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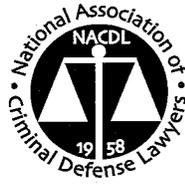
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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

January 9, 2007

**STATEMENT OF PETER GOLDBERGER, ESQ., ON BEHALF OF  
 THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
 In Connection with Testimony To Be Offered  
 Before the Advisory Committee on Criminal Rules  
 on January 26, 2007, in Washington, DC, Concerning  
 Proposed Amendments Published for Comment in August 2006**

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**Members of the Committee:**

My name is Peter Goldberger. I am an attorney in private practice. My office is in Ardmore, Pennsylvania, near Philadelphia. For more than ten years, I have co-chaired the Committee on Federal Rules of Procedure of the National Association of Criminal Defense Lawyers, and in that capacity have authored or co-authored numerous sets of comments submitted to this Committee. I have only appeared before you to testify once before, however. The NACDL, as you may know, has nearly 13,000 members; in addition, NACDL's 79 state and local affiliates, in all 50 states, comprise a combined membership of more than 30,000 private and public defenders. My own background is this: After graduating from law school in 1975, I had the honor to clerk for the late, beloved Judge Edward R. Becker. I then served as an Assistant Federal Public Defender and as a professor of law for a number of years. Since 1986 I have maintained my own boutique law practice, handling almost exclusively federal sentencings and criminal appeals throughout the nation. My committee co-chair, and the co-author of this statement, is William J. Genego, of Santa Monica, California. Bill is a trial and appellate litigator in private practice, and was formerly a professor at the University of Southern California Law School.

I will limit my comments today to the proposed rules designed to implement the Crime Victims Rights Act ("CVRA") and the proposed amendment to Rule 29 on mid-trial judgments of acquittal. We will be submitting our complete, formal written comments on or before the February 15, 2007, deadline.

"LIBERTY'S LAST CHAMPION"

## VICTIMS' RIGHTS AMENDMENTS

To start with the CVRA amendments, I begin with some general observations. The challenge posed to this Committee by the CVRA is extraordinarily difficult. The statute declares a set of eight "rights" for a special class of witnesses in criminal cases. To confer special rights on this category of witnesses is not only virtually unprecedented in the thousand year history of criminal law, it is also essentially contrary to a principal advance that our civilization made between nine hundred and two hundred fifty years ago in defining the criminal process as a legal dispute between the accused and the sovereign, rather than as a private dispute between individuals. Moreover, the CVRA declares these novel rights in terms which are often vague, undefined, or even contradictory to established procedural norms.

NACDL firmly believes that the entire "victims rights" concept is a cat's paw for novel infringements on the rights of the accused, most notably the presumption of innocence. After all, the very definition of "victim" presupposes either a determination or an assumption, effective from the moment of the defendant's initial appearance and sometime even before then, that a crime was in fact committed (if not by whom) and that this person was in fact harmed by that crime. The assignment of "rights" to a "victim" has the inevitable effect of upsetting the "balance of advantage" which our system has developed to maximize the prospect of simultaneously achieving fair trials and reliable outcomes in criminal case. All such laws are therefore at least suspect, if not illegitimate. That said, we recognize that 18 U.S.C. § 3771 is currently the law, and that the "rights" articulated there must be implemented procedurally not only by prosecutors, as provided in § 3771(c)(1) and (f), but also by judges. Id.(b)(1) ("In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)."<sup>1</sup>). Judicial implementation of the Act is properly governed by Rules of Procedure. The Rules Enabling Act requires that these Rules not create, modify or enlarge any substantive right, such as those conferred by the Act. See 28 U.S.C. § 2072(b).

Our criminal justice system is built on the model of a bipartite adversary process between the sovereign and the accused. The Constitution presupposes this model, and declares at least twenty separate rights of accused persons which are held against the State. Federal criminal defendants have additional rights created by statute. Rules of Procedure to implement the CVRA must not infringe any of these substantive rights of defendants. 28 U.S.C. § 2072(b). At the same time, to the extent that certain provisions of the CVRA are procedural in nature, the Judicial Conference is empowered by § 2072(b) to supersede any

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<sup>1</sup> Many of these "rights," however, are virtually incapable of judicial assurance, or by their nature do not arise "[i]n any court proceeding." No practice or procedure could be designed that would permit a judge to "ensure" that a "victim" receive notice of a parole proceeding, for example, or of a prisoner's escape. Id. § 3771(a)(2). Moreover, it is far from clear how a court could "assure" a "victim" the "reasonable right [sic] to confer with the attorney for the Government" during a court proceeding, id.(a)(5), without violating the separation of powers by interfering with prosecutorial discretion about how to present the case.

which appear to be ill-advised or poorly framed.<sup>2</sup> NACDL's comments are made with these basic concepts in mind.

Rule 1(b). The proposed amendments begin with an addition to Rule 1(b). It is right that "victim" be defined in the Rules no more broadly than as defined in the first sentence of 18 U.S.C. § 3771(e). (This statement puts the term in quotation marks not to imply doubt that there are people victimized by crime, but to make clear each time I use it that I mean the term as defined and the person assigned that status in the case.) The rest of § 3771(e), having to do with representatives of deceased, minor, and incapacitated "victims," however, is not a definition; that idea belongs under the heading "Who May Assert Rights."

