mr. Kenna and NCVLI to advise them that the court has continued sentencing. Government shall also serve via facsimile, a copy of this order on counsel for Mr. Kenna and NCVLI by noon 4/28/06. Motion set for hearing on 6/19/2006 at 09:00 AM before Judge John F. Walter. Court Reporter: None. (sv) (Entered: 04/27/2006)
04/26/2006		PLACED IN FILE – NOT USED re [Proposed] Order Granting Crime Victim's Ex Parte Application for Disclosure of Presentence Report. Lodged 4/25/2006. (jp,) (Entered: 05/01/2006)
04/26/2006	219	BRIEF OF AMICUS CURIAE filed by National Crime victim Law Institute in suport of Victim Motion for Disclosure of Presentence Report. (jp,) (Entered: 05/01/2006)
04/26/2006	<u>221</u>	NOTICE OF DOCUMENT DISCREPANCIES AND ORDER by Judge John F. Walter ORDERING motion of amicus curiae submitted by Defendant Moshe Leichner, Zvi Leichner, received on 4/25/06 to be filed and processed; filed date to be the date the document was stamped Received but not Filed with the Clerk. (mrgo,) (Entered: 05/04/2006)
04/27/2006	217	DECLARATION of PEGEEN D. RHYNE Regarding Notification of Court's Order Dated April 26, 2006 <u>216</u> filed by Plaintiff USA as to Defendant Zvi Leichner. (jp,) (Entered: 05/01/2006)
04/27/2006	220	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter: Order re sentencing Letters: The attached copies of sentencing letter submitted on behalf of Zvi Leichner shall be deemed filed as of this date and maintained in the original case file. (am,) (Entered: 05/01/2006)

05/05/2006	222	NOTICE OF MOTION AND MOTION for Order Compelling defendant Moshe Leichner to Execute Consents for Release of Foreign Bank Records; Memorandum of Points and Authorities. Filed by Plaintiff USA as to Defendant Moshe Leichner. Motion set for hearing on 6/26/2006 at 09:00 AM before Judge John F. Walter. Lodged Order. (jp,) (Entered: 05/09/2006)
05/09/2006	223	NOTICE OF MOTION AND MOTION for Disclosure of presentence report Filed by Crime Victim and Moving Party W. Patrick Kenna Motion set for hearing on 6/19/2006 at 09:00 AM before Judge John F. Walter. Lodged Proposed Order. (am,) Modified on 5/15/2006 (am,). (Entered: 05/15/2006)
05/09/2006	224	MEMORANDUM in Support of MOTION for Disclosure of presentence report 223 filed by Crime Victim and Moving Party W. Patrick Kenna(am,) (Entered: 05/15/2006)
05/11/2006	225	APPLICATION AND ORDER for Writ of Habeas Corpus Ad Testificandum for Moshe Leichner to testify on 6/26/2006 at 9:00 AM. before Judge John F. Walter, by Judge John F. Walter as to Defendant Moshe Leichner. Writ Issued. (jp,) (Entered: 05/24/2006)
05/12/2006		Writ of Habeas Corpus ad Testificandum Issued as to Moshe Leichner for June 26, 2006 at 09:00 AM in case. (jp,) (Entered: 05/26/2006)
05/25/2006	227	OPPOSITION to MOTION for Disclosure 223 filed by Defendant Zvi Leichner. (vc,) (Entered: 06/06/2006)
05/30/2006	226	RESPONSE TO VICTIM PATRICK KENNA MOTION FOR Disclosure 223 OF PRESENTENCE REPORT filed by Plaintiff USA as to Defendant Zvi Leichner. (vc,) (Entered: 06/06/2006)
05/31/2006	228	ORDER of USCA filed as to Moshe Leichner re Notice of Appeal to USCA – Final Judgment, 116 , Notice of Appeal to USCA – Final Judgment, 148 , CCA #05–50164 and 05–50516. Order received in this district on 6/5/06. Appellant request a 10 day extension to file his petition for rehearing. Counsel requests that he be given until 6/9/06 to file a petition for rehearing. Government counsel has indicated that he has no opposition to this request. (dmap,) (Entered: 06/07/2006)
06/12/2006	229	Victim's Reply in Support of Crime Victim's Motion for Disclosure of Presentence Report 215 filed by Defendant Zvi Leichner. (es) (Entered: 06/17/2006)
