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ADMINISTRATIVE COMMITTEE ON CRIMINAL RULES

HEARING

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WASHINGTON, D.C.

REPORTED BY: ROBIN BOGGESS

A P P E A R A N C E S

P R O C E E D I N G S

MS. SUSAN BUCKLEW: We're going to get started, and in the meantime, Professor King has joined us. My name is Susan Bucklew, and I am the Chair of the Criminal Rules Committee, the advisory committee on the criminal rules. And I'd like to welcome those of you that are here to testify, I'd also like to welcome any guests that we might have or any interested persons, observers.

We appreciate the interest in the amendments, and we hope that this hearing will be beneficial – not only to those on the committee, but perhaps of interest to those of you that are here as well. As all of you I'm sure know, the Rules Amendment have been out for public comment, and are out for public comment, I believe, until February the 15th. And during that time, we've gotten a number of written comments, and then we have had some requests from those of you that are here today to testify on the proposed amendments.

The comments as well as the written submissions that we have gotten will be considered by the advisory committee when we meet in April. We're scheduled to meet in April of this year, and what we will do is not only consider them (ind) in our yearly subcommittee, but also consider them at the full committee meeting in April. I think that maybe what I would like to do before we actually begin this morning is to have the members of the advisory committee and those that are seated around the table up here introduce themselves. So, I'll start here to my right, Dick Tallman.

MR. RICHARD TALLMAN: My name is Richard Tallman, and I'm an (indiscernible).

MS. RACHAEL BRILL: I am Rachael Brill, I'm (indiscernible) in San Juan, Puerto Rico.

MR. THOMAS McNAMARA: Tom McNamara, I'm a federal public defender for the eastern district of North Carolina.

MS. NANCY KING: I'm Nancy King, and I teach law at (indiscernible) University Law School.

MR. MARK WOLF: I'm Mark Wolf, I'm the

Chief Judge in the District of Massachusetts.

MR. JEFF BARR: I'm Jeff Barr, an attorney at the administrative office.

MR. JAMES ISHIDA: I'm James Ishida, an attorney at the administrative office.

MR. TIMOTHY DOLE: Timothy Dole, (indiscernible).

MR. MARK KRAVITZ: I'm Mark Kravitz, (indiscernible).

MR. JOHN RABLEJ: I'm John Rablej, I'm with the (indiscernible) office.

MR. JONATHAN WROBLEWSKI: I'm Jonathan Wroblewski, I work in the Office of Policy and Legislation in the Criminal Division of the Justice Department.

MR. BENTON CAMPBELL: Hi, I'm Ben Campbell, I'm from Criminal Division of the Department of Justice.

MR. LEO CUNNINGHAM: I'm Leo Cunningham, I'm a criminal law practitioner in Northern California.

MR. ANTHONY BATTAGLIA: Tony Battaglia, I'm

a magistrate judge from the southern district of California.

MR. ROBERT EDMUNDS: I'm Bob Edmunds, an Associate Justice on the North Carolina Supreme Court.

MR. JAMES JONES: I'm James Jones, a District Judge from (indiscernible).

MS. SARA BEALE: I'm Sara Beale, (indiscernible).

MS. BUCKLEW: And I think I neglected to say I am, in addition to being the chair of the advisory committee, I'm also a District Judge in the (indiscernible) district of Florida. Okay, thank you. We also, I should say, have joining us, or who will be joining us by telephone Judge David Trager, who is a District Judge who is at the circuit conference, as I understand it. And he's unable to be here. And although he's not on the phone at this point in time, he will be joining in at some point during this hearing. We also have on the phone, that I should say as well, and I believe he is on the phone now, Professor Douglas Beloof, who will be

testifying at some point, and is listening to the comments that we have (indiscernible), the comments that the witnesses will have when they testify. All right, we have a total of six witnesses who have requested to testify today, and as I've stated earlier, one of those witnesses, Professor Beloof will be testifying by telephone.

We have members that are going to be leaving early afternoon, so I think I've told most of the people on the committee that we are going to be working through lunch.

(Break in audio.)

MS. BUCKLEW: -- will not be recessing for lunch. Mr. Radia (ph) probably told the witnesses this, we have planned this out so that the witnesses --

(Break in audio.)

MS. BUCKLEW: -- and then we're going to allow about ten minutes for any questions that the members of the committee might have of that witness. The order of the testimony, as I understand it has been agreed to among the witnesses, and so you

apparently know the order that you are testifying in. We're going to start with Judge Cassell, and then we're going to hear from Mr. Goldberger, Mr. Sullivan, Mr. Butler, Mr. Hillier, and then Professor Beloof by telephone call. So, any questions or comments from the committee before we actually begin?

I should say also, that the written remarks, for those of you that are going to be testifying, that have provided us with written remarks – some of them extremely lengthy written remarks – those have been circulated among the committee members, and have been available to the committee members to review prior to your testimony today. So, Judge Cassell, you're first on the list, and we welcome you, and we look forward to hearing your comments.

And, I'm sorry – one thing else I probably should add. The comments today are actually in two areas. One has to do – and Judge Cassell is going to be testifying about the amendments, proposed amendments based on the Crime Victims Rights Act. And then we have several persons who are going – some

of them testifying on that issue, but also, we have several witnesses who are going to be testifying on the proposed Rule 29 Amendment. So, Judge Cassell, welcome.

MR. PAUL CASSELL: Thank you, I appreciate the chance to be here. Judge Bucklew, and distinguished members of the committee, I truly appreciate the opportunity to be here in person to discuss these issues about crime victim's rights. (indiscernible) was and continues to be (indiscernible), issues by way of law review articles. In fact, Judge Bucklew, you mentioned some of the submissions to be rather lengthy, I'm probably guilty as charged on that count, although I could be (indiscernible). Particularly because the length of the article is because I feel so passionately the federal judiciary may be missing an opportunity here to treat crime victims fairly, and to embrace the (indiscernible), and the Crime Victims Rights Act. And I want to kind of explain (indiscernible), the reason I'm here today.

Now, at the outset, let me acknowledge some

positive things that I see in the in the proposed (indiscernible). Professor Beale and I were talking – no one ever says to the court, "My goodness, you did a wonderful job of drafting this particular rule!" The only people that appear to even know that (indiscernible). So I did want to acknowledge that there are a number of places (indiscernible) quite useful. But the problem is that the changes are too limited in their focus. And don't fully embrace the animating principals of the CVRA. The major difference between the rules that you've circulated, and the proposals that I've made, is how to treat the crime victim's right to fairness. As you know, the CVRA requires that courts must treat victims like (indiscernible) with fairness and with respect for the victims' dignity and privacy.

Now to my mind, that Congressional command requires this committee to go through each of the rules for the federal rules of criminal procedure and decide whether this complies with that Congressional mandate. Whether that rule treats crime victims fairly. The Committee took a narrower approach, as

described in this committee's report to the standing committee. What you intended to do was to, and I'm quoting, here: incorporate, but not go beyond the rights created in this act.

Now with all respect to the committee, I believe that approach is too narrow, and only haphazardly implements the CVRA. Let me start with the most obvious though. If you incorporate the rights in the CVRA and make a statute, you've missed the most important one. You have not (indiscernible) the right to fairness under the Federal Rules of Criminal Procedure. That right is, itself, one of the rights (indiscernible). The CVRA begins with this introductory clause, quote: A crime victim has the following rights. Then it gives (indiscernible). Among them is the right to fairness. Now, we might say that well, that's just some oratory language, or aspirational goal, but if you took that approach, you would be directly contradictory to the declared intentions that have been drafted into the CVRA. Quoting now from Senator Kyle, who, along with Senator Feinstein with (indiscernible), he says that,

quote, the broad rights are situated in this section, that is section 8, the right to fairness, are meant to be rights themselves, that are not intended to be just aspirations. Now the following (indiscernible). There's a methodological problem if you must go to each and every of the rules to see whether they're fair to the victim.

Now, the reason that I understand the committee did not adopt this approach, is that it would be desirable to leave this to the litigation process. Again, the quotes from your report to the standing committee, the committee did not want to, quote: attempt to use the rules to anticipate and resolve the interpretative questions that will arise under the CVRA. Now that cautious approach may have merit in some other areas of the law. But I believe that's particularly inappropriate when we're talking about the rights of crime victims. Unlike other litigants in the criminal justice system, a representative from the justice department (indiscernible) the representative appointed in every case, crime victims, this committee must know,

typically will be without the assistance of legal help.

Most crime victims, like most defendants, are indigent, they lack both the sophistication and the financial resources to litigate complicated issues that will arise regarding the CVRA. And because of that fact, it's an empty gesture for this committee to say, "Well, we'll wait and see how the litigation process (indiscernible) on the CVRA. In the day to day run of the criminal justice system that litigation simply will not happen. One of the basic reasons for the CVRA was to change the legal culture that currently exists.

Again, to quote from Senator Kyle, "A central reason for these rights is to force a change in the criminal justice culture which has failed to focus on the legitimate interests of crime victims. Given that (indiscernible) that Congress has identified, it makes no sense to say, "Well, we'll see how things shake out in the criminal justice (indiscernible).

(Break in audio.)

MR. CASSELL: -- litigation process, I would still wonder whether that approach was consistent with the very idea behind the Federal Rules of Criminal Procedure. My understanding of the basic reason for having the rules is to try to clarify --

(Break in audio.)

MR. CASSELL: -- In other words, the rules were drafted to avoid litigation, not to encourage litigation. Now before I go through some points of mine, let me turn to a couple of the specific rule changes that I think I have highlighted in my presentation today. Let me start by commending Professor Beale on Rule 18. Because I think she's an excellent job with Rule 18. Rule the committee has adopted (indiscernible) Rule 18. This is a fairly technical rule, (indiscernible).

Rule 18 deals with the issue of moving a case from within one part of the district to another part of the district. The most vague (indiscernible) is the judge wants to move the case from one part of the district to another, the crime victim

(indiscernible). Fair enough. But now let me move to another rule that's just a few rules away, Rule 21. Rule 21 deals, not with transfers within a district, but outside of the district. And here, I suppose, well, let's consider the views of crime victims before a judge makes that decision. The committee did not recommend any changes to Rule 21.

Why was a change appropriate to Rule 18, dealing with transfer within a district, but not to Rule 21, dealing with the more dramatic transfer from one district to another? Which (indiscernible), transfer from Oklahoma to Colorado. Now the advisory committee, at least in the subcommittee report gave two reasons for this failure to change Rule 21. The first was, well, it's just general language dealing with the right to fairness, there's nothing specific about transfer. And then it talks about how some other things might be considered.

I don't think that you can treat the right to fairness in that way, and say well, that's general language, we're not going to figure out how that general language applies when the case is transferred

from one district to another. I think Congress has obligated you to decide whether it is far to crime victims to transfer a case from one state to another without even considering the views of the victim. In my view that's unfair. And I think the committee is being pushed to grapple with that question and decide one way or the other. Is it fair to send a case to a different location without even dealing with the view of the crime victim?

Now, the committee said well, look. There's another reason for not making a rule change here. There are two kinds of transfers. There's a transfer for convenience, and a transfer for prejudice, and it doesn't make sense to (indiscernible) the victims in either case.

I respectfully disagree with the committee's analysis. With respect to transfers for convenience, the committee says, well, (indiscernible) victims will (indiscernible) with the justice department.

But remember, it's the justice department that has already decided that it's convenient to

transfer the case. To let the victims sit down that that government official who's decided that now they're going to move the case makes no sense. The victim wants to have the opportunity to present his or her views to the person that will be approving or disapproving the decision to go. Now the other reason the committee gave as well if there's a transfer for prejudice, the victim's needs can't outweigh the defense right to a fair trial. But no one is arguing the victim's needs will outweigh a defendant's right to a fair trial. All that's being argued this morning by myself and other advocates for victims, is that the victims' needs ought to be considered. Maybe the defense is wrong when they're suggesting a transfer for prejudice is appropriate. And maybe the victim can point that out.