As for the second sentence of proposed Rule 1(b)(11), it is factually untrue that a "person accused of an offense is" never "a victim of that offense."<sup>3</sup> The difficulty here arises because of the fundamental imbalance in the CVRA -- the rights (as defined) are given to a person who is, in fact, a victim of a crime, not simply to the complainant or other person alleged to be the victim, whereas the person whose rights are affected is not a person proven to be the perpetrator of the crime, but rather the person accused of being the criminal, and who is presumed to be innocent. The second sentence of the proposed definition, if retained at all, should be amended to put the word "victim" in quotation marks, and the words "as that term is used in these Rules" should be added.

Rule 60. The conferring of "rights" on the "victim" comes, in general, at the expense of the defendant. Thus, due process requires that a provision be added to these Rules for a factfinding hearing, to be held whenever the proper labeling of a person as "victim" is in dispute, that is, where there is disagreement about the entitlement of that person to the privileges associated with the special status of "victim." Depending upon the circumstances of the particular case, it may be the defendant, the prosecutor, or even a putative "victim" who

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<sup>2</sup> The procedural provisions set forth in the last two sentences of 18 U.S.C. § 3771(b) provide an obvious example: "Before 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. The reasons for any decision denying relief under this chapter shall be clearly stated on the record." Each of the underlined terms or phrases is bound to give rise to wasteful and mischievous litigation.

<sup>3</sup> Circumstances where the (perhaps wrongly) accused person may in fact be a victim arise fairly often. The Note cites a scenario in fraud cases where this can occur. It also happens, for example, to abused girlfriends of drug dealers, robbers, and so forth, who may be charged with aiding and abetting, and in cases where self-defense is the issue. That the accused defendant was actually a victim is a common claim in the prosecution of corporate and other organizational defendants as well, where criminal liability is vicarious and arises out of respondeat superior.

raises this issue. The hearing must determine two facts, under the statutory definition<sup>4</sup>: first, whether a federal offense was in fact committed, and second, whether the putative "victim" is a person who was "directly and proximately harmed as a result of the commission of" that offense.<sup>5</sup>

To accomplish these changes, the Committee's proposed Rule 60(b)(2) ("Who may assert rights") should be amended not only by importing language referencing "victims'" representatives, but also to add the following:

If either the defendant or the government disputes the claim by any person to be a "victim" entitled to assert rights under § 3771(a), or if any person opposes the government's naming that person as a "victim," the court shall conduct an evidentiary hearing at which the person asserting the claim (or the government, if it supports the assertion) must prove, by clear and convincing evidence, whichever (or both) of these propositions is disputed -- (A) that a federal crime has been committed, and (B) that the person claiming, or for whom are being claimed, the rights of a "victim" was directly and proximately harmed by the commission of that offense. Rule 26.2(a)-(d) and (f), and the Federal Rules of Evidence, apply at such a hearing.

Note that we suggest use of the phrase "rights under § 3771(a)" rather than the Committee's proposed "rights under these rules." The rights of a "victim" are of necessity conferred by and defined in the CVRA, not in the Rules of Procedure. The rights which exist "under these Rules" are procedural rights which the Rules themselves establish. The phrase "rights under these rules" should be replaced in each place it appears.

Proposed Rule 60(a)(1) would place on the attorney for the government the duty to notify any "victim" of a public court proceeding, as is a "victim's" right under § 3771(a)(2). NACDL agrees that this is the best way to implement the court's obligation under § 3771(b)(1) to "ensure" that any "victim" is "afforded" this right. The court's ECF/CMS and PACER systems are ill-equipped to provide such notice; the government, by contrast, has already computerized it. See [www.notify.usdoj.gov](http://www.notify.usdoj.gov) ("Victim Notification System").

Proposed Rule 60(a)(2) merely repeats § 3771(a)(3) and part of § 3771(b)(1). Most of it restates substantive rights and does not belong in the Rules of Procedure. The only appropriately procedural aspect is the last sentence (requiring a clear statement on the record of reasons for any exclusion of a "victim"), but NACDL suggests that to use the language of the statute here is ill-advised. The Judicial Conference should instead utilize its power under

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<sup>4</sup> The determination, we would say, should be made by clear and convincing evidence, since the effect is to impinge upon the right of the accused to defend himself or herself, as well as because Congress itself chose that standard for decisions under the CVRA. See § 3771(a)(3).

<sup>5</sup> This in turn has three elements: whether the person has suffered some cognizable "harm"; whether the harm resulted from the offense that the court has found to have been committed; and whether the causation was both direct and proximate.

the Rules Enabling Act to refine the statutory provision. All that need be said in Rule 60(a)(2) is that the court shall articulate its reasons for any decision on a motion under § 3771(a)(3).<sup>6</sup> To require that the reasons be "on the record" is redundant of general legal requirements, and to require specially that the statement be "clear" is insulting to the judiciary. What the proposed Rule 60(a)(2) lacks, however, is a procedural framework for making the determination required for any decision to exclude a "victim" under § 3771(a)(3). In this regard, NACDL adopts the thoughtful suggestions of the Federal Public and Community Defenders.

Proposed Rule 60(a)(3) similarly repeats language from 18 U.S.C. § 3771(a)(4) which articulates a "victim's" right "to be reasonably heard" on the subjects of "release, plea, or sentencing" whenever those matters are decided "at a public proceeding." Again, a restatement of substantive law does not belong in a Rule of Procedure. Here, the procedural aspect is the statute's restriction that the right to be heard must be afforded "at any public proceeding in the district court." This is an unwarranted restriction on the court's discretion to manage and control such proceedings. The rule should be revised to read:

At or before any public proceeding in the district court concerning release, plea, or sentencing, the court shall adopt and follow appropriate procedures which afford any victim the right to be reasonably heard. Any such procedures must afford the defendant notice and prompt disclosure of a copy of any written submission from a victim and a fair opportunity to respond.