06/15/2006	230	RESPONSE to Victim Reply in Support of Crime Victim MOTION for Disclosure of presentence report 223 filed by Defendant Zvi Leichner. (jp,) (Entered: 06/21/2006)
06/16/2006	232	EX PARTE APPLICATION for Order Directing Counsel to Appear; Declaration of Moshe Leichner filed by Defendant Moshe Leichner. Lodged Order. (jp,) (Entered: 06/26/2006)
06/16/2006	233	MEMORANDUM OF POINTS AND AUTHORITIES in Support of EX PARTE APPLICATION for Order Directing Counsel to Appear 232 filed by Defendant Moshe Leichner. (jp,) (Entered: 06/26/2006)
06/19/2006	<u>231</u>	MINUTES OF Motion Hearing held before Judge John F. Walter as to Defendant Zvi Leichner. ORDER CONTINUING SENTENCING HEARING. The Court hears oral argument on Mr. Kenna MOTION for Disclosure of presentence report 223 . For the reasons set forth on the record, the Court DENIES Mr. Kenna Motion for Disclosure of Presentence Report. At the request of Mr. Kenna, and with the consent of Defendant, the Court hereby CONTINUES Defendant Zvi Leichner Sentencing Hearing, currently on the calendar for 6/26/2006 at 09:00 AM., ti 7/17/2006 at 09:00 AM. Court Reporter: Leslie King. (jp,) (Entered: 06/21/2006)
06/23/2006	<u>234</u>	STIPULATION AND ORDER by Judge John F. Walter that the hearing on the motion of Plaintiff USA for Order Compelling defendant Moshe Leichner to Execute Consents for Release of Foreign Bank Records is CONTINUED to 7/24/2006 at 09:00 AM. (jp,) (Entered: 06/26/2006)
06/23/2006	238	ORDER of USCA filed as to Moshe Leichner re Notice of Appeal to USCA – Final Judgment 116 , Notice of Appeal to USCA – Final Judgment 148 , CCA #05–50164, 05–50516. Order received in this district on 06/26/06. Appellants

		motion for extension of time to file a petition for rehearing until 07/05/06 is granted. (cbr,) (Entered: 07/10/2006)
06/29/2006	235	RECEIPT OF REPORTERS TRANSCRIPT of proceedings as to Defendant Zvi Leichner for the following dates: 06/19/06; Court Reporter: Leslie A. King (lr,) (Entered: 07/07/2006)
06/29/2006	236	TRANSCRIPT filed as to Zvi Leichner for dates of 6/19/06 before Judge John F. Walter, Court Reporter: Leslie A. King. (lr,) (Entered: 07/07/2006)
07/03/2006	237	ORDER of USCA filed in re: W. Patrick Kenna, CCA #06-73352. Order received in this district on 07/06/06. We have received this petition for a writ of mandamus pursuant to the Crime Victims Rights Act, The government shall file a response on or before 10 am Pacific Time, Tuesday 07/04/06. The district court may also file a response if it so desires. Petitioner may file a reply on or before 1 pm Pacific Time, Tuesday 07/04/06. (cbr,) (Entered: 07/10/2006)
07/06/2006	239	ORDER of USCA filed as to Moshe Leichner re Notice of Appeal to USCA – Final Judgment, 148 , CCA #06-73352. Order received in this district on 7/11/06. Because we have issued our opinion in this case, all remaining motions are denied as moot. (lr,) (Entered: 07/25/2006)
07/17/2006	<u>251</u>	MINUTES OF RESENTENCING Hearing held before Judge John F. Walter as to Defendant Zvi Leichner. Counts 1s-2s, 3s Defendant is committed to the custody of the Bureau of Prisons for One Hundred Thirty Five (135) months. This term consists of Sixty (60) months on each of Counts 1 and 2, to run concurrently to each other, and One Hundred Twenty (120) months on Count 3, to be served partially consecutively (75 months) and partially concurrently (45 months) to Counts 1 and 2. Supervised release for Three (3) years under the terms and conditions of the US Probation Office, General Order 318 &01-05. Fines waived, pay special assessment of \$300, restitution in the total amount of \$94,796,530.04. Defendant advised of right of appeal. Court Reporter: Nancy Smith-Wells. (es) (Entered: 09/05/2006)
