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OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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**To: Hon. Lee H. Rosenthal, Chair  
Standing Committee on Rules of Practice and Procedure**

**From: Hon. Richard C. Tallman, Chair  
Advisory Committee on Federal Rules of Criminal Procedure**

**Subject: Report of the Advisory Committee on Criminal Rules**

**Date: May 11, 2009 (revised June 2009)**

## **I. Introduction**

The Advisory Committee on Federal Rules of Criminal Procedure (“the Committee”) met on April 6-7, 2009 in Washington, D.C., and took action on a number of proposed amendments to the Rules of Criminal Procedure.

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This report presents a number of action items:

- (1) approval to transmit to the Judicial Conference published amendments to two rules pertaining to victims, Rules 12.3 and 21;
- (2) approval to transmit to the Judicial Conference published amendments to Rules 15<sup>1</sup> and 32.1; and

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<sup>1</sup>The Supreme Court declined to approve the proposed amendment to Criminal Rule 15. Because the proposed amendment to Rule 15 will not be transmitted to Congress, the discussion of the amendment is not included in the report.

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## **II. Action Items—Recommendations to Forward Amendments to the Judicial Conference**

### **A. Rules Pertaining to Victims**

The first amendments the Committee recommends for transmission to the Judicial Conference pertain to victims. The Committee recommends that two of the three published amendments be transmitted to the Judicial Conference. It does not recommend transmittal of the proposed amendment to Rule 5.

The Committee received written comments and heard testimony from witnesses who opposed all of the amendments.

Some of the arguments were applicable to all of the amendments. The Committee was urged to remain consistent with its own policy of incorporating, but not going beyond, the requirements of the Crime Victims' Rights Act (CVRA) and leaving other issues to case-by-case development that may provide a basis for later rule making. The Committee's first victim-related rules have just gone into effect, and the Committee was urged by some groups to observe the experience under these rules before making further changes. Since the recent comprehensive review of the implementation of the CVRA by the Government Accountability Office (GAO) found no problems with the judicial implementation of the Act, opponents characterized the proposed amendments as premature. Although this argument applies to some degree to all three of the rules, it has the greatest bite in connection with the proposed amendment to Rule 12.3, which parallels an amendment to Rule 12.1 that went into effect December 1, 2008.

Some opponents of the amendments also expressed concern that the promulgation of rules not necessary to implement the CVRA might provide the basis for the proliferation of mandamus actions that would tie up the courts. Alternatively, the proposed rules might cause district courts to bend over backwards to avoid rulings that could generate mandamus actions, and by so doing prejudice the rights of defendants, the government, or witnesses in ways not amendable to appellate correction.

Comments pertaining to specific amendments are addressed below.

#### **1. ACTION ITEM—Rule 12.3 (Notice of Public Authority Defense)**

The proposed amendment parallels the amendment to Rule 12.1 (Notice of Alibi Defense) that is scheduled to go into effect on December 1, 2009. Both are intended to implement the CVRA, which states that victims have the right to be reasonably protected from the accused and to be treated with respect for their dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when a public authority 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



- 21                           (i) order the government to provide the  
22   information in writing to the defendant  
23   or the defendant's attorney; or  
24                           (ii) fashion a reasonable procedure that  
25   allows for preparing the defense and  
26   also protects the victim's interests.

27   \* \* \* \* \*

28                   **(b) Continuing Duty to Disclose.**

29                   **(1) In General.** Both an attorney for the government  
30   and the defendant must promptly disclose in  
31   writing to the other party the name of any  
32   additional witness — and the; address, and  
33   telephone number of any additional witness other  
34   than a victim — if:

35   († A)     the disclosing party learns of the  
36   witness before or during trial; and

37   (‡ B)     the witness should have been  
38   disclosed under Rule 12.3(a)(4) if  
39   the disclosing party had known of  
40   the witness earlier.

41                   **(2) Address and Telephone Number of an Additional**  
42   Victim-Witness. The address and telephone  
43   number of an additional victim-witness must not

44 be disclosed except as provided in Rule

45 12.3(a)(4)(D).

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### COMMITTEE NOTE

**Subdivisions (a) and (b).** 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 a public-authority 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 a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

The Federal Magistrate Judges Association endorsed the proposal, which was opposed by the Federal Defenders and the National Association of Criminal Defense Lawyers (NACDL). The comments of Federal Defenders and NACDL parallel the arguments made in opposition to the amendment to Rule 12.1. The central concern is that the amendment requires the defendant to disclose the names and addresses of the witnesses who will support his public authority defense without any guarantee of reciprocal discovery of all of the government's rebuttal witnesses. The opponents argue that the amendment would violate due process under *Wardius v. Oregon*, 412 U.S. 470 (1973), which requires discovery to be a two-way street. Moreover, they urge that amendment has the same constitutional defect as restrictions on cross examining a government witness concerning his real name and address. Finally, they argue that the proposed amendment makes two unwarranted assumptions: that defendants generally pose a threat to victims who would testify concerning the defendant's claim of a public authority defense, and that defense counsel also pose a threat.