The Committee Note should expand on the nature of this discretion. It should explain that the court is authorized to determine that it will hear the "victim" only in writing. Even when the court permits an oral presentation, it must have authority to control the format, length and tenor of those remarks. In affording the "right to be reasonably heard," the court may properly require a "victim" to respond to questions from the "victim's" counsel (or from the prosecutor) and defense counsel rather than to speak ad libitum; to testify under oath; to limit the presentation to material topics; to omit legal argument (except as pertains to the scope of rights under § 3771 and these Rules); not to repeat what has already been covered in a written submission; to refrain from personal abuse or vilification; to stay within a time limit; or any other "reasonable" restriction designed to ensure a fair proceeding and a decision based only on considerations made relevant by the governing body of substantive law. The court only acts reasonably if it requires any presentation to be made at a time and in a manner which allows the defendant prompt access to the "victim's" statement and a fair opportunity to prepare for and respond at the hearing.

Proposed Rule 60(b) should also be modified to specify that rights under § 3771(a) must be claimed in the manner specified in Rules 47 and 49, as if the "victim" were a party, that is, by motion, in writing if practicable, and with notice to and service upon the parties. The statute itself refers to "motions" as the mechanism for invoking CVRA rights. 18 U.S.C.

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<sup>6</sup> NACDL agrees with the Committee's apparent conclusion that the last sentence of § 3771(b) may be read to refer only to motions under subsection (a)(3).

§ 3771(d)(3). An inspection of some of the early decisions under § 3771 suggests that some such claims have been decided without notice to the defendant and without affording the defense an opportunity to be heard, which would seem to violate due process. As these cases show, the defendant's rights are very much at issue and at risk. To allow the defendant to participate in the adjudication of a claim of rights under § 3771(a) does not violate the restriction that the accused "may not obtain any form of relief under this chapter," properly construed.

NACDL has had the opportunity to review drafts of the proposed alternative text for Rule 60 that has been prepared by the Federal Community and Public Defenders, and we endorse their proposed draft, in preference to the draft circulated by the Committee for comment. It makes a number of constructive suggestions for clarification and enhanced fairness.

Rule 12.1. The proposed amendment to Rule 12.1 (notice of alibi) raises the question of how the Committee should implement the rights of a "victim" "to be reasonably protected from the accused," 18 U.S.C. § 3771(a)(1), and "to be treated with respect for ... privacy." Id.(a)(8). Most accused persons pose no threat to any witness against them, including victims. Quite simply, it is not "reasonable" to restrict all defendants' opportunity to investigate and prepare the case on the basis that a victim-witness has a right to "protection" unless, in fact, protection is required in that particular case.

For this reason, the Rule should not provide for withholding the address and telephone number of a victim-witness when other witnesses' addresses and numbers are disclosed, unless the "victim" or the attorney for the government can establish a special need for secrecy. Even then, the court should be able to consider disclosure of the information to defense counsel under a protective order restricting the further dissemination of that information. The proposed rule would create an elaborate and burdensome procedure for "victims" that is not available even for confidential informants or "cooperating" co-defendants (which are much more common situation).

The suggestion in the Note that the court might "authorize the defendant and his counsel to meet with the victim in a manner and place designated by the court" is unhelpful. The defendant personally will rarely if ever participate in the interviewing of witnesses during the pretrial investigation of a case. "Victims" who are willing to meet with defense counsel (and counsel's investigator) will do so.<sup>7</sup> Others can be approached, within the limits of professional standards, to seek information from them.

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<sup>7</sup> If the proposed amendment is not withdrawn, as we suggest, then new subsection 12.1(b)(1)(B)(ii), or at least the Advisory Committee Note's discussion of that provision, should be clarified to specify that a "reasonable" alternative procedure does not include either a requirement or a judicial authorization for the prosecutor or other government agent to attend any interview of the "victim" by the defense.

Nor does the statute's vaguely articulated protection for "privacy" entitle a victim-witness to be free from professionally conducted efforts at defense investigation. Of course, no witness is required to speak with any investigator before trial, whether the investigator be a government agent or a member of the defense team. But the mere fact that a witness is also a "victim" does not justify protecting that person even from being approached, in a lawful manner, for purposes of pretrial investigation and preparation.

There is already a statutory provision allowing the government to obtain a TRO to bar harassment of any victim or other witness. 18 U.S.C. § 1514. It is a crime to threaten or harm any witness, *id.* § 1512(a), or to attempt to "corruptly persuade" a witness to withhold testimony or absent themselves from the proceedings. *Id.* § 1512(b). Nothing in the CVRA specially requires an amendment to Rule 12.1, and to apply the rather general terms of the Act in the manner proposed will cause more issues to arise than is justified by any good that might be accomplished. This amendment should be withdrawn.

Rule 17. This amendment also is unnecessary (that is, it implements no particular provision of the CVRA) and should be withdrawn. Subpoenas in criminal cases cannot be used for pretrial discovery; a subpoena can only require a person to attend court, with or without also producing documents or tangible things. (Even those subpoenas which, by special direction of a judge, are returnable prior to trial can only direct production "in court." Fed.R.Crim.P. 17(c).) The defendant in a criminal case has rights under the Sixth Amendment to the effective assistance of counsel in preparing and presenting the defense, and to compulsory process, as well as to confront (and cross-examine) adverse witnesses. (The draft Committee Note suggests that this rule would apply only to "defense subpoenas," while the proposed amended rule as written would apply to trial subpoenas issued by the government as well.<sup>8</sup> In any event, NACDL's concern is with the impact on defense subpoenas.)