07/17/2006	<u>252</u>	JUDGMENT AND COMMITMENT by Judge John F. Walter as to Defendant Zvi Leichner (2), Count(s) 1s-2s, 3s, Defendant is committed to the custody of the Bureau of Prisons for One Hundred Thirty Five (135) months. Supervised release for Three (3) years under the terms and conditions of the US Probation Office, General Order 318 &01-05. Fines waived, pay special assessment of \$300, restitution in the total amount of \$94,796,530.04 Signed by Judge John F. Walter. (es) (Entered: 09/05/2006)
07/18/2006	240	ORDER of USCA filed as to Moshe Leichner; re Notice of Appeal to USCA – Final Judgment, 148 ; CCA #05-50164, 05-50516. Order received in this district on 7/20/06. Appellant's petition for rehearing received on 7/07/06, is ordered filed. The panel voted unanimously to deny the petition for panel rehearing. The petition for panel rehearing is hereby denied. (lr,) Modified on 7/25/2006 (lr,). (Entered: 07/25/2006)
07/18/2006	243	Notice of EX PARTE APPLICATION for Order substituting counsel; requiring detailed billing statement; release of balance of retainer and return of property Filed by Defendant Moshe Leichner Ex Parte Application set for hearing on 7/24/2006 at 09:00 AM before Judge John F. Walter. (es) (Entered: 07/27/2006)
07/24/2006	<u>241</u>	MINUTES OF Motion Hearing held before Judge John F. Walter as to Defendant Moshe Leichner. The case is called and counsel make their appearance. The Court confers with counsel and counsel argue. The Court Grants the government's Motion to Compel defendant Moshe Leichner to Execute Consents for Release of Foreign Bank Records 222 . The Court signs order requiring defendant to execute the consents for release of foreign bank records on or before 8/7/06. Court Reporter: Victoria Valine. (es) (Entered: 07/26/2006)
07/25/2006	<u>242</u>	ORDER Compelling defendant Moshe Leichner to Execute Consents for Release of Foreign Bank Records 222 by Judge John F. Walter as to Defendant Moshe Leichner (es) (Entered: 07/27/2006)

07/26/2006	<u>246</u>	MANDATE of the 9th CCA filed as to Defendant Moshe Leichner re Notice of Appeal to USCA – Final Judgment, 116 , Notice of Appeal to USCA – Final Judgment, 148 , CCA #05–50164; 05–50516.The appeal is Affirmed. Mandate received in this district on 7/28/06. (es,) (Entered: 08/09/2006)
07/28/2006	<u>244</u>	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter : On 7/24/06, the Court held a hearing on the Government's Motion for an Order Compelling Defendant Moshe Leichner to Execute Consents for Release of Foreign Bank Records. Defendant's counsel of record, failed to appear at the hearing. Accordingly, the Court hereby orders Mr Scalisi to show cause, in writing, no later than 8/7/06, why sanctions should not be imposed against him for failure to appear at the 7/24/06 hearing. No oral argument on this matter will be heard unless otherwise ordered by the Court. The Order will stand submitted upon the filing of the response to the Order to Show Cause. Court Reporter: not reported. (es) (Entered: 07/31/2006)
08/01/2006	247	DENIED ORDER Directing Counsel to Appear by Judge John F. Walter as to Defendant Moshe Leichner (es) (Entered: 08/14/2006)
08/01/2006	248	DENIED ORDER Substituting Counsel' Requiring A Detailed Billing Statement; Refund of Balance of Retainer; and Return of Property by Judge John F. Walter as to Defendant Moshe Leichner (es) (Entered: 08/14/2006)
08/07/2006	<u>245</u>	Written Response of Counsel Re Order to Show Cause filed by Defendant Moshe Leichner (es) (Entered: 08/09/2006)
08/07/2006	249	Written Response of Counsel Re Order to Show Cause filed by Defendant Moshe Leichner (es) (Entered: 08/14/2006)