Maybe there are other alternatives that could be considered to transferring the case to a different location. I cited my prepared remarks on a state court decision which I think is instructive here. The State v. (indiscernible), out of New Jersey. In that case, rather than move the trial to

a different location, the judge decided to protect the rights of the poor family that was involved in that case, so he imports a jury back to the home town of the victim. That's certainly one reasonable alternative that ought to be explored in some cases. It might fairly balance the need for the defendant's right to a fair trial with the victim's right to have an opportunity to appear in the proceedings.

I think, and I have proposed in Rule 21 that judges ought to get that kind of information. And I commend that change to you. Another change that I have proposed is to Rule 22. Rule 22 talks about (indiscernible) with a jury trial. And currently, what is required for that? Well, the defense has to confess to that, the government has to (indiscernible). The court is required to approve that, and I have proposed that the court ought to consider the view of the victim in making that decision.

Here again, the advisory committee declined to adopt that recommendation (indiscernible). I think there is something in the CVRA that addresses

that. The right to fairness. And I think they need to decide. Is it fair for a judge to contend with our ordinary mode of deciding cases, the jury trial, without even considering the victim (indiscernible)? I submit that it's not, and I again commend that change to your attention. I'm happy to address any specific questions that you have about any of my rule changes, though I certainly don't mean to keep you.

I've already (indiscernible) 95 page argument, and I'm happy to (indiscernible). So, please interrupt me and direct my attention to (indiscernible). I have a few others that I'd be happy to highlight. Let me highlight one of them which I think is particularly important. Rule 32 is a rule dealing with (indiscernible). What do I propose? Again, I submit that there's nothing revolutionary.

All I propose is that we take the single most important document in the sentencing hearing, the (indiscernible). Something that every other person who is an active player in the courtroom has had a chance to read, and I propose that the rule

ought to be changed to say, well let's give the relevant parts of that to the crime victim. The committee has not adopted that proposal, and again I suggest that it's unfair to crime victims, clashes with the language of the CVRA, and disregards the (indiscernible). Let's talk about each of those points. The CVRA says that at sentencing, the victim has the right to make his case.

And if you look at the (indiscernible) the CVRA, it is quite clear that what Congress intended was for the victims to be involved in the sentencing process, to be able to make sentencing recommendations along with the prosecution and (indiscernible). Well, what does it mean to make an effective representation? We all know the way sentencing works in federal courts around the country. In the vast majority of cases, the critical piece of information is (indiscernible), the sentence is going to be denied by the (indiscernible) -- and we know that two out of three cases (indiscernible), the sentence is going to fall within guideline range. But yet we do not give that information to Congress.

How can we expect crime victims to (indiscernible) participate in the sentencing process, when we withhold from them the key piece of information that everyone else in the courtroom knows, which is the guideline range that's going to be looked at by the judge. Now, obviously, there are different ways to draft this (indiscernible). But I am here to argue this morning that it's unfair to target (indiscernible). And again, I don't think there's any doubt as to how this proposal of the committee will be treated by Congress.

Senator Kyle said very specifically, that he intended for the statements in the CVRA to insure that crime victims have the opportunity to meaningfully participate in the sentencing process. The proposal that the advisory committee is going to leave in place is (indiscernible), it does not allow victims meaningful participation in the sentencing process. Another thing the committee has done, is to actually backtrack on crime victims rights, and (indiscernible), I think rather remarkable.

Before the CVRA went into effect, the victims of violent crimes or I think they were sexual assault crimes – crimes of violence and sexual assault – could speak at the sentencing hearing. That's Rule 32. And that was the rule that was in effect before the CVRA passed it's committee (indiscernible), and it's not fair to limit that to a few victims in crimes of violence (indiscernible) -- propose expanding the rules to give every victim, regardless of what the crime was, the right to speak. Then the CVRA passed, and rather than to carry forward the victims right to speak, this committee has now substituted in it's proposed changes the Rule 32i4, the requirement that the victim can only be "reasonably hurt."

And as I understand it, between the advisory committee notes and looking at the minutes – in this, Professor Beale commented on Santa Rosa – the idea is, well, we're not sure whether that means the right to speak or not, so we'll leave that to litigation. I find that remarkable, that the committee would take the victim's right to speak,

which was guaranteed before the CVRA passed, and (indiscernible), and has now backtracked to say only that the victim would have the right to be reasonably hurt. The rule should say victims have the right to speak, and provide other reasonable information so that there's no backtracking from what the law was before the CVRA passed.

Let me go to another change that I think is particularly important, Rule 44. I proposed changing Rule 44 so that victim's would have the opportunity to request (indiscernible). We've already talked about this committee approach to leaving the CVRA to case by case litigation. I think if the committee is going to adopt that approach, the least it can do for crime victims is to put into the rules recognition – although I think it already exists by statute, by commonwealth, and by other bodies of law – the right of according it's discretion to appoint counsel to crime victims. That was something the courts did for criminal defendants (indiscernible), something that Title 28 of U.S. Code recognizes can be done, it seems to me that it would be handy to have that

provision folded into Rule 44 directly.

Another rule change that's important is Rule 46. Which is the right to be heard regarding bail decisions. The committee has put in, just parroting the language of the CVRA, a provision that says well, the court must permit a victim to be reasonably heard, (indiscernible) seeking the following relief. Although the committee has not spelled out, once the victim is heard, what the judges should do with that information. And my proposal very straightforwardly says, that the courts should consider that information in making its bail decision. I'm concerned that otherwise this committee (indiscernible).

Rule 48 is another important rule change. I said that in deciding whether to dismiss the case, the court ought to consider the view of the victim. With the committee here I think – I'm having some difficulty understanding this rationale for not adopting my proposed change to Rule 48. The committee's comments are, well, if there's a public hearing on a dismissal, the crime victim will be

heard at that hearing. And yet, the committee's rule on that subject, which is Rule 6, the right to be heard, says that victims can be heard at three points. We only give them three points. Bail, (indiscernible). Seems to me, if you're saying in your advisory committee notes the victim can be heard when the case is dismissed, you ought to include that in Rule 6.

Moreover, the committee says that well, the CVRA doesn't explicitly address the subject of (indiscernible). Again, I think the committee has stacked the deck and said, let's take out of the deck the right to fairness, and looking through the rest of the rights to see the one dealing with dismissal and say no you don't. But of course you can't do that. You have to look at the dismissal issue in light of the victim's right to fairness.

MR. EDMUNDS: Judge?

MR. CASSELL: Yes?

MR. EDMUNDS: Are you speaking of 48 A and B? Or-

MR. CASSELL: 48 A.

MR. EDMUNDS: Okay. Thank you.

MR. JONES: Now Judge, let me ask you a question in regards to your contention here that the committee ought to insert language that the court must consider the victims (indiscernible). What do you mean by that? What is the import of that? And I say that in this context; of course, there is a right about (indiscernible) of the defendant. Rules do not say, "The court must consider the defendant's statements" do they?

MR. CASSELL: It says the court must address the defendant, I think you're right. There is no specific language about the consideration of (indiscernible).

MR. JONES: So what does it mean to add that the court must consider the victims statements? In other words, is that a reviewable standard? I mean, (indiscernible)?

MR. CASSELL: I appreciate the point. Because you're saying, look, in Rule 32, (indiscernible). I think the difference is this. Courts are used to hearing from government

representatives, defense representatives, (indiscernible). The CVRA is trying to change a culture that is not used to considering crime victims. And so unless there is some direction to the courts to consider this, I think we (indiscernible) say well, thank you for those remarks, now let me get down to serious business.

I think the rules need to direct courts to change the old practice which is not to fairly consider what victims (indiscernible), and embrace the new practice which is to consider victims as part of the process. Now, could the courts commit an error? I think it would be very unlikely for the court to commit an error unless the court said something like this – I'm not going to consider (indiscernible), but thank you for those remarks, and now let's get to the substance (indiscernible). Those would be the only ways (indiscernible). Specifically disavow (indiscernible). But the problem right now is that there is nothing in the rules that says, the courts have to consider this. And one of the things that worries me was I proposed

to change the rules (indiscernible). Which says these rules are going to be construed in various ways. A kind of general discussion.

Now the victims have to be considered (indiscernible). This committee does not put any such language in the rules (indiscernible). This committee has not adopted the CVRA's demand that crime victims be treated with fairness. And in light of the failure of the committee to do some of those other things, I'm worried that when we get to a provision like Rule 32, or Rule 48, whatever it we're looking at, unless you specifically put something in there about victims, the courts are going to continue to call it business as usual, which is not to consider (indiscernible).

MR. TALLMAN: But Judge Cassell, you (indiscernible). You're talking about remedies and (indiscernible).

MR. CASSELL: Yes. And let me look at the broad answer, and then look at the narrow answer to (indiscernible). The broad answer is this – the CVRA says that crime victims have the right to be treated

with fairness throughout the criminal justice process. Someone who's being treated with fairness has to have (indiscernible). That's clearly the intent of the drafting of the CVRA.

Now I understand that this committee is not obligated to follow the intent of the draft of the CVRA. But I would say that it would be remarkable for this committee not at least consider the intent of the drafting of the CVRA and to articulate very clearly why, if you think that well, I don't think there should be (indiscernible), and Senator Kyle and Senator Feinstein charted out a different path, I think you need to articulate pretty clearly why you were deviating from the intent of the drafters of the committee – I'm sorry – of the Senate.

MR. TALLMAN: So, who (indiscernible)?

MR. CASSELL: That depends – the government.

MR. TALLMAN: But the government is made up of the people (indiscernible).

MR. CASSELL: But the CVRA is premised on the idea that however effective Mr. (indiscernible)

colleagues may be, in representing the United States of America, there are independent interests of crime victims that deserve their own recognition. That's why crime victims have the right to be heard. That's why they have the right to be treated with fairness. That's why they have the right against unreasonable delay. All the other rights that are listed in the CVRA.

MR. TALLMAN: But by what authority does (indiscernible)?

MR. CASSELL: What's pending is the controversy over the application of (indiscernible) 701. A (indiscernible), which gives crime victims the right to confer with the government. The government's failing to discharge that legal obligation, the courts have a controversy over the application of that law, just like any other (indiscernible). I want to, if I could just give a specific answer too. You were saying, what about (indiscernible)? I'm not arguing for any of that. All I'm arguing for, and I think this committee has recognized, that there are remedial provisions in the

CVRA that you can get an injunction in this situation, or within ten days you can file (indiscernible).

The relief provisions are fairly narrowly tailored and already spelled out. Nothing that I'm proposing this morning in any way alters those provisions (indiscernible). Those are all covered in the CVRA (indiscernible). (2:53:00)

MS. BUCKLEW: Judge Wolf?

MR. WOLF: I wasn't on this committee when these revisions were being most debated, but at least superficially, initially, it made sense to me to incorporate the specific provisions of the statute, and permit a kind of "common law" experience to evolve. On page 18 of your testimony, you cited a number of revisions that have occurred. For example, clarifying the standard for pre-sentencing with a guilty plea, for eliminating (indiscernible) on traditional guilty pleas. Those were the areas where experience shows there is a problem.

It seems to me that one thing to take into account at this point is the understanding that you

don't have experience with this particular statute, you don't have a sense of what are the real problem areas – or what the appropriate way to strike the balance should be. And if we waited some period of time and revisited this, we could see where clarification would be helpful, and those decisions would be informed by more common law experience. If we do (indiscernible) we'll get a lot of direction from Congress, and one size fits all the precautions need to, want to at least be careful before taking the same approach, (indiscernible). How do you respond to that concern?

MR. CASSELL: Well, I think there are couple of things. One is that the CVRA was intended to be a dramatic change in the culture that's out there (indiscernible). It's contrary to the animating principles of the CVRA. There's another point, and I think Congress intended the Federal Rules of Criminal Procedure as (indiscernible). Congress wanted to do it right in the federal system, because (indiscernible) have a model to look to. What's critical then, if the rules spell out exactly

how victims are going to be treated, and treated fairly in the federal system, (indiscernible).

MS. BUCKLEW: Any other questions? Professor King?