Almost by definition, any subpoenaed information within the purview of this Rule is being sought for the purpose of impeachment of a victim-witness's credibility, or to impeach some other government witness's testimony about the "victim's" involvement in the case. If the "victim" will not be a trial witness, or the "victim's" otherwise-private affairs are not already a subject of trial testimony, then the subpoena would have no valid purpose. "Privacy" is simply not a legitimate issue in such circumstances. A subpoena cannot be "unreasonable or oppressive" because it exposes the "victim" to cross-examination or impeachment of character or credibility. If defense counsel issues such a subpoena, in other

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<sup>8</sup> The Note's stated rationale for excluding grand jury subpoenas from the reach of the Rule is unconvincing. The government obtains much of its trial evidence, in many cases, by the use of grand jury subpoenas. While grand jury secrecy may protect a "victim's" privacy before indictment, the use of that material after indictment for trial preparation and presentation is not restricted by Rule 6 or otherwise. Hence, the amended rule, as drafted, especially coupled with the reference to "defense subpoenas" in the Note, sends a distinct message of being anti-defendant rather than evenhandedly supportive of "victims'" legitimate interests.

words, it is almost certainly one which the Sixth Amendment entitles the defense to issue. Proper and legitimate cross-examination, moreover, often demands an element of surprise. To establish a mechanism for judicial pre-screening of all such subpoenas which encourages notice to the person who is the subject of the subpoena is thus to undermine three of the defendant's related Sixth Amendment rights. The general terms of the CVRA that refer to protection of privacy should not be construed in a manner which raises serious constitutional concerns. This proposed amendment should be withdrawn.

Rule 18. This proposed amendment would add "victims'" interests to the required considerations in selecting a courthouse within the district for the holding of proceedings. The Note states that "this amendment implements the victim's right to attend proceedings ..., codified at 18 U.S.C. § 3771(b)." The referenced language calls upon the court to "make every effort to permit the fullest attendance" of any "victim." This proposal misconstrues the relationship between § 3771(a)(3) and § 3771(b)(1) of the CVRA, as written. The right of the "victim" in regard to attending court is conferred not by subsection (b)(1) but by subsection (a)(3); as stated there, it is only a right not be excluded. The language in subsection (b)(1) to which the Note refers describes a set of procedural mechanisms for enforcing the right conferred at (a)(3), including a duty to consider alternatives to exclusion, even where there is a finding that hearing other witnesses would cause the "victim's" testimony to be altered. This proposal, then, would actually create a new (substantive) right and is thus contrary to 28 U.S.C. § 2072(b).

The interests of any "victim" who will be a testifying witness are already addressed by the existing text of Rule 18. To the extent the Committee believes that the CVRA goes so far as to allow a non-witness "victim" to press, under threat of a mandamus action, for a place of trial that may be hundreds of miles from the courthouse that is convenient to the judge, testifying witnesses and the defendant, and that this right is merely procedural in nature, a proposition we strongly doubt, the Rules Enabling Act entitles the Judicial Conference to override the unreasonable provisions of § 3771(b)(1), and does not require their implementation. This amendment should not be adopted.

Rule 32. The proposed amendments to Rule 32 deal with provisions of § 3771(a) which afford rights "to be reasonably heard at any public proceeding in the district court involving ... sentencing ...," id.(a)(4), and "to full and timely restitution as provided in law." Id.(a)(6). First, NACDL agrees that the CVRA supersedes prior, more narrow provisions affording victims of only certain specified offenses the right to speak at sentencing proceedings. Beyond that, we must respectfully disagree with the Committee's approach, however.

With respect to restitution, the proposed amendment to Rule 32(c)(1)(B) would make a report on restitution mandatory even when the court has otherwise determined that the interests of justice warrant dispensing with a Pre-Sentence Investigation Report. A report would be required not only when the substantive law make an award of restitution mandatory (the current Rule), but also when it does not (compare 18 U.S.C. § 3663 with id. § 3663A).

This change would undermine the utility of the docket-management tool provided by Rule 32(c)(1)(A)(ii) (dispensing with PSI in appropriate cases) and prevent a case-by-case exercise of sound judicial discretion.

Under that rule, which would not be changed, a judge cannot lawfully sentence without awaiting a PSI unless the court finds that record already contains sufficient information to comply with 18 U.S.C. § 3553. One aspect of compliance with § 3553 is a duty to consider the need to award restitution to any victim. *Id.*(a)(7). Yet under the proposed amendment, even though the court has already determined that it can give that issue sufficient determination without a further written report, and even where otherwise allowed by the restitution statutes, it must delay sentencing, hold another hearing, and suffer all the related costs and inconvenience. Moreover, cases where the court is prepared to sentence immediately after plea or verdict are often those in which it is evident that a "time served" sentence for a detained defendant is the only just outcome. This amendment can be expected to cause injustice through excessive incarceration in those cases as well.

There is a detailed statutory scheme setting forth the procedures to be followed in ascertaining the appropriate recipients of restitution, the proper amount and timing of such payments, and the collection of any unpaid amounts. *See* 18 U.S.C. §§ 3663, 3663A, 3664, and 3611-14. To address that subject in Rule 32(c) -- particularly with language which suggests that the probation officer may conduct the investigation of restitution questions in any manner which produces "sufficient information" -- risks rendering those statutes, and in particular 18 U.S.C. § 3664(d), "of no further force or effect," by virtue of 28 U.S.C. § 2072(b). The wording of the CVRA itself strongly suggests that this subject is to be left as presently "provided in law." While the Committee is looking at this Rule -- although this point is not responsive to any proposed change circulated for comment -- it might wish to consider addressing the subject of restitution only by directing an investigation "in accordance with governing statutes."