08/14/2006	<u>250</u>	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter : The Court ordered Mr Scalisi to show cause, in writing, no later than 8/7/06, why sanctions should not be imposed against him for failure to appear at the July 24, 2006 hearing. On 8/7/06, Mr Schalisi filed a response to the Order to Show Cause. The court hereby sets a hearing for 9/11/06 @ 9:00am. Mr Scalisi is directed to either 1) appear at the hearing, or 2) file a motion to withdraw as counsel of record no later than 9/5/06. IT IS SO ORDEREDCourt Reporter: No Court Reporter. (es) (Entered: 08/15/2006)
09/05/2006	253	NOTICE OF MOTION AND MOTION to Withdraw as Attorney by Peter Scalisi. Filed by Defendant Moshe Leichner; Lodged Order (es) (Entered: 09/07/2006)
09/11/2006	<u>254</u>	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, Relieving Counsel Peter Scalisi as Attorney of Record 253 as to Moshe Leichner. (es) (Entered: 09/12/2006)
09/11/2006	<u>255</u>	MINUTES OF Motion Hearing held before Judge John F. Walter as to Defendant Moshe Leichner. Case called, and counsel make their appearance. Court hears oral argument, and for the reasons stated on the record, Mr Scalisi Motion to withdraw as counsel for Defendant Moshe Leichner is Granted. Order to show cause why attorney Peter Scalisi should not be sanctioned for failure to appear at the July 24, 2006 hearing is discharged 253 Court Reporter: Victoria Valine. (es) (Entered: 09/12/2006)
09/20/2006	256	EX PARTE APPLICATION for Order to Show Cause re Criminal Contempt; Filed by Plaintiff USA as to Defendant Moshe Leichner. Lodged Order. (mb,) (Entered: 09/25/2006)
09/25/2006		ORDER to Show Cause Re Criminal Contempt by Judge John F. Walter as to Defendant Moshe Leichner 256 (es) (Entered: 09/26/2006)
09/25/2006	<u>257</u>	ORDER by Judge John F. Walter as to Defendant Moshe Leichner to Show Cause Re Criminal Contempt (es) (Entered: 09/26/2006)
09/25/2006	258	SUPPLEMENT to EX PARTE APPLICATION for Order to Show Cause Re Criminal Contempt 256 filed by Plaintiff USA as to Defendant Moshe Leichner (es) (Entered: 09/27/2006)

10/23/2006	<u>259</u>	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter : Case called, and counsel make their appearance. Defense counsel is not present. For the reasons stated on the record, the Court continues the hearing to 10/24/06 @ 8:30AM. The hearing will be held in Courtroom 890 in the Roybal Federal Building. Court Reporter: Victoria Valine. (es,) (Entered: 10/24/2006)
10/23/2006	<u>260</u>	MINUTES OF IN CHAMBERS ORDER Discharging Order to Show Cause Re Criminal Contempt and Vacating Hearing by Judge John F. Walter: Based on the foregoing, the 9/25/06 Order to show Cause is hereby Discharged. The further hearing on the Order to show Cause, currently on calendar for 10/24/06 @ 8:30am, is Vacated. Court Reporter: No Court Reporter. (es,) (Entered: 10/24/2006)
10/23/2006	261	MEMORANDUM REGARDING SERVICE OF ORDER TO SHOW CAUSE filed by Plaintiff USA as to Defendant Moshe Leichner (ew) (Entered: 10/25/2006)
01/26/2007	<u>262</u>	EX PARTE APPLICATION for Appointment of Counsel Filed by Defendant Moshe Leichner (Attachments: # <u>1</u> Proposed Order # <u>2</u> # <u>3</u> Proposed Order) (Deitch, Philip) (Entered: 01/26/2007)
02/01/2007	<u>263</u>	NOTICE of Under Seal Filing filed by Defendant Moshe Leichner (Deitch, Philip) (Entered: 02/01/2007)
02/02/2007	<u>264</u>	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter : DENIES EX PARTE APPLICATION for Appointment of Counsel <u>262</u> Court Reporter: No Court Reporter. (pj,) (Entered: 02/12/2007)
02/02/2007	265	SEALED DOCUMENT – APPLICATION For Order Permitting Filing of Supplemental Filing Under Seal (lm,) (Entered: 02/26/2007)
02/02/2007	<u>266</u>	SEALED DOCUMENT–ORDER PERMITTING FILING OF SUPPLEMENTAL FILING UNDER SEAL. (ab,) (Entered: 03/01/2007)