MS. KING: Judge Cassell, I found your lengthy but very detailed submission very helpful, and I appreciate it. I had a couple questions. One, I thought it would be helpful to hear from you on your proposal for Rule 12. Which would limit the court's ability to turn over – to order the disclosure of victim's address and telephone numbers, and I was wondering how (indiscernible), if the court is able to order the defendant to turn over alibi evidence, does the constitution prohibit a rule that would disallow the typical discovery on that part of it?

MR. CASSELL: I think that's an excellent question, because when I was looking over my proposal to change Rule 12 yesterday, I think (indiscernible). I had put in a provision that said the government will not turn over names and addresses of victims, (indiscernible), but what I failed to put in

(indiscernible). Neither side should disclose telephone or address information. And once the rule then reasonably applies to both the government and defense, or (indiscernible).

MS. KING: So, can I just try to – I'm (indiscernible). In any case, there's a victim, there's going to be a rebuttal witness for an alibi defense.

MR. CASSELL: Either before the defense or the victim. There are situations where the victim, as defined in the CVRA could be an alibi witness for the defendant and might be (indiscernible) for the defense.

MS. KING: So you consider reciprocal discovery the Constitutional requirement (indiscernible) if the victim was (indiscernible) from both sides. But what if the alibi witness for the defense was not the victim, and the alibi witness for government was the victim, then you wouldn't have reciprocal --

MR. CASSELL: Well, you'd have a rule that in that particular context is operating on behalf of

the government in terms of not requiring disclosure.

MS. KING: So, in those cases you couldn't order the defendant to disclose the alibi witness?

MR. CASSELL: In those cases there would still be the requirement to disclose the alibi witness. All we're talking (indiscernible). There's nothing in the Constitution – at least that I read - that says you have to turn over (indiscernible). The address of the victim? Telephone number of the victim? Information that could be literally life threatening to the victim? And certainly (indiscernible).

I don't think the Constitution requires that type of information to go back and forth. I think (indiscernible) neither side has to disclose information. It's clear that when we have even handed rules, when you turn to one particular case, (indiscernible). But if the rules evenhandedly say no one has to disclose it, I think (indiscernible).

MR. WOLF: But you see, to me that brings into sharp focus the question of whether this should

be an ironclad rule. Just listening to this very interesting debate. And I quickly state this Duke Lacrosse case. And we have a victim, or an alleged victim, and the defense lawyer has the right and the duty to go and investigate that person. I mean, now we're talking about alibis, but why would it only be an alibi?

We'd get confused if they testify, and in some cases, the nature of the defendant, the fact that he's part of a gang, or organized crime, might cause me as a judge to think that if I have the power I wouldn't permit certain specific pieces of information identify the victim. Because even if the defendant is locked up, you've got other people who could threaten the victim.

There are other cases where I would find that fundamental fairness of due process requires that the defendant to have that information to adequately prepare their defense, to get out into the community and find what this person's reputation is. So, just focusing on this one thing, I'd kind of like to see how this plays out in real life, in real

cases, and if there's nothing that specific now, if this becomes a problem over time, the rules could be amended then. But for now, I'm elaborating on the (indiscernible), just as an answer, it's really a question. What about that? (indiscernible).

MR. CASSELL: Well, let me try to throw in another body of water, because I know we've been focusing on the CVRA this morning. I think some of the questions you and Professor King sort of assume is the defendant ordinarily gets the name of the victim. But actually, that assumption flies right in the face of the Jenks Act, and I know (indiscernible). When this committee drafted Rule 16, I think, in 1975, it (indiscernible), again, requiring the government to disclose the name – even the names of witnesses to the defense. Why? Because there was serious risk of assault and so forth.

And now we're debating what I think would be, clearly a much subsidiary question is, all right, how are we going to turn over the address and telephone number? If the defendant has no right in the rules to get the name, (indiscernible), it seems

to me a very fine tuning kind of adjustment to say you don't get the address either.

MR. WOLF: But the fact that you don't have a right in the rules doesn't mean that it doesn't commonly, it happens (indiscernible), the district of Massachusetts it happens. Routinely, (indiscernible), and if it's still a right to adequately investigate it, the governor (indiscernible), if I were asked for an opinion on that, for the direct testimony of the witness because the defense lawyer said, we have no way to investigate this witness, so prior to her or his testimony, it is essential that we do that, if we send this jury home for a week, or two or three, while that's done – again, the fact that the rule doesn't prescribe or require disclosure of witnesses doesn't mean, at least in my experience that it doesn't commonly happen.

And then, when there's a good reason – and sometimes there is – to stand on the fact that there's not a right in the rules, the courts will rely on that, the fact that it's not there. But

again, it gives us some flexibility to develop things that are just. And I will say, I'm really engaged by this idea that the statute's intended to change the (indiscernible). As I said to you before the testimony started, I think that the dynamic is very different, particularly the (indiscernible) of a judge here from the victim.

But I – almost humility, which I'm really accused of, because of the (indiscernible). How can we feel, when we're trying to change the culture, that we can recognized all these issues and calibrate the response correctly (indiscernible).

MR. CASSELL: It does raise one point I think I was making this morning. As I look around the table, and I understand the composition of this committee is designed to bring representation from all aspects of the criminal justice community, it's interesting I don't see a single friendly face here, in the sense that – although many of you are my friends – but none of you are here representing crime victims. We have a justice department representative, (indiscernible), in an official

capacity here as a federal defender from our districts (indiscernible).

It would be nice, I think for you to include in your discussions around the table, a crime victim representative who could tell you what they see. I've been out there litigating victims' cases, this is how it works. I've talk to crime victims, this is what they think. This is a fairly big committee, and I don't think the result is from having money or members, (indiscernible), some of the others who are knowledgeable on the victims to talk about them.

Let's turn to your Rule 12. I guess what we're debating on Rule 12 is this. Should we ordinarily - our rules right now, they say, really, let's give the address of the victim over to the defense. Should that be our default position? Or should the default position be, we're not going to turn over a home address of a victim, and then unless you can show good cause. I would point out that Rule 12B, and I'm not proposing any change to Rule 12B. Rule 12B says, for any of these rules the court can

grant an exemption for good cause shown.

So I would think at the minimum, we ought to have a default that the victims address won't be turned over, if the defense attorney can say, by golly, Judge Wolf, in this particular case I don't want to throw your (indiscernible), I need it for these particular reasons, the rule itself would allow an exemption.

But what you have in place right now is something that is very sensitive, indeed, as I mentioned, almost life threatening information, automatically turned over in alibi cases? I don't see how that rule can be squared with the requirement of the CVRA, that crime victims be reasonably protected from the accused.

MS. BUCKLEW: Let me ask you, just quickly, if any of the other members of the committee have a question, and I have two hands up, Leo Cunningham I saw you first so I'll let you go first.

MR. CUNNINGHAM: Your Honor, does the new statute control rights on corporations as victims, and government agencies, state, federal, local, as

victims?

MR. CASSELL: I looked at that, question, and I believe the answer to that question is no. And I think the answer to that is found in Section E of the CVRA, which defines a crime victim meaning, and I'm quoting here; A person directly approximately (indiscernible).

MR. CUNNINGHAM: Without arguing, and I don't know. It was my impression that under prior statues, the restitution statute, that the victim, in the definition, that corporations had qualified as recipients of restitution. Do you know if that's the case?

MR. CASSELL: Not off the top of my head maybe Mr. Campbell --

MR. CAMPBELL: I do actually know, and that has happened in certain circumstances. Corporations have qualified under the restitution statute for restitution payments from, for example, corporate officers who have defrauded the corporation, or engaged in (indiscernible) to harm the corporation's interests.

MR. CUNNINGHAM: Right, and I guess the dialog typically is framed in contemplating an individual victim. If it is the case that government agencies, including federal government agencies and corporations are victims under the act, would that suggest some modification of anything that you've proposed?

MR. CASSELL: I don't think so. I think everything I've proposed would apply. (Indiscernible). I haven't thought about – I have to confess I haven't thought about that angle.

MR. CUNNINGHAM: As I was trying to figure out, what the intended consequences might be, I wonder about with respect to government agencies, for example, would we end up with, in essence, two (indiscernible) against one (indiscernible) if a government agency (indiscernible) of a federal case, if allowed to come in and meaningfully and virtually as a co-party.

MR. CASSELL: I don't think so (indiscernible) victims right to trial, of course, the victim's right to trial (indiscernible), agent

from the IRS (indiscernible), your tax payments (indiscernible).

MR. CUNNINGHAM: Well, at the sentencing, for example, with the IRS, because it's the victim agency, would it be expected or allowed to have separate counsel who could come in and fully argue at the sentencing?

MR. CASSELL: Well, in theory, you could read the CVRA (indiscernible).

MR. CUNNINGHAM: And I know that Professor Beloof is going to speak to the boundaries of the notion of the right to fairness. But I wondered, are there participants in the criminal justice process who are not currently entitled to be treated with fairness?

MR. CASSELL: Well, for example, witnesses.

MR. CUNNINGHAM: Are they not entitled to be treated with fairness?

MR. CASSELL: There's no body of law that I know of that requires it – there is a rule of evidence. I think its 611, it says the judge shall prevent harassment and so forth of witnesses. But

other than those specific rules, there's nothing. If a witness (indiscernible), there's no body of law that says (indiscernible). So there are other issues. The issue for here (indiscernible), you have a mandate from Congress, (indiscernible).

MS. BUCKLEW: Alright, Mr. McNamara, we'll make this the last question.

MR. McNAMARA: Mr. Cassell, in your submission, you mentioned Rule 11, and you want to provide some more victim participation in (indiscernible).

MR. CASSELL: You know, those kinds of arguments I have to submit, with all due respect, are completely out of bounds (indiscernible). And the reason I submit that they're out of bounds is because Congress has already heard (indiscernible) the Federal defenders who participated in the drafting process of the CVRA. (Indiscernible), Congress said by golly, whatever arguments can be made against it, we want victims to be reasonably heard (indiscernible).

Will that slow things down? I suppose it

potentially would. I don't think it's going to slow things down significantly. (Indiscernible) from one court to another, and in Federal courts all over the country I haven't seen (indiscernible). North Carolina, we have a representative there, I believe in North Carolina, victims have a right to be heard at (indiscernible).

I think what happens, if you know a victim is going to object to a plea (indiscernible). In the rare case when a victim objects to a plea, I think what they typically want is for somebody to at least hear them out. As the judge said, (indiscernible). But let me tell you some reasons why participation (indiscernible). There are some concerns. (Indiscernible). And I think even if the victim's statement is rejected, (indiscernible). At least victims walk away from the process feeling they've been heard, and are more satisfied with the outcome. Does this take some additional (indiscernible)? But I think taking a few minutes to hear the victim out is nothing that will overwhelm the system. Certainly something that Congress is commanding

(indiscernible).

MS. BUCKLEW: Judge Cassell, we appreciate your being here, we appreciate the submission, and thank you.

MR. CASSELL: I appreciate the opportunity to be before you. Thank you (indiscernible).

MS. BUCKLEW: Mr. Goldberger?

MR. GOLDBERGER: Well, thanks for accepting my request to testify. I'm Peter Goldberger, I know a number of you but not all of you. I'm a private criminal defense lawyer in Ardmore, Pennsylvania, a suburb of Philadelphia. My practice consists almost entirely of federal criminal appeals, and some sentencing co-counseling, I almost never try cases. I was an assistant federal public defender for a couple of years – thirty years ago - then I did try cases.

I've been the spokes person for NACDL to this committee, you and your predecessors for, I think, fifteen years. But I've only asked to testify twice. And that's when I think that the proposals are incredibly important, and complicated, and there

might be questions that really warrant discussion, and this, obviously, is one of those times. We work on our comments in close cooperation with the federal public defenders. And I read their draft that they were working on, that lengthy submission that they made, they read my drafts and we tried not to be redundant, we didn't always agree. But I'm going to put that out candidly.