The proposed amendment to Rule 32(d)(2)(B) would eliminate the existing requirements that information concerning "victim impact" be "verified" and that it be stated in the Pre-Sentence Investigation Report "in a nonargumentative style." The Note suggests that these phrases should be eliminated because there is no similar direction in Rule 32 concerning information to be included in the PSI on other subjects. There is a reason that these cautions were included on this particular point, however -- the heightened risk, as observed through experience, that such submissions, when unverified, are unreliable, and that descriptions of victim impact have a unique tendency to become emotionally charged. The defendant, after all, has a well-established Due Process right to be sentenced only on the basis of reliable information. *United States v. Tucker*, 404 U.S. 443, 446 (1972); *Townsend v. Burke*, 334 U.S. 736 (1948). Retaining these phrases would help to guarantee that right.

Moreover, to eliminate the phrases now, as part of a "victims' rights package" rather than as part of a stylistic cleanup, would send an inappropriate message. The latter suggestion (regarding writing style) is demeaning to the professionalism of United States Probation

Officers and insulting to the dignity of the judiciary. The purpose of a PSI is to provide the information that a judge needs to select and impose a lawful sentence. The idea that it could properly be in any manner "argumentative," or that an "argumentative" report would be helpful to a judge (much less that it might be more helpful than one which was "nonargumentative" is indefensible. The first change, eliminating the requirement that victim impact information be "verified," is contrary to 18 U.S.C. § 3664(d)(2) and (d)(4), which call for information in support of a restitution request to be supplied by affidavit or testimony. To strike either term would be seen as sending a message that victim impact discussions should be presented less objectively than is presently the case.

The proposed amendment to Rule 32(i)(4)(B) implements the CVRA language without taking a position on the existing controversy in the case law about whether a right to be "reasonably heard," under 18 U.S.C. § 3771(a)(4), implies a right to speak in person. As discussed above under Rule 60(a)(3), NACDL suggests that the Committee should take a position now and head off this unnecessary conflict of judicial opinions. Despite having before it the existing language of Rule 32(i)(4)(B) which affords certain victims a right to "speak," Congress adopted instead only a right to be "heard." In law, the "right to be heard" does not imply any right to speak in person, if the Court in its discretion deems a written submission sufficient. Most motions in the district court do not receive argument time and more than do most appeals in the Circuits. Our approach is also implied by Congress's choice to include the modifier "reasonably."

As discussed above under proposed Rule 60(a)(3), the Rules implementing CVRA should make clear that the judge conducting a sentencing proceeding enjoys considerable discretion to determine the manner in which any "victim" will be heard. Indeed, with the proposed Rule 60(a)(3), a separate Rule 32(i)(4)(B) becomes redundant and can be stricken. Accordingly, in lieu of repeating the statutory language of § 3771(a)(4) in Rule 32(i), NACDL suggests that the heading of Rule 32(i)(4) be changed (to avoid confusion) to "Opportunity To Be Heard," and that the text of subsection (i)(4)(B) read, "*By a Victim*. A victim's right to be heard at sentencing is addressed in Rule 60(a)(3)."

Conclusion. As noted in the introduction, NACDL suggests that the Judicial Conference adopt fair and even-handed rules of practice and procedure, consistent with 28 U.S.C. § 2072(b), for the implementation of the rights listed in 18 U.S.C. § 3771(a). We have consulted with the Federal Defender representatives in devising their proposals in this regard, which we endorse, along with the procedures suggested above, including a due process hearing for the determination of contested claims of who is entitled to be treated as a "victim" under the CVRA.

## MID-TRIAL JUDGMENTS OF ACQUITTAL

The proposed amendment to Rule 29 would preclude an accused from challenging the sufficiency of the government's evidence before presenting a defense, and before having the case submitted to the jury, unless he or she waived the constitutional right not to be placed in jeopardy again for the same offense.

The proposed amendment rests on the proposition that the interest in protecting against "erroneous acquittals" is sufficiently strong to outweigh the important protection against government abuse afforded by the Double Jeopardy Clause, as it would compel defendants to give the government the power to put them in jeopardy a second time as a condition of seeking to terminate a prosecution for insufficient evidence without first affording a jury an opportunity to convict. This proposition is flawed in its conception, because to accept it would be to reject the proposition established by the constitution that allowing the government to put an accused in jeopardy twice poses a greater danger than allowing an "erroneous" acquittal to go uncorrected. The proposed amendment would make significant inroads in eroding the protection against multiple prosecutions, and the tangible costs of its unintended consequence of putting an end to all midtrial acquittals far outweighs the illusory benefit to be gained from allowing the government a second opportunity to try to convict a person who has been acquitted.