02/02/2007	<u>267</u>	*NVPV* SUPPLEMENTAL FILING OF FINANCILA AFFIDAVIT BY DEFENDNAT MOSHE LEICHNER IN SUPPORT OF HIS APPLICATION FOR APPOINTMENT OF CONSE FOR POST CONVICTION PROCEEDINGS. (ab,) Additional attachment(s) added on 3/1/2007 (ab,). Modified on 8/3/2007 (ab,). (Entered: 03/01/2007)
05/18/2007	<u>268</u>	PROCESS RECEIPT AND RETURN (USM–285) (es,) (Entered: 05/22/2007)
06/25/2007	<u>270</u>	REQUEST for Hearing as to Status Conference to Set Schedules Filed by Defendant Moshe Leichner (es) (Entered: 06/29/2007)
06/29/2007	<u>269</u>	MOTION to Vacate, SetAside, Correct Sentence pursuant to 28:2255 (Civil Case 07–04128.) Filed by Defendant Moshe Leichner (Attachments: # <u>1</u> CV–17)(es) Civil case 2:07–cv–04128 opened. (Entered: 06/29/2007)
07/16/2007	<u>278</u>	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, re REQUEST for Hearing as to Status Conference to Set Schedules <u>270</u> ; Status Conference set for 7/17/2007 10:00 AM to consider the issues raied in petitioner's request for status conference before Judge John F. Walter. (ab) (Entered: 07/23/2007)
07/17/2007	<u>271</u>	MINUTES OF REQUEST TO SET SCHEDULE [fld 6/25/07] RE: DEFENDANT/PETITIONER'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. § 2255 [fld 6/25/07] held before Judge John F. Walter as to Defendant Moshe Leichner, re REQUEST for Hearing as to Status Conference to Set Schedules <u>270</u> . Court provides counsel with a copy of an anonymous letter received by the Court as to Moshe Leichner. Court and counsel discuss the content of the letter. For the reasons stated on the record, the Court orders the Governments response to Petioners Motion to Vacate, Set Aside or Correct Sentence to be filed on or before September 17, 2007. Court Reporter: Victoria Valine. (ca) (Entered: 07/18/2007)
07/17/2007	<u>277</u>	MINUTES OF REQUEST TO SET SCHEDULE (FILED 6/25/07) RE: DEFENDANT/PETITIONER MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. 2255 (FILED 6/25/07) Motion Hearing held before Judge John F. Walter as to Defendant Moshe Leichner, re MOTION to Vacate, SetAside, Correct

		Sentence pursuant to 28:2255 (Civil Case 07-04128.) <u>269</u> ; for reasons stated on the record, the Court orders the Government response to petitioner's motion to vacate, set aside or correct sentence to be filed on or before 9-17-07. Court Reporter: Victoria Valine. (ab) (Entered: 07/23/2007)
07/19/2007	<u>272</u>	PROPOSED ORDER ON RENEWED APPLICATION BY DEFENDANT MOSHE LEICHNER FOR APPOINTMENT OF COUNSEL; FOR APPOINTMENT OF PARALEGAL AND FOR ORDER FOR HIM TO REMAIN AT MDC PENDING POST CONVICTION PROCEEDINGS by Judge John F. Walter as to Defendant Moshe Leichner, re EX PARTE APPLICATION for Appointment of Counsel <u>262</u> DENIED. (ab) (Entered: 07/19/2007)
07/19/2007	<u>273</u>	EX PARTE APPLICATION for Order for Order declaring partial waiver of attorney client privilege Filed by Plaintiff USA as to Defendant Moshe Leichner (Attachments: # <u>1</u> Proposed Order)(Fettig, Derik) (Entered: 07/19/2007)
07/19/2007	<u>274</u>	EX PARTE APPLICATION for Order for unsealing financial affidavit Filed by Plaintiff USA as to Defendant Moshe Leichner (Attachments: # <u>1</u> Proposed Order)(Fettig, Derik) (Entered: 07/19/2007)
07/20/2007	<u>275</u>	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents. The following deficiency was found pfoof of service missing for non-electronically served parties: RE EX PARTE APPLICATION for Order for Order declaring partial waiver of attorney client privilege <u>273</u> (ab) (Entered: 07/20/2007)
07/20/2007	<u>276</u>	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents. The following deficiency was found proof of service of non-electronically served parties: RE EX PARTE APPLICATION for Order for unsealing financial affidavit <u>274</u> (ab) (Entered: 07/20/2007)