And I did talk to Tom Hillier, who's going to testify later about the subject matter of testimony, and Tom's suggestion – which immediately agreed to – was that he would talk about the Rule 29 proposal, and I would talk about the CVRA proposal. Although, if you saw differences in our ideas, and you want to ask me about what we had to say about Rule 29, I'm certainly happy to do that as well. As I say, I do think the implementation of the CVRA is one of the most complex and difficult problems that this committee has had to deal with in the whole time that I've worked on these problems for NACDL. And we try to take it very seriously, when looking in our comments.

I want to make clear that the NACDL does not dispute that there are people who are victims of crime. And we do not dispute or disagree that those people ought to be treated fairly. I think some of the questions we've already heard show though, that there are lots of people involved in the criminal justice process of all sorts, who are entitled to be treated fairly. In fact, everyone is entitled to be treated fairly. And in the thirty-one years that I've worked in the process, since I was a district court law clerk for Judge Becker, eons ago, I don't know that I've had very many experience with dealing with someone who wasn't being treated fairly.

I mean, putting aside feeling that the defendant wasn't being treated fairly, which happens, fairly often that feeling, and then you realize that you're heart is in the matter. And I've seen cases when I was sitting there biting my tongue, but thinking to myself, boy, that judge is not treating the prosecutor fairly. But that happens, you know, and is there a systematic problem with victims of crimes not being treated fairly that requires a

massive effort to remedy that problem by amending these rules? No. There is not.

This is a made up problem, with a gigantic solution being proposed. Now, why is this so – that's part of why this is such a difficult task for the committee. Congress passed a statute, and here I agree with my friend – who I think of in this context as Professor Cassell, not Judge Cassell. As he said in his testimony, "I and other advocates for victims." When someone sits here and says, "I am an advocate for victims," that person is not a judge in that capacity, at that moment. So, I think of him as Professor Cassell, with no lack of respect. This is his law review, world, the professor world, but this is not the judge world.

And I'm not here to rebut what Professor Cassell has to say on this subject because most of what he has to say was not proposed by the committee for comment. If the committee wants to change its mind and implement some of those ideas, under the Rules Enabling Act, it would clearly have to circulate a new set of proposals for public comment,

and I'll be back next year, to talk about the ones that you reconsider and – if there are any – that you want to propose.

But I'm not here to comment on Judge Cassell's, or Professor Cassell's ideas and comments, except indirectly. I'm here to talk about what has been circulated by the committee for comment. And that's not to say when, in my comments I don't sometime say, you know, I think you ought to also amend the rule this way or that way, I do that, and you've seen that and sometimes you've done those things and when it warrants further circulation you do that. But I'm trying to stay rigorously within the Rules Enabling Act process. And that's one of the two main concepts under which I'm trying to operate here, in our written comments and my – today.

Number one, defendants have Constitutional rights. Uniquely. We represent people, in NACDL, our members are twelve thousand, thirteen thousand members now. We represent people who have a very special status under our constitution. A unique

status. Something like twenty rights are articulated in the Constitution for good reason. The framers thought that people in the position of defendant in a criminal case needed to be specially protected in a number of ways, and that had to be written in the Constitution. Protected against the state, against the sovereign.

Crime victims, as a class, have no Constitutional rights. Congress did not even approve that idea to be circulated to the states. But crime victims, as defined in a statute, have statutory rights. Congress passed that statute, and I agree with Professor Cassell that this committee has a duty, fairly and evenhandedly, to implement that statute under it's Rules Enabling Act mandate. That is, to look at the statue carefully, decide what in the statute is substantive, what in the statute is procedural. That which is substantive must be implemented by rules, if rules are needed to implement it.

What is procedural in that statute should be looked at and said, is that a good procedure or is

that not a good procedure, because the Rules Enabling Act allows you to re-write any procedure created by the statute, by rule. Lay that rule before Congress, Congress will accept it or reject it and, to the extent that it's procedural, it will amend the statute. That's the way I look at these problems.

A lot of what – and here I am responding to what Professor Cassell has to say – is to take a position of the statute, it's fairness and it's fact, the clause "treat with fairness." Treat it as a substantive matter, and then ask that it be implemented through procedures, which, in effect, create new rights that we view as substantive, that are not procedures for implementing fairness. They are whole new really substantive matters. I question whether treat with fairness is a substantive right that can be implemented by rule. It seems to me that's a way in which the procedure is carried out, in fact, that's the way that every judge tries to carry out every procedure.

And to order fairness, or to treat fairness as a substantive matter, that then needs

implementation by rules is a trick in my opinion. It's at least odd. It's a way of trying to get this committee to do things that Congress didn't do. To quote Senator Kyle, and ask that that be treated as law is to ask the committee to do things that Congress didn't do. That's why the advocates of greater CVRA implementation quote individual senators on the floor and not the statute.

Now the statute tells us how these rights are to be implemented. They are to be implemented to two actors in the system. By the courts, and by the government. Subsection B tells us that in any court proceeding involving a defense against a crime victim, the court shall insure that the victim receives the rights – that is the substantive rights set forth in the statute – in any court proceeding. If it's not in a court proceeding, then the rights are to be implemented by the government. And that's what it says in subsection C and subsection F of the statute.

This committee should not implement, or attempt to implement – in fact, it would be contrary

to the statute for the committee, for the Rules Enabling Act and for this CVRA, for this committee to try to implement the rights which do not come up in a court proceeding. Because those rights by statute are assigned to the government to implement. By regulation, and by their own practice. And that's on them, and if there's going to be – maybe some day, some crime victim, or some person will say, "I'm a crime victim, the government isn't giving me my rights under subsection C, or subsection F, and I want to sue the United States government, get an injunction for that."

Maybe there will be a case for controversy, maybe there won't. But that's not about the rule. Before I forget, I'm just a little bit off track; on the subject of "persons" to Mr. Cunningham's question – the word "person" as technically defined in Title 1. This court has said that a person as being used in Title 18 is the person as defined. I think it should be Title 1, section 1; it's the corporate crime cases. The early corporate crime cases that say a corporation, a partnership, and other

artificial associations, unions are persons, within the meaning of the of – well, if I want to use the word "person" as seen in Title 18 unless otherwise defined.

But that a government agency is not a person. So, I think there's a right answer to the question you raised, Mr. Cunningham, and I'm not going to try and make trouble and chose things about the CVRA by saying, oh, it could be applied to government agencies and make them get two lawyers. I think it's already very clear that they can. But a government agency is not a victim.

I think there's even cases under the restitution statute where the government wants restitution for buy money in a drug deal, you know and the courts have said no, the government is not a person with a victim of crime in that sense. The defendant may have to give back buy money that they've received, but that's a court matter, that's not a – as my friend from justice department is agreeing – that that's the law already. That's not a confusion under this statute.

MS. BUCKLEW: Mr. Goldberger, are you recommending to this committee that none of the amendments should go forward?

MR. CUNNINGHAM: Oh, no, no, no!

MS. BUCKLEW: All right.

MR. CUNNINGHAM: I've submitted twenty pages about what should and what shouldn't. You've suggested implementing five ways, I say three of them are unnecessary and inappropriate. Rule 12.1, 17 and 18, for detailed reasons I said should be withdrawn. They either create too many problems and don't solve a real problem that exists, or they're not procedural, but rather substantive. And that Rule 32 and 60 should be looked at more carefully.

Our comments on Rule 60 are all this procedure and substance (indiscernible). Okay? I don't think it's appropriate for the rules to re-state the statute and I've worked with Professor Beale on other things before, and I like her and respect her a lot, but I think it's a really basic mistake that's been made. And I know that this is not the reported proposal, this is the advisory

committee's proposal, but my comments aren't in any way personal to the reporter. But, there's a basic mistake in some of what you've done here is to restate and repeat that matters from the statute which should stay in the statute because they're substantive.

What the rule should do is say what procedure would be appropriate for a court in a court proceeding to implement – the substantive matter. One of the most important things though that we bring up that I think is essential here is a fair procedure for determining who is a crime victim. The big fallacy and flaw and hole in the proposal that we know who a victim is.

A crime victim is defined in the statute as a person who has been harmed by the commission of a federal crime. Not a person who is alleged or who claims by one person or another at one time or another, but who has been. So, one of the most important things that we propose now, and without which you cannot implement this statute – cannot implement this statute – is to add substantially to

the who may assert rights clause, wherever you put it, in the place you proposed it or the place we proposed it – a procedure or a hearing to answer this question. As soon as a right is asserted and the standing of the person who asserts the right is disputed.

And this can come up because the prosecutor wants to assert a right for a crime victim and that person says I'm not a crime victim, I wasn't affected by this crime, I wasn't harmed. We know cases where that happens. I wasn't harmed. I want nothing to do with this. I want nothing to do with anything involved in this process. There are certainly cases where the defendant will say that person (indiscernible), no crime was committed. And – or, if a crime was committed it didn't harm that person. Or, it affected that person but that person wasn't harmed.

Any of those things are fact questions that underlie the definitions on which you have to have a hearing. So as soon as someone steps up and says, I want these rights, someone else can say, a party can

say, or that person, if it's being done on their behalf, first we need a hearing on whether this person has entitlement to claim these rights. Now, we describe that here. It may be, like you noted, it's like a preliminary hearing. The statute, the CVRA by being passed by Congress, has in effect, in many cases, created a right to the defendant to have a substantial preliminary hearing very early in a criminal case which, otherwise he would not have in an indictment case.

At which the government must prove – we suggest by (indiscernible) evidence, that a crime was committed – not necessarily that this defendant committed it, because that's not a fact that's described in the definition, but that this person who claims to be a victim, or who he's claimed to be a victim was harmed by that crime.

And the defendant has a right to be heard on that matter because if the decision is this person is a crime victim, then the defendant's rights are reduced. There's no doubt about that. Every time a right is asserted under CVRA it's asserted at the

expense of the defendant and sometimes also at the expense of the government. They're not without --

MR. EDMUNDS: Would there be an advocate for the person claiming victim status?

MR. GOLDBERGER: I'm sorry?

MR. EDMUNDS: Would there be an advocate for the person claiming victim status?

MR. GOLDBERGER: The statute says that person can be heard by counsel, or can be heard by the prosecutor, if the prosecutor agrees with that person's position. Or, as in any court proceeding, could be pro se. I think if the judge – here's a perfect example of what fairness would be about. If the defense entitled to that hearing, as I say the defendant is, and the judge that the hearing could not be conducted fairly unless the victim were represented by a lawyer – which might be true – then the judge would have to find, I guess, a lawyer for that person.

Now, Professor Cassell talked about appointing a lawyer. But there's a distinction between inviting and appointing. There's no

statutory authority for the appointment of counsel for a victim. Nothing in the Criminal Justice Act, or in the CVRA, or in any other law I know of. It can't be done by rule because that would be substantive. It wouldn't be (indiscernible).

MR. JONES: Well, that doesn't mean that you're (indiscernible).

MR. GOLDBERGER: I mean there's no statutory authority for appointing a lawyer. I mean, that's why I said – but it's also true that there's none for compensating. There is --

MR. JONES: Doesn't the court have an inherent power (indiscernible) --

MR. GOLDBERGER: Yes, definitely. Yes, it's not statutory. Yes, I agree with that, it's not statutory. But the court under the professional responsibility of lawyers is to accept requests, and I think it's a request. So, really it amounts to an appointment because the judge – the lawyer has only one answer to the request.

MR. JONES: Let me ask you, if I can, about the hearing to determine who's the victim. Wouldn't

that also in some cases require the determination of whether they can find a victim?

MR. GOLDBERGER: Absolutely, when that's in dispute.

MR. JONES: So, this is going to be pretty -- can be involved --

MR. GOLDBERGER: Oh, yes. And I'm not just trying to make trouble here, I think this is what the statute implies.

MS. BUCKLEW: Professor King?

MS. KING: We are in the position, in the federal system of looking at these issues somewhat after some of the states have had experience with similar statutes. Do you have any information about how these particular problems have been addressed in the states, and whether any of the states have felt it was required by the constitution or their statute to have this sort of hearing set up?

MR. GOLDBERGER: I don't.

MS. KING: To identify who's the victim?