The Advisory Committee's Report to the Standing Committee documents the significant time and resources that have been devoted at the behest of the Department of Justice (DOJ) to devising a method of circumventing the Constitution in order to prevent what by all accounts is a minuscule number of so-called "erroneous acquittals" by federal judges. This expenditure of time and resources is even more notable given that it comes at a time when the mounting body of evidence demonstrating that the criminal justice system produces an alarming number of objectively erroneous convictions is being met with efforts to limit the jurisdiction of the courts to correct them. See Rodney Uphoff, "Convicting the Innocent: Aberration or Systematic Problem?," \_\_\_ Wisc. L. Rev. \_\_\_ (forthcoming 2007; see [www.thejusticeproject.org](http://www.thejusticeproject.org)) This incongruity is a fitting, albeit unfortunate, reflection of the degree to which a process intended to protect the accused against the sovereign has been turned on its head as a process to expand and insulate the power of the executive branch. The proposed amendment reflects a view that would have the time-honored adage that it is better that twelve guilty people go free than one innocent person be convicted, reformulated to state instead that it is better that twelve people previously acquitted be subjected to multiple prosecutions than one person the prosecution deems guilty be allowed to stand trial only once.

The proposed amendment should be withdrawn for multiple independent reasons:

- First, the rationale for the amendment, the need to protect against "erroneous acquittals," is itself a flawed concept which too easily dismisses the significant constitutional protection the Double Jeopardy Clause provides, and if accepted as a sufficient justification

for compelling a waiver of that protection with respect to midtrial acquittals, would apply with equal force to acquittals rendered by a judge sitting as the factfinder as well as by a jury;

- Second, the statistical information that was presented by the Department of Justice regarding erroneous acquittals and which the Committee relied on in proposing the amendment does not support the claimed need for the amendment; the data is at best unreliable but even if it is accepted as accurate it demonstrates the number of “erroneous acquittals” are so few in number as to be insignificant; more fundamentally, the DOJ's argument is premised on wrongly equating a judge's decision not to allow a charge to go to the jury with a judge's decision to rule a jury's verdict was not supported by the evidence;

- Third, the proposed amendment would have the unintended consequence of putting an end to all midtrial acquittals (which the Committee expressly intended to preserve, and for good reason) and assure the government that it could always get its case to the jury no matter how insufficient it might be; this would result because a defendant would always be better in refusing to waive double jeopardy when making a midtrial motion for acquittal, and proceed to seek acquittal from the jury and then renew the motion for acquittal if jury did not acquit, as the defendant would then get two chances at acquittal and the first would not be subject to review;

- Fourth, well-established Supreme Court precedent renders the amendment unconstitutional, as it would require a defendant to waive one constitutional right (the right not to be placed in jeopardy twice for the same offense) as a condition of exercising another constitutional right (the right to be acquitted where the government's evidence is insufficient); and

- Fifth, even if adopted the proposed amendment would not accomplish its intended objective of allowing the government to appeal midtrial acquittals, because notwithstanding the amendment, there is no authority that grants the government the right or ability to appeal an acquittal, as the Criminal Appeals Act, 18 U.S.C. § 3731, only allows the government the right to appeal a dismissal. That the proposed amendment would attempt (unsuccessfully) to expand appellate jurisdiction by giving the government the right to appeal where none exists also serves to illustrate that the proposed amendment exceeds the Committee's authority under the Rules Enabling Act and should be withdrawn for that reason as well.

### Discussion

1. The right and obligation of a trial court to acquit a defendant of a charge that is not supported by sufficient evidence existed at common law. Ex parte United States, 101 F.2d 870, 876 (7th Cir.), aff'd by an equally divided court, United States v. Stone, 308 U.S. 519 (1939). The court had the power to acquit both before submitting the case to the jury as well as after the jury returned a guilty verdict. Id., 101 F.2d at 876-77. The Framers were obviously aware of this power of trial courts, and drafted the Double Jeopardy Clause so that it prohibited the government from retrying a defendant following an acquittal without regard to whether the acquittal was by judge and whether it was issued before or after the jury's return of a verdict.

The Department of Justice now seeks to alter this fundamental constitutional protection, and for the first time in history give the executive branch the power to subject an accused who has been acquitted of an offense to be placed in jeopardy a second time. Nearly as striking as the proposal itself is that the DOJ seeks to accomplish this groundbreaking change by an amendment to Fed. R. Crim. P. 29.

The DOJ's push for the proposed amendment stems from its view "that it is anomalous and highly undesirable to insulate erroneous preverdict acquittals from any appeal." "Report of the Advisory Committee on Criminal Rules," p. 2 (revised July 20, 2006). This view is historically shortsighted, as it has been established for well over a hundred years that no appeal is allowed from an acquittal where a reversal would require further proceedings. See United States v. Scott, 437 U.S. 82, 89, 90 (1978), citing United States v. Ball, 163 U.S. 662 (1896) & United States v. Martin Linen Supply, 430 U.S. 564, 571 (1977). Congress expressly incorporated this constitutional limitation into the Criminal Appeals Act, 18 U.S.C. § 3731 ("[N]o appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.") In fact, it was not until 1977 that the Supreme Court endorsed the view that a government appeal of a post-verdict judgment of acquittal did not offend double jeopardy. See United States v. Martin Linen Supply, *supra*; see "Advisory Committee Note of 1994 to Amendment to Rule 29," citing, *inter alia*, United States v. Martin Linen Supply, *supra*; United States v. Scott, *supra*. Even then such reversals were narrowly limited to circumstance in which they would not encroach upon the protection afforded an accused by the Double Jeopardy Clause, as they were only allowed where reversal would not afford the government a second opportunity to convict but merely result in reinstatement of a prior verdict of guilty. Scott, 437 U.S. at 90, citing Martin Linen Supply, 430 U.S. at 571. What is truly "anomalous" then is not the government's inability to appeal midtrial acquittals, but the DOJ's suggested circumstance in which it would be allowed to appeal an acquittal where the result would be to allow it to place an acquitted defendant in jeopardy a second time, and free it to mount a new effort to obtain a conviction based on what it learned in its first failed attempt.