Although these arguments were presented very effectively in the written statements and testimony, they were, in effect, considered and rejected when Rule 12.1 was approved. One witness urged that Rule 12.3 is distinguishable from Rule 12.1 because victims would not be witnesses in cases raising a public authority defense. The Committee was not persuaded by this argument. Although there are not likely to be a large number of situations where the rule would apply, a



Although the Federal Magistrate Judges Association endorses the proposal, the remaining comments by the Federal Defenders, the National Association of Criminal Defense Lawyers (NACDL), and Mr. Alex Zipperer oppose the amendment. The comments opposing the amendment correctly observe that nothing in the CVRA compels the adoption of the amendment. Although the CVRA restricts the court's authority to exclude victims who are otherwise able to attend proceedings, the Act neither gives non-testifying victims a right to have the proceedings held at a place convenient for them nor requires the government to transport victims to the place of the trial.

NACDL argued that the proposed amendment in effect creates such a substantive right, and in so doing exceeds the authority of the Rules Enabling Act as well as the policy judgment expressed in the enactment of the CVRA. Opponents of the amendment also expressed concern that the proposed amendment improperly equates the convenience of the non-testifying victims with the convenience of the defendant, the prosecution, and the witnesses. This could result in holding the trial in a location that requires substantial travel, or imposes other significant costs on the parties and witnesses who are required to attend. In order to avoid a time-consuming mandamus challenge, the district court might actually give greater weight to the convenience of those who claim the status of non-testifying victims than to the interests of the defendant, the government, or the witnesses, because they do not have the ability to seek mandamus to enforce their preferences.

The Committee did not find these arguments persuasive. The rule comes into play if and only if a defendant moves to transfer the case. At that point the court "may" transfer the case, which makes the court's discretion clear. This point is further emphasized in the Committee Note, which states that "[t]he court has substantial discretion to balance any competing interests." This emphasis on the court's discretion was intended to allay any fear that mandamus would be a realistic concern. (Indeed, it was unclear how mandamus could be properly be employed to enforce a provision of the Federal Rules, when the statutory right to mandamus applies to the rights afforded by the CVRA. *See* 18 U.S.C. § 3771(d)(3).) Finally, Committee members noted that the rule already allows the court to consider "the interest of justice," which might in some cases be thought to include the interest of victims.

The Committee voted, with two dissents, to forward the proposed amendment to the Standing Committee.

***Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 21 be approved as published and forwarded to the Judicial Conference.***

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### Committee Note

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill-suited to proceedings involving the revocation of probation or supervised release. See *United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law. See, e.g., *United States v. Loya*, 23 F.3d 1529, 1530 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).<sup>2</sup>

Four comments were received in response to the publication of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Magistrate Judges Association endorses the proposal, but the other three comments were critical. Although one comment criticized the standard of clear and convincing evidence as “impossibly high,” this standard is mandated by statute. The current rule requires the court to follow 18 U.S.C. § 3143(a), subsection (1) of which requires detention unless “the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released ....”

The Federal Public Defenders (whose views were also endorsed by the National Association of Criminal Defense Lawyers) did not challenge the clear and convincing evidence standard, but they opposed the rule as drafted and sought two significant changes:

- (1) a preliminary requirement that the court find probable cause before detaining an individual under this provision, and

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<sup>2</sup>The Standing Committee determined that these cases should be deleted from the note to conform to the pertinent style conventions.

(2) a requirement that the government bear the burden of proof in cases in which the Sentencing Commission's policy statements provide for modification of the term or conditions of supervised release (rather than imprisonment).

The Committee rejected the proposal to add a preliminary requirement that the court find probable cause. The present rule was intended to satisfy due process by requiring a finding of probable cause at a preliminary hearing which must be held "promptly," and Rule 32.1(a)(1)-(6) sets forth a procedure for an initial appearance that would occur before – and not duplicate the function of – the preliminary hearing. Rule 32.1 was amended in 2002 to add the provisions concerning the initial appearance. The 2002 Committee Note indicates the Committee's awareness that some districts were not conducting an initial appearance. The Note states that under the new language an initial appearance is required, although a court may combine the initial appearance with the preliminary hearing if that can be done within the accelerated time requirement of Rule 32(a)(1) ("without unnecessary delay"). The purpose of the initial appearance is to provide the defendant with the advice required in Rule 32.1(a)(3), and to make an initial decision on release or retention under Rule 32.1(a)(6). As noted below, under Rule 32.1(a)(6) the person has the burden of establishing that he is not a flight risk or a danger to any other person or the community. Unless an individual court chooses to combine the initial appearance with the preliminary hearing, they serve distinct purposes.