MR. GOLDBERGER: But we have a very good national network through the association, and I would

be happy to try and find out, and I know that our friends from the victims rights movement that are here also have a national perspective on what's been done. I can't answer that question from my own knowledge.

MS. BUCKLEW: Are there any other questions? Mr. Battaglia?

MR. BATTAGLIA: Especially in light of Judge Jones' comments that this may be an involved proceeding. How do we square what you're suggesting about being compelled with a speedy follow up? Is this going to be something that's going to collide? In fact, with that is something that you propose we suggest exclusions be created for? How do we deal with that?

MR. GOLDBERGER: That's a great question.

MR. BATTAGLIA: Do you have any advice for a speedy trial, and a speedy prelim, now the indictment no longer obligates.

MR. GOLDBERGER: You know, I hate to talk to - violates a very fundamental rule of practice in my office to talk about statutes without having the

statutes open in front of you – and I didn't bring my Title 18 with me. There are a lot of exemptions under the speedy trial act and I wouldn't be surprised if one of them didn't fit. I know, any proceeding – there's exclusion for any proceeding involving a defendant, that might be one.

And, in any event, we also suggest, we also suggested in our implementation rule, our proposed amendments to Rule 60, how the committee, does the committee call the judge's attention to the possibility that the CVRA will conflict with another statute and that the judge may have to balance. I mean, these are statutory rights. But the statutory right conflicts with another statute, there are all sorts of rules for resolving those conflicts.

But the resolution would not be not to hold the hearing, it would be not to enforce the claimed right of the person who purports to be a victim if to do so would require a violation of the speedy trial act. And conflict of statutes principles that call on the judge to enforce the Speedy Trial Act rather than the CVRA. Because the CVRA is a statute. It

doesn't trump another statute automatically. It does trump though – I'm just jumping around a little bit, but – the thought relates to a comment that we heard about what was called backtracking, in Rule 32.

The CVRA did, I think, imply it to be repealed, the right of certain victims to speak at sentencing. So I substituted and said Congress chose a general right for all victims, not special rights for victims of sex crimes, but instead general rights for all victims but phrased it less generously to the victims. And so he said, in having a right to speak they have a right, reasonably to be heard. And this is a very important part of our comments throughout, that the right to be heard is well understood in the law and in the criminal process.

Not to imply a right to speak. My clients have a right to appeal. I do appeals. My clients, as appellants have a right to be heard with respect to that appeal. That doesn't give them a right to oral argument in every one of my appeals. I have a right to file motions, my colleagues have a right to file motions in criminal cases. We don't have a

right to argue those motions. Yet our clients are receiving their right to be heard with respect to those motions. So we suggest throughout that there is absolutely no right to speak anywhere. That's guaranteed. But the right to be heard is the right to be heard in normal legal process and procedure, and that the judge should decide in circumstances of each case whether the right to be heard with fairness requires the right to speak and how much of a right to speak.

But this, the idea that there is what some of the cases have already called "absolute right to speak," including a case written by Judge Cassell. An absolute right to speak? That is contrary to the statute. It can't – it's not absolute, and it's not a right to speak. With all respect. I don't want to prejudge any --

MS. BUCKLEW: Any other questions? (indiscernible).

MR. WROBLEWSKI: Mr. Goldberger, I was intrigued. In part of your testimony, you suggested there's a difference between indictment cases and

preliminary hearing cases. Did I hear that wrong? Because --

MR. GOLDBERGER: Well --

MR. WROBLEWSKI: Go on.

MR. GOLDBERGER: In most federal criminal cases there is no preliminary hearing because the indictment is returned, and once an indictment is returned probable cause is presumed established, and the defendant no longer has the right to a preliminary hearing.

MR. WROBLEWSKI: Right. So, an indictment case, rather than this --

MR. GOLDBERGER: Rule 5.

MR. WROBLEWSKI: Right. You're suggesting that there's an elaborate hearing that has to occur, and I know you're not trying to make trouble, but you're suggesting there be an elaborate hearing with witnesses, and we're going to find the crime. Why in an indictment case, when a grand jury has already found, by some standard and not entirely convincing, but by probable cause that a crime has committed, why can't we stop there, at least on that front, and why

couldn't we have a much more truncated hearing as to whether this particular human being is or is not a victim? Why couldn't it be just a much shorter trial?

MR. GOLDBERGER: Because we've suggested a higher standard. Because if you chose the standard of probable cause then the indictment would conclusively establish that there is probable cause to believe that a crime was committed and the hearing would only have to be on whether this person – you know, you're aware of the fact – that this person was the victim of that crime and harmed. And if they could indict, they did say it would be (indiscernible).

MR. WROBLEWSKI: Well, there are a lot of statutes. I don't want to quibble with you – there are statutes that require a charging (indiscernible) with injury, for example, and the name of the particular victim. But admittedly --

MR. GOLDBERGER: Those cases are --

MR. WROBLEWSKI: -- admittedly they're rare.

MR. GOLDBERGER: They're not the typical federal criminal --

MR. WROBLEWSKI: Right. But if this committee thought that probable cause was the standard, you're saying it might be admissible in this type of hearing. The hearing you're describing could be much – could be very, very short.

MR. GOLDBERGER: Might be. I'm proposing a standard that I think would be most fair to the defendants. Because the defendant's rights are going to be impinged across the board once that determination is made. So we suggested a hearing that would be skeptical, before the defendants could be (indiscernible) by the court.

We also suggest, I just want to call your attention, in the Rule 60, which is a joint – Rule 60 proposal is a joint proposal, with the defenders, and the NACDL. How to implement the much more detailed, but purely procedural, this mandamus right that's created by the statute. We know from these first couple of Ninth Circuit cases that that is a horrible mess.

(Laughter.)

MR. GOLDBERGER: That the statute is very difficult. I don't think it speaks for itself of how to be implemented. We tried to be scrupulous, and say what does a district judge need to know about this mandamus right, and how should the district court proceed if this mandamus right is invoked, and we have recommended that this committee call to the attention of the Appellate Rules Committee and now with the latest amendments to the CVRA, perhaps the Habeas working committee group of this committee that, you're aware that subsection D is the statute, but the CVRA was amended subsequent to the time you started working on this.

It stands some of these rights to rights of crime victims in federal court hearings regarding Habeas Corpus. So, that's something that may need to be looked at in terms of the Habeas group. But as far as the appellate rules are concerned, we just say somebody ought to make it clear, because the Ninth Circuit didn't seem to understand this – that a mandamus, under the act is a mandamus. And Rule 21

of the appellate rules applies.

And with that idea in mind we suggested how a district court would perceive these are the mandamus brought under the CVRA. When and how should a judge think about a stay? When does the district court not have jurisdiction to proceed? When can a motion be heard depends on the outcome of the mandamus (indiscernible). And we tried to give you some suggestions of how they'd be implemented because they weren't in the Rule 60 that was proposed.

(Cell phone ringing.)

MS. BUCKLEW: That was not intentional!

MR. GOLDBERGER: I was impressed.

MS. BUCKLEW: Any other questions?

MR. EDMUNDS: Did I understand you to say the rule has been amended to increase victim's rights?

MR. GOLDBERGER: Yes. What you have – what you may be familiar with as 3771B is now B1. And there's a B2 that talks about implementing – this was for this fall and last summer and Professor King is nodding. It's just really within the last six

months, right? That what had been subsection B of the statute became B1 and there's a new B2 that talks about equivalent rights and habeas proceedings.

MR. EDMUNDS: This may be real specific to me, but the rule definitely states (indiscernible).

MR. GOLDBERGER: Exactly. In fact, that's what it says. In fact, the way that the statute was amended it doesn't apply to federal crime victims in 2255 hearings. It only applies to state crime victims in 2254 hearings held in federal court. Don't ask me why.

MS. BUCKLEW: Okay, we'll make this the last question, Judge Wolf?

MR. WOLF: Just for clarification, is it your position that there should be a hearing to determine whether somebody is a victim within the meaning of the statute, if that individual (indiscernible), then the defendant uses the victim's status? Or are you advocating that the defendant would have a right to that hearing even before the victim attempted to (indiscernible)?

MR. GOLDBERGER: No, no. We say only if

the right is invoked under the act. And either the government or the defendant, or the person who's named as victim disputes the assertion that that person is a victim.

MR. WOLF: So, this isn't – your proposal isn't a proposal for sort of general (indiscernible) and general discovery --

MR. GOLDBERGER: No, no.

MR. WOLF: -- in every criminal case? It's only when the victim (indiscernible)?

MR. GOLDBERGER: That's right. Yes. And we suggest that it be put under the who may assert rights clause in Rule 60.

MR. WOLF: This is the counter-part to what I asked Judge Cassell; why does that need to be in the rule? When I'm presiding this case, the government tells me that somebody would like to participate with their permission, and the defendant says that's not the victim, that's in dispute. I would get the information necessary, it may be on paper, may be it's credibility at issue, I would look at that. Why does it need to be in the rules?

MR. GOLDBERGER: Well, you can ask that question about every rule and procedure. I mean, if there were anything for which a judge has to do for which there is no rule or procedure, the judge nevertheless may do and must do in a fair way. So, you can always say you don't need a rule, the judge would just deal with it as it comes up. I'm suggesting that this is something which, for the same reason we have rules and procedures on anything. We think it will come up frequently enough, and the judges will have different ideas about it that ought to be channeled.

MR. WOLF: But you don't know how frequently it comes up at the state (indiscernible). Similar to the concern I expressed (indiscernible), it's an intriguing issue, but if it's going to happen four times a year, I suspect (indiscernible).

MR. GOLDBERGER: I do know, from my experience – and it's a lot of experience in federal sentencing work, but there are many disputes about who was harmed – who was harmed at all. That comes up in the restitution context. So we know that there

were always be controversy, even if there's no – sometimes there's just very much a dispute of who is among the victims, especially with among the victim cases as opposed to one victim cases, who is among the victims, and also, whether that person, in the long run suffered harm.

MR. KRAVITZ: What is the standard (Comments made away from microphone.)

MR. GOLDBERGER: Oh, the level of (indiscernible)?

MR. KRAVITZ: Okay, (Comments made away from microphone.)

MR. GOLDBERGER: Oh, I think – so it's a preponderance of (indiscernible) evidence, (indiscernible).

MR. KRAVITZ: (Comments made away from microphone.)

MR. GOLDBERGER: Yes, yes because it's at the beginning. It's at the beginning that will impinge the defendant's right throughout.

MR. KRAVITZ: But Judge Wolf's -- (Comments made away from microphone.) The victim might come

forward only at sentencing. And it might arise the defendant's already plead guilty, (Comments made away from microphone.)

MR. GOLDBERGER: Well, actually, let me just have a moment to talk about the restitution question. The statute says that the victims' rights with respect to restitution shall be, this is a separate right. The victim's right to (indiscernible) restitution is separately A6 under the statute. A right to full and timely restitution as provided in law. And we pointed that out in our comments and said that the rules could not create new rules.

They should only reference the restitution statute. The last thing I think you would want to do is to address the question – anything that would address the question of restitution in the Rules of Criminal Procedure and then have it claimed by some smart alec like me that under the rules enabling that, you have repealed the restitution statute. Okay? Once you create procedures in Rule 32 that regulate the implementation of restitution, you are

superceding section 3664, which is a detailed statute that regulates restitution.

So our proposal is to say that with respect to restitution the victim's rights are as provided by law. But you should refrain from impinging on that.

MS. BUCKLEW: Thank you, Mr. Goldberger. We appreciate your remarks.

MR. GOLDBERGER: Thank you.

MS. BUCKLEW: Mr. Sullivan? Welcome.

MR. SULLIVAN: Thank you. What a pleasure it is to appear before distinguished judges, at a time when the life and liberty of one of my clients is not directly impacted.

(Laughter.)

MR. SULLIVAN: I can say what I want. And to you other professors and members of the justice department, thank you, it's a pleasure to be here. My position is very straightforward. I'm opposed to any change in Rule 29. I applaud the submissions of Judge Holderman and Peter Goldberger on behalf of the criminal defense lawyers. And adopt them in almost all respects. My contribution to you today might

very well just a report from the front line.