07/24/2007	<u>279</u>	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, re declaring partial waiver of attorney client privilege and compelling disclosure of certain attorney-client communications <u>273</u> . (es) (Entered: 07/24/2007)
07/27/2007	<u>280</u>	RESPONSE filed by Plaintiff USA as to Defendant Moshe Leichner <i>statement of confinement status and opposition to application for reconsideration of orders</i> (Fettig, Derik) (Entered: 07/27/2007)
08/01/2007	<u>281</u>	ORDER DENIED by Judge John F. Walter as to Defendant Moshe Leichner; COURT DID NOT CONSIDER THE ANONYMOUS LETTER IN ITS RULING. (ab) (Entered: 08/02/2007)
08/02/2007	<u>282</u>	NOTICE of Proposed Order Returning Petitioner to Custody of the Federal Bureau of Prisons filed by Plaintiff USA as to Defendant Moshe Leichner, Re: Response (Non-Motion) <u>280</u> (Fettig, Derik) (Entered: 08/02/2007)
08/02/2007	<u>283</u>	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, Granting EX PARTE APPLICATION for Order Unsealing Financial Affidavit of Petitioner Moshe Leichner in Support of Petitioner's Application for Appointment of Counsel <u>274</u> . (es) (Entered: 08/03/2007)
08/03/2007	<u>284</u>	ORDER Returning Petitioner Mosh Leichner to the Custody of the Federal Bureau of Prisons by Judge John F. Walter as to Defendant Moshe Leichner, (es) (Entered: 08/03/2007)
08/09/2007	<u>285</u>	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter : NOTICE TO COUNSEL OF UNDER SEAL FILING COURT Counsel are hereby notified that the court has filed an anonymous letter dated 7/31/07 and received by the court on 8/8/07 under seal; the court clerk shall provide a copy of the letter to counsel. (ab) (Entered: 08/10/2007)
08/10/2007	<u>286</u>	SEALED DOCUMENT-LETTER DATED JULY 31, 2007 FILED UNDER SEAL. (ab) (Entered: 08/23/2007)
09/14/2007	<u>287</u>	OPPOSITION to MOTION to Vacate, SetAside, Correct Sentence pursuant to 28:2255 (Civil Case 07-04128.) <u>269</u> filed by Plaintiff USA as to Defendant Moshe Leichner. (Attachments: # <u>1</u> Exhibit A# <u>2</u> Exhibit B# <u>3</u> Exhibit C# <u>4</u> Exhibit D# <u>5</u> Declaration of George Buehler# <u>6</u> Declaration of Peter Scalisi)(Fettig,

		Derik) (Entered: 09/14/2007)
09/20/2007	<u>288</u>	EX PARTE APPLICATION for Extension of Time to File defendants reply to government opposition to petition. Filed by Defendant Moshe Leichner (Attachments: # <u>1</u>)(Deitch, Philip) (Entered: 09/20/2007)
09/24/2007	<u>289</u>	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, Granting EX PARTE APPLICATION for Extension of Time to File defendants reply to government opposition to petition; IT IS ORDERED that the petitioner may have to and including 10/4/07 to file his traverse to the government's opposition to his petition under 28:2255 <u>288</u> (es) (Entered: 09/24/2007)
10/04/2007	<u>291</u>	UNOPPOSED APPLICATION for Further Extension for of Date for Filing of Traverse [Reply Brief] to Government's Return [Answer] to Petition. Filed by Defendant Moshe Leichner. Lodged Proposed Order. (jp) (Entered: 10/09/2007)
10/05/2007	<u>290</u>	DUPLICATE ORIGINAL ORDER by Judge John F. Walter as to Defendant Moshe Leichner, re EX PARTE APPLICATION for Extension of Time to File defendants reply to government opposition to petition. <u>288</u> ; GOOD CAUSE SHOWN from the unopposed application of petitioner, it is ordered that the Petitioner may have to and including October 15, 2007 to file his response to the Government's opposition to his petition for writ of habeas corpus filed by petitioner. (ab) (Entered: 10/05/2007)