Additionally, 18 U.S.C. § 3606 provides another important safeguard that occurs even earlier in the process. This section provides the authority for the arrest of a probationer or person on supervised release if there is probable cause to believe that he or she has violated a condition of the probation or release. Where the arrest of a person on probation or supervised release is made pursuant to a warrant, a judicial officer will necessarily have made a finding of probable cause pursuant to § 3606 (and the Fourth Amendment) before the arrest is made.

The Committee also declined to add a provision to the amendment that would shift the burden of proof in cases in which the applicable Guideline policy statement would not provide for imprisonment. The text of 18 U.S.C. § 3143(a)(1) places the burden of proof on the defendant except in cases when no imprisonment is provided for in the applicable "guideline" promulgated by the Sentencing Commission. The Commission has not promulgated any guidelines concerning supervised release, though it has promulgated policy statements. The Commission determined that policy statements rather than guidelines "provided greater flexibility to both the Commission and the courts." U.S.S.G. Ch. 7, Pt.A.3 (a). The court in *United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007), found that the language of § 3143(a)(1) was not applicable in the absence of a guideline.

In this context there is a significant difference between guidelines — to which 18 U.S.C. § 3143(a)(1) refers — and the policy statements concerning revocation. At least seven circuits have held that the Commission intended the policy statements of Chapter Seven to be only recommendations that are not binding on the courts. *See, e.g. United States v. O'Neill*, 11 F.3d 292, 301 n.11 (1st Cir. 1993) (noting that the policy statements of Chapter 7 "are prefaced by a special discussion making manifest their tentative nature" and "join[ing] six other circuits in recognizing Chapter 7 policy statements as advisory rather than mandatory"); *United States v. Hooker*, 993 F.2d

898, 901 (D.C. Cir. 1993) (stating “it seems contrary to the Commission’s purpose to treat Chapter VII policy statements, which were adopted to preserve the courts’ flexibility, as binding.”). Courts have employed their discretion to order imprisonment for lower grade offenders even when the policy statements would provide only for lesser alternatives. *See, e.g., United States v. Redcap*, 505 F.3d 1321 (10th Cir. 2007) (supervised release revoked for violation of drinking alcohol, and sentence imposed exceeded that recommended in the policy statement); *United States v. Moulden*, 478 F. 3d 652 (4th Cir. 2007) (probation revoked for defendant who argued that his violations were "technical" and "only" Grade C violations); *United States v. Crudup*, 461 F.3d 433 (4th Cir. 2006) (supervised release revoked and maximum sentence imposed for Grade C violations). Accordingly, the Committee determined that it would not be appropriate to rely upon the policy statement in Chapter 7 to define a class of cases in which the government would have to bear the burden of proving risk of flight or danger under Rule 32.1(a)(6).

***Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32.1 be approved as published and forwarded to the Judicial Conference.***

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13 government intends to rely on to oppose the  
14 defendant's public-authority defense.

15 (D) Victim's Address and Telephone Number. If  
16 the government intends to rely on a victim's  
17 testimony to oppose the defendant's  
18 public-authority defense and the defendant  
19 establishes a need for the victim's address  
20 and telephone number, the court may:

21 (i) order the government to provide the  
22 information in writing to the defendant  
23 or the defendant's attorney; or

24 (ii) fashion a reasonable procedure that  
25 allows for preparing the defense and  
26 also protects the victim's interests.

27 \* \* \* \* \*

28 **(b) Continuing Duty to Disclose.**



**COMMITTEE NOTE**

**Subdivisions (a) and (b).** 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 a public-authority 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 a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

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**CHANGES MADE TO PROPOSED AMENDMENT  
RELEASED FOR PUBLIC COMMENT**

No changes were made after the amendment was released for public comment.

**Rule 21. Transfer for Trial**

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**(b) For Convenience.** Upon the defendant's motion, the

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court may transfer the proceeding, or one or more

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counts, against that defendant to another district for the

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convenience of the parties, any victim, and the

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witnesses, and in the interest of justice.

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**COMMITTEE NOTE**

**Subdivision (b).** This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

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**CHANGES MADE TO PROPOSED AMENDMENT  
RELEASED FOR PUBLIC COMMENT**

No changes were made after the amendment was released for public comment.

**Rule 32.1. Revoking or Modifying Probation or Supervised Release**

1 **(a) Initial Appearance.**

2 \* \* \* \* \*

3 **(6) Release or Detention.** The magistrate judge may  
4 release or detain the person under 18 U.S.C.  
5 § 3143(a)(1) pending further proceedings. The  
6 burden of establishing by clear and convincing  
7 evidence that the person will not flee or pose a  
8 danger to any other person or to the community  
9 rests with the person.

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**COMMITTEE NOTE**

**Subdivision (a)(6).** This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass.

2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence.

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**CHANGES MADE TO PROPOSED AMENDMENT  
RELEASED FOR PUBLIC COMMENT**

No changes were made after the amendment was released for public comment.