First, I'm against any change. I think rule one trumps Rule 29. Rule one -- isn't rule one always, "If it's not broke, don't fix it"? I don't see that it's broken, I don't think there's any evidence that it's broken. I'm suggesting to you that the statistical evidence that I have not seen, but based on the analysis of Judge Holderman, did not see the basis for any change, and I'd be surprised if the statistical evidence that I did not see actually has any concrete incident in which a Federal District Judge went overboard and granted a Rule 29 prejortic judgment of acquittal when he or she should not have done so.

So, by way of background, let me just tell you that I come from Williams and Connolley, the law firm founded by Edward Bennett Williams. A beloved, legendary trial lawyer; I begin my 38th year this month at the law firm. Those are the old days, when people went into a law firm and stayed, I guess. We have about 250 lawyers who practice out of one office, we do as much criminal litigation nation wide

on all coasts, I think as any other law firm in the country.

We actually try cases in our law firm, and so I can bring to you some front line experience about Rule 29. I can tell you this, that whenever there's been a Rule 29 judgment of acquittal in our law firm, it's been followed immediately by a parade, it's so rare. And there've been very few parades in the 38 years I've been at the law firm. And we do as much of this as anyone else. But I'm not just relying upon my instinct about when the parades occurred. In my own recollection, I went to the fountainhead of all evidence.

I issued an email to my lawyers and my partners, and I had a survey done of all the lawyers in the law firm. We think the is the largest assembly of criminal litigators under one roof. And I am pleased to make a report from what I found. First I limited the email to 100 partners, thinking that they had to be around for eight or ten years, and that the younger person would never have had a Rule 29 experience that the partners would not have

known about. So I think I was safe in that.

And my question was very straight forward, it simply was, how many times in your career have you achieved a Rule 29 pre-verdict acquittal, how many cases, and how many counts in each case? Here is my report. I received six responses from 100 lawyers. One lawyer with 15 years experience: one case, one count out of four. Second lawyer, with 10 years experience; one case, one count out of three. Third lawyer, with 23 years experience; one case, one count out of six.

Certainly didn't tip the balance of justice there! Went on to trial, and whatever happened, happened at the trial. Outside of my own experience, I found three cases in the hundreds of years of collective experience in which all counts were dismissed by virtue of the Rule 29 pre-acquittal acquittal. One of those, a lawyer of 32 years, had one case, all counts. It was a tax preparer case and the lawyer went on beyond my questions -- and by the way, this lawyer was a justice department official.

Actually was the highest ranking acting

assistant attorney general of tax division in the time period ’92, ’93, and was the deputy assistant attorney general from ’89 to ’92. And as I understand his position, he saw all tax cases in the country at the time he was in office. He took a wayward approach and became a defense lawyer, and in his defense experience and in his government experience, he’s personally seen one. He adds, quote, “In my experience, it’s extremely rare. During my time in government, I only heard of a couple of others.”

Next case, one lawyer somewhere in 1970 had all counts dismissed in an anti-trust case. And the third is another lawyer with 40 years experience with one case all counts, also a tax case. So, I have six responses from 100 lawyers, from several thousand years of experience, leading me to conclude that it’s not a problem. Now, my own personal experience. I had one case in the 1970’s in which all counts were dismissed. Sort of a fascinating case in which the FBI developed a sting. The FBI bought a parcel of land, moved to rezone it, submitted the rezoning

through a panel, went to one of the panel members and said, "We'll give you $10,000 to fix this." The guy said, "No" three times, the zoning was approved unanimously, without any effort on his part.

The FBI came back one more time, pushed the $10,000 dollars on him, and sadly, he took it. He felt so badly about it he went right to Oriole's baseball game in Camden Yards and flushed the $10,000 down the toilet. I don't know whether it's of any help to you, but it takes about 20 minutes to flush $10,000 down a toilet at Camden Yards.

(Laughter.)

MR. SULLIVAN: At any rate, the judge was so incensed that the government created crime, and then this entrapment case never got on to put on the defense. But he was so incensed that he thought that this was the one time in his career that he would grant a Rule 29 in that particular case. The other experience I have -- so that's one case in which all counts were dropped -- 40 years of criminal litigation, only half my work is criminal, to be clear. Half is civil.

The other case, and I must say, maybe the reporter will put a little footnote in your report that I actually, along with my partner Barry Steinman (phonetic sp), I think, hold the record for Rule 29 judgment of acquittals -- 189. We actually have had 189 judgment of acquittals, the problem was it was in one case. In that particular case, the government indicted eight defendants with over two hundred and some-odd counts. After thoughtful consideration, the judge granted a Rule 29 judgment of acquittal to 189 of the money laundering counts.

This was a case brought against eight defendants. College professors, accountants, lawyers, and businessmen. The case went on to trial in 20 serious counts, and the jury acquitted. The judge then -- there was some severed counts, there was a second trial against three. The judge gave Rule 29 to two of them, and in the final act, the judge gave Rule 29 to six counts in the second trial with respect to six counts, but let it go to the jury on a theory D of the government. Judge later granted a new trial, the government appealed and then five or

six years later the case was over. But there again, even in that case, there was a three month trial, followed by a several week trial when the justice department had it's chance, of course, to do justice.

So, I'm suggesting here that from this report from the front line, from a group of people that really try these cases, it is extremely rare when there's a Rule 29 judgment of acquittal. And I guess I could say, even under oath, I personally have never seen --in a room -- Rule 29 judgment.

(Laughter.)

MR. SULLIVAN: Those occasions, we fully agree with the District Court judges. Now, on reflection, and in full candor with the committee, I wanted to point out one thing that I might disagree with, in Mr. Goldberger's submission. At point three, page 13, he basically says there, and I'm quoting, "A defendant would always be better in refusing to waive double jeopardy when making a mid-trial motion for judgment of acquittal and seek acquittal from the jury; and then renew the motion

for acquittal if the jury did not acquit."

I must say, I have an exactly opposite belief there. If I'm in court with a defendant, and a judge is about to give me a Rule 29, I'm going to take it. If I have to waive some other right -- which I don't want to do -- then preserve the error, and hopefully some circuit judges will think I've been abused down below and should not have waived it, I'm going to do it. If I get a judgment of acquittal, that might be one my three children!

I'm not going to let it pass, I'm going to take it and worry about it another day. The point of my disagreement, basically, is that there's going to be litigation. If these changes as proposed pass, there's certainly going to be constitutional challenges of significant dimension. My own view as expressed in my letter, from my colleagues that helped me prepare it, is that frankly, it appears, at least at first glance, to be a violation of 28 U.S.C. section 20.72(b)., because in essence, we'd be modifying a substantive right. I also want to add something that I don't think we've mentioned. And it

is this; I believe Rule 29 as it now stands provides an important prophylactic effect on the government.

Right now, any time a prosecutor wants to bring a case, I hope he's considering the fact that he has a distinguished District Court judge sitting there, that's going to look at this case at the end of his or her presentation, and is going to decide whether it's appropriate for Rule 29. That has to be a consideration the prosecutor -- as they decide whether to bring a case. The fact that that rule is there, and they have to get over that hurdle in every criminal case, I hope would make them more careful about their assessment about whether the facts warrant this prosecution, and whether the law warrants this prosecution.

Because, frankly, I can't think of anything more embarrassing to a prosecutor than being told by a Federal judge that the case is thrown out on Rule 29, it's not even worthy of a jury. So, I would suggest to you that on reflection there must be that kind of prophylactic effect. And I would urge maintaining the rule as it is so that that is a

factor which should temper the kinds of callous presentation to a jury, thinking maybe this case will inflame jurors enough that they'll not focus on the facts too much so that it will get by.

Lastly, if I might say, in concluding, I frankly think that it's somewhat insulting to the men and women who've devoted their lives to being Federal judges, and they're down there on the front lines to do justice, that they can't be trusted with this kind of a decision. I would be fascinated to know from the District judges here. I'd be willing to bet that the people here haven't granted more than a few Rule 29 judgment of acquittals after the presentation of the government case.

And frankly, I think we should not try to handcuff the men and women that are performing that role, it's decidedly a great sacrifice, by changing this rule and showing the Federal District judges, you know, we really don't trust you. We think that even though you rarely do this we want some court of appeal to take a second look at this. And those, my friends, are my thoughts from the front lines.

MS. BUCKLEW: Thank you, Mr. Sullivan.

MR. SULLIVAN: Thank you.

MS. BUCKLEW: Any questions? Two over here, we'll start in this row with you.

MS. BRILL: I know that this wasn't necessarily the subject of your survey, but you have any thoughts on the interplay of this proposed change and Rule 29B, and, I think, C, which allow the judge to reserve sentence until after the jury comes back with a verdict, and then can possibly grant Rule 29 at that stage?

MR. SULLIVAN: Well, I notice that there was a lot of attempt to mix apples and oranges, apparently from the judges report of the justice department data and I think that's a very different situation. I have seen judges -- I personally have not experienced that situation where a judge lets it go to the jury, but tells you ahead of time that I'm considering a Rule 29, or I'll consider it at that time. And I've never been the beneficiary of a judge doing that.

And I think that's even rarer when a judge

does that. So, I frankly think that the principal focus should be on the Rule 29 and whether it warrants any change. Because that is the point which tries to catch the cases that are so bad that they really shouldn't be subjected to a jury. All of us in this system, I think have faith in here, but all of us who have been before the jurors know that they can do things improperly as well.

There are compromises, or the jury can be inflamed in certain kinds of cases because of large amounts of money, because of the alleged amount of a fraud which is a billion dollar fraud, as opposed to something they really get their arms around. So, my focus strictly is on the other. Now, do I have any view about whether a judge could do it? I remember, I actually remember, in the one case that I remember -- I call it the Oriole Ballpark Case, in which the prosecutor plead, don't do this! Don't do this!

You know, and you can do this at the end of the case. Let it go to the jury and do it at the end of the case. And the judge looked right at him (indiscernible) way, and said, this case is so bad;

this is my duty to do this, and I'm going to do it.

MS. BUCKLEW: Mr. McNamara?

MR. McNAMARA: If I could add something to what Mr. Sullivan said. I've been litigating criminal cases for 42 years, and I don't see any problem either. I've had two pre-verdict Rule 29s granted. One was 1977, the other one was 1979. I've seen two -- count 'em -- here and there. But it seems to be not a problem. And even in the (indiscernible) office that I'm involved with, (indiscernible).

MR. SULLIVAN: Thank you.

MS. BUCKLEW: Alright, I think the justice department would like to be heard (indiscernible).

MR. WROBLEWSKI: First of all, we're grateful that you came here today, and I'm especially grateful, because you laid out a procedure that we have actually followed ourselves when we first were approached about this idea. We went to our attorneys as well, all over the country, and sort of asked them and surveyed them and frankly, what I think we've found, and I actually don't think there's a whole lot

of dispute, actually about the extent of it.

We know, not just from the survey data, but also from the data from the administrative law offices of the court, and this was submitted by some of your colleagues, that there are somewhere between 50 and 150 acquittals a year throughout the country. And whether that's significant or not, obviously that's the matter that's clearly in dispute. But I'm grateful that you laid out that survey, because five, six, seven years ago I sent out an email very similar to your email.

One other thing I do want to address, and then I want to ask you a question along the lines of what Ms. Brill talked about. I don't think this is a matter about whether District judges can be trusted. There are, of course, a whole host of procedures where a District judge makes a ruling and they are appealed. That doesn't mean that District court can't be trusted.

So if you make a suppression motion under Rule 12, the rules provide that that should be done before trial, the decision should be made before

trial, it should not be deferred until after the jury is brought in, because it's making the case double jeopardy. And that all allows for appeal. That doesn't mean the District judge shouldn't be trusted, it's just, there's a reason why we have an appellate court. Your proposal is all about getting these decisions from the appellate court.

Now let me ask you the question that I have, and that is about deferral. The rule now provides that in some cases, the judge may defer, and in fact, I think again your colleagues suggest that it is appropriate for judges to defer this ruling until the end of the case in certain circumstances. Could you tell us what circumstances you think they should defer, and if it would be appropriate to put such a thing in the rules?