10/17/2007	<u>293</u>	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, GRANTING UNOPPOSED APPLICATION. Petitioner may have and including 10/18/2007 to file his response to the government's opposition to his petition for writ of habeas corpus. (jp) (Entered: 10/22/2007)
10/18/2007	<u>292</u>	REPLY opposition MOTION to Vacate, Set Aside, Correct Sentence pursuant to 28:2255 (Civil Case 07-04128.) <u>269</u> filed by Defendant moshe leichner. (Deitch, Philip) (Entered: 10/18/2007)
10/18/2007	<u>294</u>	REPLY MEMORANDUM to the answer submitted by the respondent and REQUEST for Evidentiary Hearing filed by Defendant Moshe Leichner. (jp) (Entered: 10/22/2007)
10/19/2007	<u>295</u>	PETITIONER'S EXHIBITS in support of MOTION to Vacate, Set Aside, Correct Sentence pursuant to 28:2255 (Civil Case 07-04128.) <u>269</u> filed by Defendant Moshe Leichner. (jp) (Entered: 10/23/2007)
10/25/2007	<u>296</u>	PETITIONER'S AMENDED REPLY MEMORANDUM AND REQUEST for Evidentiary Hearing <u>294</u> filed by Defendant Moshe Leichner. (jp) (Entered: 11/03/2007)
10/25/2007	<u>297</u>	PETITIONER'S AMENDED EXHIBITS in support of PETITION under 28 USC 2255 (Civil Case 07-04128.) <u>269</u> filed by Defendant Moshe Leicher. (jp) (Entered: 11/03/2007)
10/25/2007	<u>298</u>	EXHIBITS in support of PETITION Under 28 USC 2255 (Civil Case 07-04128.) <u>269</u> filed by Defendant Moshe Leichner. (Attachments Main document Exhibits Pages 1-34: # <u>1</u> Exhibit A 1.2 Pages 35-59 # (2) Exhibit A 1.3 Pages 60-84 # <u>3</u> Exhibit A 1.4 Pages 85-109 # (4) Exhibit A 1.5 Pages 110-159 # (5) Exhibit A 1.6 Pages 160-184 # (6) Exhibit A 1-7 Pages 185-209 # (7) Exhibit A 1.8 Pages 210-234 # (8) Exhibit A 1.9 Pages 235-259 # (9) Exhibit A 1.10 Pages 260-284 # (10) Exhibit A 1.11 Pages 285-298 & Proof of Services) (jp) (Entered: 11/03/2007)
10/25/2007	<u>300</u>	ERRATA SHEET RE: PETITIONER'S REPLY MEMORANDUM AND REQUEST for Evidentiary Hearing <u>294</u> filed by Defendant Moshe Leichner. (jp) (Entered: 11/03/2007)
11/01/2007	<u>299</u>	ORDER by Judge John F. Walter DENYING Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 (Civil Case 07-04128.) <u>269</u> . (jp) (Entered: 11/03/2007)
11/01/2007	<u>301</u>	JUDGMENT by Judge John F. Walter as to Defendant Moshe Leichner, Pursuant to this Courts November 1, 2007 Order denying MOTION to Vacate, Set Aside,

		Correct Sentence pursuant to 28:2255 (Civil Case 07-04128) <u>269</u> . IT IS NOW, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED, that the above-captioned action is dismissed with prejudice. (jp) (Entered: 11/06/2007)
11/30/2007	<u>302</u>	NOTICE OF APPEAL to Appellate Court filed by Defendant Moshe Leichner re Miscellaneous Order, <u>301</u> Filed on: 11/1/07; Entered on: 11/6/07; Certificate of Appealability Pending. cc: Philip Deitch (car) (Entered: 12/08/2007)
11/30/2007	<u>303</u>	NOTIFICATION OF APPEAL NOTIFICATION form issued regarding Notice of Appeal to USCA – Final Judgment <u>302</u> as to Defendant Moshe Leichner. (car) (Entered: 12/08/2007)
11/30/2007	<u>305</u>	NOTICE of Civil Appeal Docketing Statement filed by Defendant Moshe Leichner, Re: Notice of Appeal to USCA – Final Judgment <u>302</u> (dmap) (Entered: 12/18/2007)
12/10/2007	<u>304</u>	APPLICATION FOR ISSUANCE OF Certificate of Appealability to USDC by Petitioner Moshe Leichner (car) (Entered: 12/12/2007)
12/20/2007	<u>306</u>	ORDER by Judge John F. Walter as to Defendant Moshe Leichner denying Petitioner's Application for Issuance of Certificate of Appealability re: Petition for Certificate of Appealability <u>304</u> (dmap) (Entered: 12/26/2007)
12/26/2007	<u>307</u>	CERTIFICATE OF RECORD Transmitted to USCA as to Defendant Moshe Leichner, re Petition for Certificate of Appealability <u>304</u> (dmap) (Entered: 12/26/2007)