The government's view also gives short shrift to the Double Jeopardy Clause. Acquittals are not "insulated" from review in order to protect the court from being reviewed, as the DOJ's view suggests, but to protect the individual from being subjected to multiple prosecutions for the same offense. While the proposed amendment may seek "to protect ... a defendant's interest in holding the government to its burden of proof," it does nothing to protect a defendant's right not to be subject to successive prosecutions for the same offense. To the contrary, the amendment conditions the protection it affords "a defendant's interest in holding the government to its burden of proof," upon the defendant abandoning the constitutional protection against being subject to multiple prosecutions. This important "insulation" against government abuse that is written into the Constitution cannot just be dismissed based on the "undesirability" of acquittals the DOJ views as "erroneous."

The competing concerns that are put at issue by the proposed amendment are the "undesirability" of erroneous acquittals and preserving the constitutional protection that

prohibits the government from placing a defendant twice in jeopardy for the same offense. The DOJ is certainly entitled to its view that the greater harm is an erroneous acquittal. However, it should not be allowed to circumvent the constitutional protection that bars its view from being adopted directly, by compelling a waiver of that protection from the defendant in return for being able to hold the government to its burden of proof.

The implications of accepting the DOJ's view must also be considered. If the DOJ's concern about the undesirability of what it deems to be "erroneous" acquittals is deemed sufficiently weighty by the Committee to justify compelling a waiver of the constitutional provision that prohibits the government from appealing verdicts it views to be erroneous, it would presumably apply with equal force to all acquittals. If the current amendment is adopted, the DOJ can be expected to attempt to further encroach upon the protection against double jeopardy by making the point "that it is anomalous and highly undesirable to insulate erroneous [bench trial] acquittals from any appeal," given that preverdict acquittals are subject to review, especially given that preverdict acquittals are constrained by a higher standard. The same waiver the government now seeks to circumvent the Constitution in order to appeal preverdict acquittals can be similarly compelled from a defendant who seeks a bench trial.

Concern that the encroachment upon the protection the constitution provides the individual that would result from adoption of the current proposed amendment will lead to further encroachments in the not-too-distant future is especially apt here as the amendment itself illustrates how, when given an inch, the government tries to turn it into a mile. The government has taken the inch it was given by case law holding that it can appeal and obtain reversal of a post-verdict acquittal without violating double jeopardy where it will not lead to further proceedings, and is trying to turn it into a mile by suggesting that given its ability to appeal post-verdict acquittals that do not subject the defendant to a second prosecution (and thus do not violate the Double Jeopardy Clause), it is anomalous not to allow it to appeal midtrial acquittals that would subject the defendant to a second prosecution (and thus would violate the Double Jeopardy Clause), and that a mechanism should be established to end this anomaly.

2. The Committee need not devote its time to contemplating these important constitutional and historical reasons in order to conclude that the amendment should be withdrawn, as the DOJ has failed to make a sufficient showing of its claimed need for the amendment.

The Advisory Committee's Report to the Standing Committee accompanying the proposed amendment explains that in May 2004, when it voted to leave the Rule as it is, the Committee "was under the impression there had been only a very small number of problematic preverdict acquittals under the present rule." "Report of the Advisory Committee on Criminal Rules," p. 2 (revised July 20, 2006). The Report also explains that the Committee reconsidered its position to leave the rule as it was after the Department of Justice twice presented additional information and materials it had assembled as to the number of erroneous preverdict acquittals. *Id.*, pp. 2-3.

The Committee's Report does not indicate what these materials consisted of or what they purported to show. The December 22, 2006 letter of Chief Judge James F. Holderman of the Northern District of Illinois commenting on the proposed amendment to Rule 29 details the information presented by the DOJ. In essence, as Judge Holderman's letter explains, the DOJ's assessment of the likely number of erroneous preverdict acquittals is based on an "extrapolation of the" data it assembled regarding post-verdict acquittals. Letter of Chief Judge James F. Holderman, p. 4, section II. Judge Holderman's letter demonstrates with convincing clarity the unreliability and speculative nature of the post-verdict acquittal data that was the basis for the DOJ's extrapolation as to what it contends are the likely number of erroneous preverdict acquittals. The unreliability and speculative nature of the data should alone preclude relying on it for altering the balance of power in the criminal justice system. Even if the DOJ's data is accepted as presented, however, and its methodology of extrapolating from post-verdict to preverdict acquittals is allowed, it turns out that the number of erroneous midtrial acquittals that it seeks to amend Rule 29 in order to attempt to correct by a second opportunity to convict is less than one case a year (.063) in the 83 districts in which the United States Attorney responded to its inquiry. Letter of Chief Judge James F. Holderman, p. 3, section I.

As Judge Holderman also explains, the DOJ's extrapolation is "inherently flawed" not just because of the unreliability of its data, but its because of its methodology. The number of reversals in postverdict acquittals cannot be relied as a basis for determining how many preverdict acquittals are erroneous because the two decisions are viewed and acted upon differently by the judges who make them. Our experience is that judges are more inclined to grant postverdict acquittals than preverdict acquittals because they know a postverdict acquittal is reviewable, and they are more willing to grant postverdict acquittals in close cases because they know their decision is subject to appeal and reversal. Conversely, they take the drastic action of not allowing a case to go the jury and granting a midtrial acquittal only in the most clearcut and compelling cases because they know their decision is final.