MR. SULLIVAN: Okay, let me respond first, Jonathan if I could, to the number of cases. Well, if there are 50 or 150 times that that happens, again I would urge that -- no, I believe it's a basic constitutional right to acquittal at the Rule 29 procedure point, before those (indiscernible). That

is, I believe a constitutional right. And I would not do anything to change that right, which has been in effect for 200 years, basically.

MR. WROBLEWSKI: But are you suggesting then that the deferral provision, which would put that decision off from the end of the government's case, and sheet it until after a verdict is returned -- you think that's under constitutional law?

MR. SULLIVAN: No, I think that a judge obviously has the authority to do that. What a judge is doing at that time, it seems to me, is he's saying -- he or she is saying -- I don't know. I assume a judge will have enough integrity at that point to grant a Rule 29 judgment of acquittal if the judge believes that it is appropriate to do so at that time. And the mere waiting of it, you know, in a way, judges are human too, they may want to take the burden of themselves, thinking the case is so bad the jury will acquit and I won't have to actually make the decision.

I think that's a human kind of a thing that a judge might do. But by the same token, I would

argue to a judge it's your duty to do it if you perceive that it shouldn't go to the jury at that stage. So I don't think deferral, the fact that there's a deferral, the fact that judges can defer, the fact that they can look at the whole case at that time and decide that this is now worthy of a Rule 29 judgment acquittal, I don't think that changes the issue. I just think that deflects our attention from really what's being done.

Also, I might add here, that with respect to those other things you mentioned, with respect to those other appellate issues, we're not asked to have the defendant waive a constitutional right. This is a seedy bargain, in a way. There the judge is, thinking about doing this, and now the defendant is confronted with waiving a constitutional right to double jeopardy, to get that judges decision? I just -- It makes me squeamish. I don't think it should be done. I don't think there's any reason to do it. I'll trust our judges at that juncture in the process. They make many, many other important decisions that we all trust and list. I say,

continue to trust them with the Rule 29 pre-verdict judgment of acquittal.

MS. BUCKLEW: Judge Wolf?

MR. WOLF: It's possible, I think to solve the (indiscernible) in part, through one of the successes (indiscernible) in your letter as well. With regard to the government's right to appeal a decision on a suppression motion, and the rule version does not require who filed the decisions, if they're possible. (Indiscernible) evidence, I've authorized my staff to (indiscernible).

Like, reading these materials, and again, (indiscernible). To weigh the very substantial question in my mind is whether it's appropriate to even to attempt to address this with a rule if it's not a statute that authorizes appeal in circumstances, but it doesn't in other circumstances. And the analogy to (indiscernible). I wonder if you and some of the other witnesses on this side want to elaborate on this point that if there's going to be a reform, would you illegally require, (indiscernible) require that Congress act rather than addressing this

issue?

MR. SULLIVAN: Well, that is the point on our letter. There is no basis for this committee to make this change based on a rule. It would require an act of Congress, and even then, it might be questionable from a constitutional point of view, whether to give an appellate right at that juncture.

I mean, we don't allow appeals of acquittals in America. That's a longstanding principle, we don't allow it. So why should we bargain at that crucial juncture, when some Federal judge thinks this is so bad, that's what they're saying -- this is so bad they can't stomach it going to a jury. Let our judges decide it, and a rule committee, I think is, let me go back to my baseball analogy, out in left field. To try to make a change like this. Thank you, Judge. I agree with that.

MS. BUCKLEW: Any other questions? Mr. Sullivan, we thank you.

MR. SULLIVAN: Thank you.

MS. BUCKLEW: We're going to take a brief

break here. Let's take 15 minutes, or until about 12:15, and try to get going with these. My watch says 12:00 now, so 12:15 would when we would start. It may be a little fast.

(Off the record at 12:00 p.m.)

(On the record at 12:15 p.m.)

MS. BUCKLEW: Okay, Mr. Butler? Welcome to you.

MR. BUTLER: Thank you, Your Honor. Members of the committee, my name is Russell Butler, I am the executive director of the Maryland Crime Victims Resource Center. I've been a practicing attorney for 22 years, the first 17 years I served in general practice, including criminal defense. Had a number of CJA cases, and one of my clients during those period of time was the Stephanie Roper Committee and Foundation.

About five years ago, those two organizations merged, and I was asked to become executive director. I have been representing crime victims, including in court, for over ten years. Most of them have been in state court. Recently, I

have represented victims in federal court, we've also had pro bono attorneys represent victims and we also currently have one of our attorneys in our office is (indiscernible), for a victim in a federal case in Maryland.

Our experience in representing and assisting victims are victims do not understand the criminal justice system. They're very intimidated, they feel, often that they have been victimized, they have been traumatized, sometimes we have to remind victims over and over again – it has always been our organization's position never to impose our position. We treat all of our victims as clients, we try to inform them so that they make intelligent decisions and their decisions - obviously within the bounds of the law, we try to advocate for them. In terms of your proposed rules, and we do applaud this committee for looking at the Federal Rules. And we do believe that the intent of Congress should be implemented through these rules.

We do have a couple particular concerns that I would like to highlight, and then try to

answer any questions that any members of the committee may have. First I'd like to refer to the proposed changes in Rule 32, and I'm on page 368. The current rule regarding victims says, "Before imposing sentence, the court must address any victim of the crime of violence or sexual abuse who is present at sentencing."

And rightfully, the committee is striking "of crime of violence or sexual abuse" so that it applies to all victims. "And must permit the victim to speak, or submit any information about the sentence." So, under the current rule, victims have the ability to speak, obviously verbally, and it can be about the sentence, not just the impact on the victim, but federal law has provided that victims can provide information about the sentence. We feel that the proposed amendment actually does repeal and not grant victims further rights - as intended by Congress - but limits that.

And I would suggest, it's a very easy fix, and I would urge this committee to just add what the committee does, to be reasonably heard, including to

speak or submit any information about the sentence. We've already heard Mr. Goldberger say that victims shouldn't have a right to speak. They will clearly argue that this change eliminates the ability to speak – the victims can't speak, and they're not going to be able to speak about the sentence – all that can be reasonably heard and there will be lots of litigation over what this means and we believe that Congress intended to strengthen, not reduce victims rights.

So we would clearly hope that this committee keep the existing law, and incorporate the CVRA. I would also indicate in regards to the pre-sentencing report, and I've attached a testimony that I presented to the sentencing commission. And I think the sentencing guidelines provide that the court has an obligation not to accept stipulations. Who is going to know, other the government or the defendant or the defense counsel what the real facts are? To be heard in the federal case is, what factors that are considered on the guidelines? There's certain factors that are considered or not

considered, or not correct.

I think that the court is not going to be imposing – I'm sorry – will not be following their obligation. And I think to allow the victims to at least have access to those parts of the pre-sentence report that deals with the offense and what factors are being considered – and we're not talking about privileged or confidential psychiatric reports about the defendants. But we think it's only fair for the victims to be heard about sentencing, information about sentencing. You have to know what the court is considering.

MS. BEALE: Mr. Butler, may I ask you a question, just to take you back just for a minute. Did I hear you say that by using the statutory language we would be in violation of Congress' intent? If you use the language "to be reasonably heard," which is the congressional language, that would be inconsistent with what Congress' intended?

MR. BUTLER: I think Congress' intent was to increase crime victim's rights, to make them participants in the justice system.

MS. BEALE: But it did use certain language.

MR. BUTLER: Absolutely. And, this body needs to make recommendations that implement that. And when the existing rule says, to speak or submit any information about sentencing – when you remove that, if Congress intended to broaden the rights, and yet by redacting that information you are actually limiting that – yes. I do believe that's contrary to Congress' intent. Because I don't think Congress intended to remove any right of any victim to speak or to be heard about the sentence.

MS. BEALE: And does your submission – I've forgotten if it does – does it refer to anything specific in the legislative history? Because it does seem that Congress replaced very specifically focused on that language, and employed that terminology. Can you give us anything specific in the legislative history?

MR. BUTLER: I know I had a couple --

MS. BEALE: Where it shows it's supposed to be both, and? I think you're saying it's supposed to

be both, and. Right? It should be "speak and be reasonably heard" right?

MR. BUTLER: Well, I think – I don't know if I quoted specifically the legislative history, and I know that's in the federal sentencing reporter. My article's attached, but all of those provisions are in there. But I think Congress' intent was strongly to increase, not decrease the rights of crime victims. And clearly, I think this is a decrease, or at least arguably, a decrease in the rights of crime victims. And we've already heard the defense bar saying that they're going to articulate that.

MS. BEALE: I just wanted to you to sharpen that focus. Thank you. I'm sorry to have not come in quite when you were speaking about that and taking you back with regard to that point.

MR. WOLF: Maybe I could pick up on this a little bit, and I confess, I had to study this (indiscernible), the legislative history of when the statute was talking about the victim of a crime of violence, it said --

MS. BUCKLEW: I'm sorry, I have been told

to tell the committee members to talk into the mic --

MR. WOLF: I'm sorry.

MS. BUCKLEW: -- and I have neglected to do that.

MR. WOLF: When the statute was limited to providing the right to victims of sexual abuse or --

MR. BUTLER: Crimes of violence --

MR. WOLF: -- crimes of violence, I think the paradigm would be a limited number of victims. One or a couple. I thought, now that it's "victims" generally, there are some crimes, particularly financial crimes that may have dozens if not hundreds of victims. And something really could become unmanageable if everyone of them wanted to speak, or the judge could think it was unmanageable.

So I assume that this was intended to give us some flexibility because the paradigm had broadened. But again, I know for myself if a victim wants to speak at a sentencing, I think that's valuable, I hope its cathartic. It's helpful to me to hear it orally. So I wonder if there's a reason

to think that it's a practical matter, the way the rule is written now is going to present a real problem for the anguished victims that I think you have in mind in raising this point.

MR. BUTLER: I think clearly, we've already heard from Mr. Goldberger that "heard" does not mean "speak." If they're arguing that here before this committee, they're going to be arguing that in courts across the country. And what I would say for your financial crime, there is language in the CVRA where there are multiple victims where the court can craft a remedy.

And that may be sort of like a class action, where there are certain victims who will have the opportunity to speak orally, and the others can submit written statements. I don't dispute that. I'm not saying each and every victim. But I think at least some victims were the court can class a remedy, should have the right to speak about the sentence.

MR. WOLF: Was there any concern – I just let some victims tell me what they thought the sentence should be last week. Not just what the

impact on them was. In a capital case though, victims are not allowed to do that. They can't end their testimony by saying, "Therefore, ladies and gentlemen of the jury, please vote in favor of execution." Was there any concern manifest by Congress about that concept?

MR. BUTLER: Well, number one, I don't know the answer to that question. I will tell you in Maryland, Ware v. State is exactly that, the victim cannot state their opinion at the sentence. I do think that some states are contrary to that. But, that is the law in Maryland. And, I think, Tennessee v. Payne is clear and the court has the ability to take appropriate actions so that the defendant is not - I believe the Payne uses is "unfairly prejudiced."

So, clearly, I think the court has much more discretion on limiting what the scope is. But even in Payne was an oral address, sort of a victim allocution. So, I clearly think under Supreme Court precedent, it is appropriate, clearly, even in a capital case. And if it is appropriate in a capital case, it is clearly appropriate in a non-capital case

to have a victim to speak.

MR. WOLF: But you and I, at least on this, are in the same position. Because whether it is a right or just discretion, with me, I believe I would always let a victim speak unless there was so many of them that we had to work to some mechanism to make it manageable.

MR. BUTLER: Well, and I would say that I had a case several months ago, where the victim – federal case – the prosecutor called the victim at the sentencing hearing, the victim testified on behalf of the government, the judge had read the written victim impact statement as part of the pre-sentence report, and my client came back after testifying and said well, I thought – Mr. Butler you told me that I would be able to speak and I say what I thought the sentence would be.