12/26/2007		Transmission of Notice of Appeal and Docket Sheet as to Moshe Leichner to US Court of Appeals re Petition for Certificate of Appealability <u>304</u> (dmap) (Entered: 12/26/2007)
11/14/2008	<u>308</u>	ORDER of USCA filed as to Moshe Leichner re Notice of Appeal to USCA – Final Judgment <u>302</u> , CCA #08-55132. Order received in this district on 11/14/08. The request for certificate of appealability is denied. (cbr) (Entered: 11/17/2008)
09/02/2009	<u>309</u>	MOTION Seeking Relief from a Final Judgment Pursuant to Rule 60(b). Filed by Defendant Moshe Leichner. (jp) (Entered: 09/04/2009)
09/08/2009	<u>310</u>	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter as to Defendant Moshe Leichner : Government's Response to Motion due by 9/28/2009; Defendant's reply due 10/13/09. (se) (Entered: 09/08/2009)
09/23/2009	<u>311</u>	MOTION to Appoint Counsel to Assist Petitioner with the Rule 60(b) Proceedings and Renewed Request for Evidentiary Hearing Filed by Defendant Moshe Leichner. (se) (Entered: 09/24/2009)
09/28/2009	<u>312</u>	OPPOSITION to MOTION for Order for Seeking Relief from a Final Judgment Pursuant to Rule 60(b) <u>309</u> filed by Plaintiff USA as to Defendant MOSHE LEICHNER. (Attachments: # <u>1</u> EXHIBIT A, # <u>2</u> EXHIBIT B, # <u>3</u> EXHIBIT C, # <u>4</u> EXHIBIT D, # <u>5</u> MOSHE LEICHNER PROOF OF SERVICE)(Fettig, Derik) (Entered: 09/28/2009)
09/30/2009	<u>313</u>	MINUTES (IN CHAMBERS) by Judge John F. Walter: ORDER DENYING <u>309</u> Motion for Order for Seeking Relief from a Final Judgment Pursuant to Rule 60(b) as to Moshe Leichner (1); ORDER DENYING AS MOOT <u>311</u> Motion to Request Appointment of Counsel to Assist Petitioner with the Rule 60(b) Proceedings and Renewed Request for Evidentiary Hearing as to Moshe Leichner (1). Because Defendant has not requested or been granted permission by the Ninth Circuit to file a successive motion under 28 USC 2255, this Court lacks jurisdiction over Defendant's motion. (See attached Minute Order for further information). (jp) (Entered: 10/01/2009)
10/19/2009	<u>314</u>	MOTION TO REQUEST for Extension or Enlargement of Time to Resonse to the Government's Opposition to Defendant's Moshe Leichner's Motion Pursuant to FRCP 60(b); Memorandum of Points and Authorities; Exhibits. Filed by Defendant Moshe Leichner. (jp) (Entered: 10/22/2009)

06/16/2010	<u>315</u>	NOTICE OF APPEAL to Appellate Court filed by Defendant Moshe Leichner re Order on Motion, <u>313</u> Filed on: 9/30/09; Entered on: 10/1/09; cc: Moshe Leichner, Attorney Philip Deitch. (car) Modified on 6/16/2010 (car). (Entered: 06/16/2010)
07/08/2010	<u>316</u>	NOTIFICATION by Circuit Court of Appellate Docket Number 10-56087 as to Defendant Moshe Leichner, 9th CCA regarding Notice of Appeal to USCA - Final Judgment <u>315</u> . (dmap) (Entered: 07/08/2010)
07/20/2010	<u>317</u>	Order by Judge John F. Walter The Certificate of Appealability is DENIED for the following reason(s). There has been no substantial showing of the denial of a constitutional right. Notice of Appeal to USCA - Final Judgment <u>315</u> as to Defendant Moshe Leichner. (lr) (Entered: 07/21/2010)
01/26/2012	<u>318</u>	ORDER of USCA filed as to Defendant Moshe Leichner re Notice of Appeal to USCA <u>315</u> CCA #10-56087. The request for a certificate of appealability is denied. Order received in this district on 1/26/2012. (dmap) (Entered: 01/27/2012)

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

Amy Baron-Evans¹
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 allocution at one defendant’s sentencing eliminates the need to allow victim allocution 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. Marcelllo*, 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.