3. The Committee's report recognizes the value and importance of a trial court midtrial acquittal power, as it provides "the trial court with a valuable case-management tool," especially in large and complex cases, saves the expense of prolonged proceedings when the result should plainly be a foregone conclusion, and protects an innocent accused from the ordeal of continued proceedings and the risk of an irrational jury verdict. It was for these reasons that the Committee expressly declined to adopt the DOJ's alternative proposal of prohibiting midtrial acquittals. "Report of the Advisory Committee on Criminal Rules," p. 3 (revised July 20, 2006).

Notwithstanding the Committee's wise intention, the effect of the proposed amendment would be to put an end to midtrial acquittals, and assure the government that it will always get its case to the jury. This would result because a defendant would always be better off in refusing to waive double jeopardy when making a preverdict motion for acquittal, and proceed to seek an acquittal from the jury, and then renewing the motion for judgment for

acquittal if jury does not acquit, as the defendant would then get two chances at acquittal and the first would not be subject to review. Because defendants will not waive the protection against double jeopardy, trial courts will not be able to order an acquittal until after the jury returns its verdict. The government would know that, no matter how weak its case, it will always have a chance of convincing a jury to convict, and the significant benefits that result from a court's midtrial acquittal authority would be forever lost.

4. Yet another reason why the proposed amendment should be withdrawn is that it is (arguably) unconstitutional. It is well-established that a defendant may not be forced to waive one constitutional right in order to exercise another. Simmons v. United States, 390 U.S. 377, 394 (1968) In Simmons, a defendant Garrett moved to suppress evidence obtained from the seizure and search of a suitcase. In order to assert that his Fourth Amendment right was violated he was required to establish standing, which in turn required him to testify at the suppression hearing to his possessory interest in the suitcase. The government introduced Garrett's testimony, as delivered at the suppression hearing, against him at trial to connect him to the incriminating evidence found in the suitcase as proof of his guilt. The Supreme Court ruled that the government was prohibited from using Garrett's incriminating suppression hearing testimony against him at trial. The Court explained that although Garrett was not "compelled" to incriminate himself in the ordinary sense, he nonetheless had to provide the incriminating testimony in order to assert his Fourth Amendment rights. Consequently, the testimony could not be used against him at trial, the Court ruled, because it is "intolerable that one constitutional right should have to be surrendered in order to assert another." Simmons, 390 U.S. at 394. The principle established by Simmons remains the law and has been relied on to prevent a defendant from being forced to waive one right in order to assert another. See, e.g., United States v. Bryser, 95 F.3d 182, 186 (2d Cir. 1996) ("We have ordered use immunity under Simmons upon a showing of substantial tension between a defendant's desire to testify in a hearing that adjudicates a claim of constitutional right in a criminal case and the right of that defendant not to give testimony that is incriminating as to the charge in question." (citations omitted))

As applied here, the principle established in Simmons would prohibit the government from relying on an acquitted defendant's compelled waiver of the right not to be placed twice in jeopardy as a basis for initiating a second prosecution, because the waiver of the constitutional right not to be placed in jeopardy twice was surrendered in order for the defendant to assert the constitutional right not to be convicted based on insufficient evidence.

Even if the contention that this renders the proposed amendment unconstitutional is considered debatable, it still illustrates why the proposed amendment is bad policy and precedent. It is unfair to force a defendant to forego one constitutional right to exercise another, and once the practice was sanctioned by the Rules, it would stand as a model for compelling a defendant to waive one constitutional right in order to exercise another.

5. Last but not least the proposed amendment should be withdrawn because it would not accomplish its intended objective of allowing the government to appeal midtrial acquit-

tals. The right to appeal is granted by statute, and no statute grants the government the right to appeal an acquittal. The Criminal Appeals Act, 18 U.S.C. § 3731, to the extent even arguably pertinent, only grants the government an appeal “from a decision, judgment or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment,” and “from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding ... “ Id. There is no authority affirmatively granted in section 3731 (or anywhere else), as would be required, for the government to appeal a midtrial acquittal. The provision of the statute granting the government an appeal from an order “dismissing” an indictment does not grant it the right to appeal a midtrial acquittal. See Sanabria v. United States, 437 U.S. 54, 65-68 (1978); United States v. Wilson, 420 U.S. 332 (1975). Nor can the government's right of appeal be expanded by the “consent” of its adversary or by a compelled “waiver.” The waiver of double jeopardy compelled from the defendant would free the trial judge to grant a midtrial acquittal, under the amended Rule as proposed, but it would not enable the government to appeal that acquittal.

This point gives rise to yet another reason why the proposed amendment should be withdrawn – because the proposed amendment would purport to create or enlarge the government's right to appeal, it exceeds the scope of the Judicial Conference's power and authority under the Rules Enabling Act, 28 U.S.C. § 2072(b).<sup>9</sup>

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<sup>9</sup> Nor does it come within the unique and very limited rulemaking authority relating to appellate jurisdiction which is conferred by § 2072(c) (Rules may specify when order is “final” for purposes of 28 U.S.C. § 1291).

To: Judicial Conf. Standing Committee on Rules  
Re: NACDL Comments on Proposed Criminal Rules Amendments

January 2007  
p.18

The National Association of Criminal Defense Lawyers is grateful for the opportunity to appear and speak to these important issues. I will attempt to answer any question that the Committee has for me.

Please reply to:  
Peter Goldberger  
50 Rittenhouse Place  
Ardmore, PA 19003  
(610) 649-8200  
[peter.goldberger@verizon.net](mailto:peter.goldberger@verizon.net)