And on behalf of my client, I asked the Court, and the Court said well, he assumed that just because he had read the written victim impact statement and he had heard that that was all my client wanted. And the Court clearly followed the

rule, there was no ambiguity about it, and the Court heard my client as to what the sentence should be. I think that rule is working well, there are no abuses. I do think that there are problems for those of you who are judges or attorneys who practice, this law has been on the books for more than two years.

How many times have you seen, especially since this law allows attorneys for crime victims, how many attorneys have you seen representing crime victims in any federal criminal case? How many times have you seen, at a bail hearing, a victim say, "I want to be heard. Reasonably heard." At a plea? On a sequestration motion?

The problem is that victims have these rights, but no victim is going to have the wherewithal – now you may have some intelligent victims, Mr. Kenan in the Ninth Circuit clearly did that – but that is the exception rather than the rule, and the victims are intimidated, they don't know – and I agree with the rationale of (indiscernible), even smart and intelligent people don't know the rules of law and the court, and you

need an advocate, a legal advocate.

And sometimes the government does that and they did it very well. Other times – I'm not saying intentionally or unintentionally, there may be different interests – but, you know, the statute provides for independent counsel. How many times has any body in this seen, since the CVRA was enacted, the victim have counsel? I know only a handful of cases in the country. Even if you did, how many attorneys would know?

How many attorneys would know how to represent a victim, and where's the line? And I don't think there are very many, and I think that we're trying to educate attorneys and pro bono attorneys to be able to serve as attorneys for crime victims, and guarding our legal defense. I do have a couple other concerns about the rules that I would like to address.

Rule 17, I think the intent behind Rule 17 is – it has a good intent, I think the drafting of that rule, unfortunately is flawed, I've given you the example of a case, the United States District

Court of Maryland from our US Attorney about a terrible violation about appendix 1, or appendix a, where the defendant's ex parte sought and got access to a victim's VA record. They weren't turned over to the court, they were turned over to the defense counsel, and had lots of matter totally unrelated to this case from years from when this person was a veteran.

And the defense attorney used that with the prosecutor to leverage a plea. If the information is privileged or confidential, this information should not be applicable, I think the rule needs to be clear, even in those cases where it should be allowed, it should not be turned over to the defense counsel rights of confrontation, not trial rights, not pre-trial rights, and I think our example is a prime example of where the drafting on Rule 17 would allow, implicitly, discovery – or where discovery where could not go.

And one of the cases, I cited, you could even go to that if a victim was represented by an attorney, you could get attorney client privilege

broken. Again we can always hope that the third party custodian will object. But if it's the victim's right the victim's right to privacy, the victim has that independent right.

In terms of Rule 60, one of the things that I think that is omitted, and I attached a couple of Maryland rules that I think are very applicable. Number one is counsel. We've had cases where we have been represented and we have not been notified by clerk, we have not been notified by opposing counsel on issues relating to the victim, we hope that you would look at the Maryland rules and emulate them to make sure that the clerk notifies counsel for victim, and that other counsel on the case notify victim.

One of the most important things of the CVRA that I think the rules omit is, the CVRA says that the court shall ensure that the right of victims are allowed. And that to me does not mean that the court becomes an advocate for the victim no more than the court becomes an advocate for the defendant or the prosecution.

Rule 11 is clear what the court needs to do

before accepting a plea, we know what is, we've done it for years, but we do not know what the court needs to do for victims. So Maryland has some language, the rule we talked about before, Rule 32 says, "Before imposing sentence the court must address any victim of the crime." It doesn't say that for a plea, it doesn't say that of the sequestration motion, doesn't say that at a bond hearing, clearly, if the victims have rights, the court needs to make sure that there is a knowing, voluntary relinquishment of those rights.

I think that's easy if the victim is present in court, I think that's more difficult if the victim is not present. I think the Turner case that I cited to you is a case where the court, at a bond hearing, wanted to make sure that the victim had notice. And they needed to know who were those victims were.

MR. TALLMAN: Mr. Butler, I thought the statute put the onus on the prosecutor as far as notice of (indiscernible).

MR. BUTLER: The prosecutor, just as in the

State of Maryland, is responsible for notification, but if the court has an obligation to insure these rights, the court at least has a minimal obligation to ask the victim if in court whether they want to exercise their rights or whether they want to waive it.

And at least, if the victim is not present, ask the government whether they have in fact met their good faith efforts under the statute to notify victims. It may be that their computer system is broken, and maybe that they didn't. You know, the court has an obligation. The court cannot assume --

MR. TALLMAN: (Comments made away from mic.)

MR. BUTLER: I think it's very simple. Did you notify the victim? Its two and a half seconds. Yes, Your Honor, we followed. But if the government says, no we haven't, our victim's coordinator was sick, or we weren't able to reach them, I think the court has an obligation then to figure out how to provide that person's rights. I would also say that

I believe victims, like all Americans, have Constitutional rights.

They have got the (indiscernible) of due process rights. And this is a way that Congress has implemented those rights. To just say that victims have no constitutional rights, in my view is wrong. Last but not least, is, I think, the obligation – just as the court protects a defendant's obligations by appointing counsel, I think there should be a rule dealing with, since the court is required to insure the rights, in appropriate cases, appoint counsel for crime victims. Or, guardian ad litem. There is a statute, a federal statute for guardian ad litem, I do not think it's used often enough.

I think just by incorporating them – perhaps a cross reference in one of the committee notes, and I think there are ways that court has an obligation to protect rights, insure rights, and I think the right to counsel, and I've given you some language.

And let me just conclude. We've had – since 1982 we've had victims rights in the federal

system, we've had victims rights in the state system. I think the Crime Victim's Rights Act clearly, for the first time provides for some enforceability for crime victims rights. They're made participants, they're provided the right to have independent counsel under the CVRA. And I think this committee should do its job. I think it has a good start doing its job.

Hopefully, we ask that these points be considered and addressed, and I think that we can have the intent of Congress clearly implemented with rules that everybody will know what the rules are. We don't want to start creating litigation, you know, we've never had a problem. Right now, the defense bar could say, well, who's this victim? We don't have a history of all these judges – have you ever had cases under the existing, as to who was the victim and how long it was, do you need a full evidentiary hearing?

Pre-hearing to determine that? Do you then to then, as suggested in the written testimony, provide the victim's statement at pre-trial and then

it's going to materially alter and represent all the other witnesses who testify? We urge you not to buy this "CVRA creates new rights for defendants." That's not the intent, I know the defendants.

I was a defense attorney, I like preliminary hearings, I like getting discovery, but that's not the intent, that's not where Congress was going, and implement the CVRA as Congress intended and I think that will be good for victims, it will be good for justice, and we will have more justice for all if you considered the interests of crime victims. Thank you, I'd be happy to answer any questions anybody might have.

MS. BUCKLEW: Thank you. Any other questions?

MR. BUTLER: Thank you, Your Honor.

MS. BUCKLEW: Mr. Hillier? Welcome.

MR. HILLIER: Thank you very much. In my letter with my written submission, I apologize for its length and I do so to each and every one of you all, so I think it reflects how, out of the depth of our concern with the government's persistent effort

to amend Rule 29. As the saying goes, Brendan Sullivan is a tough act to follow, but I do have a few additional thoughts I'd like to give you.

I think we're back again, on this proposal, because as indicated, in your notes, Your Honor to the standing committee, of additional information provided by the United States Attorney in his 2004 survey that Jonathan referred to, I think our submission more fully and fairly explicates on those cases that the government submitted that information, and emphatically demonstrates that the time has come to finally close the door on this effort.

And at bottom, what we're talking about here is the government's dissatisfaction with what it calls the undesirability of erroneous, what it thinks to be erroneous acquittals. Motions for judgment acquittals, pre-verdict. And --

MS. BUCKLEW: This is Exhibit B, in your submissions?

MR. HILLIER: Yes, it is Exhibit B, and it's actually, as it relates to Rule 29 --

MS. BUCKLEW: Right --

MR. HILLIER: -- by far and away, the largest part of that submission are written testimony. Its length is dictated primarily because of the rules related to the Crime Victims Right Act, and its complexity and I'm not going to speak to it. And I did extract a promise from one member here that I would get no questions and, unlike Mr. Goldberger, I invite none on that topic. In fact, if you want to save to save time, you don't even have to question me on Rule 29.

(Laughing.)

MR. HILLIER: All right. I think the government's a party to this litigation that relates to MJOAs. And so, not to be surprised that they may be a little piqued now and then when they lose that battle. But that pique has to be measured against what's at stake here. And what's at stake are very fundamental constitutional rights.

When the government loses that, it means that they have failed to demonstrate proof beyond a reasonable doubt, proof sufficient to overcome the presumption of innocence and they're not allowed to

appeal that because of the double jeopardy clause. So these are constitutional rights that are bedrock to our system of democracy. And these notions are hardly, as the government argues in its paper, an anomaly thought ought to be overcome through a rule change here.

And I agree with Brendan Sullivan and Peter Goldmark's (phonetic spelling) submission that beyond just the lack of a perceived need to fix this -- there are huge constitutional problems with trying to waive a constitutional right to usurp another one. There are statutory problems, 3731, I think it is, limits what rights the governments does have to appeal, and this is not one of those rights. And so there's going to be predictable litigation should this move forward, and indeed, as all the opponents to this change have indicated, there may even be an issue concerning this committee has the authority to make this sort of a substantive change.

But what I want to focus in on is that perceived justification for the government's persistence here. And unlike Mr. Sullivan, who is as

charming as his name suggests his name might be, I think if you look at the government's submission, what they are saying is that, indeed our judges have abused the authority that has been given to them by virtue of their duty to enforce the constitution.

They say, it says, it happens too often, and sometimes it occurs because of judicial inattention to the law and indeed, they go on to say that sometimes it has occurred intentionally for personal reasons, or to advance personal agenda, such as a disagreement with the kinds of prosecutions that are brought forward. And they say that. The government says that in its submissions.

With respect to the frequency, I think Mr. Sullivan spoke well to that. Our submission focuses primarily on data that's newer than the government. The government's submission is dated. Most of it relates to cases from 2002, 2003. We have given to the committee the most recent stats, prepared by the administrative office, but those were generated in 2005. And what data shoes, is that, if anything, the frequency of MJOA's is decreasing.

In 2005, there was only 159 MJOA's granted out of the 86000 prosecutions that were brought. To make that statistic less -- I think statistics can always be messed with and I think the government has done that. And I don't think that comparing those 159 MJOA's with 8600 cases is fair either. But, compared to the 3835 that actually went to judgment, what it amounts to is four percent of all verdicts resulted from MJOA's. And we don't know -- court granted acquittals.

We don't know how many of those were just judge trials. But when you look at the statistics, contrary to what the government claims without any backup whatsoever, I think that the statistics suggest that probably most of those occur after judge trials. Because there's almost 300 judge convictions after judge trials, so it suggests that there are quite a number of cases that are tried just before a judge. So we have to assume that a large number of those 159 cases occurred after the judge tried the case.

And I assume, contrary to the government's

claim, that a good deal also happen after the case has been submitted to the jury, and a guilty verdict is found, the judge overrules that. I'd say that, because contrary to the government's view, I think the judges do follow the advice of the rules, which encourage that kind of procedure, particularly in closed cases. I think judges do that. I know my experience, unlike Mr. Sullivan's is, the one time I ever had an MJOA granted, it was after a verdict. It wasn't before a verdict.

And in my thirty some years, I have never experienced a pre-verdict MJOA in the wildly liberal western district of Washington. So, I agree with Mr. Sullivan, this is a creature that doesn't come around very often, and rule one, as he invoked, seems to apply. I think it's also important to note that what the government hasn't given you here -- there are a hundred and fifty something cases this year, or more than 200 or so in the years that they were doing their surveys. They've come up with a handful of cases that they think are egregious examples of the abuse of the authority the court has.

But what about the other 150, or 200 cases that they don't bring to your attention? It seems to me that what we can assume is that those cases don't merit your attention because the judge properly granted those MJOA's because the evidence was not sufficient. The government over charged, it didn't prove its case. Which is the function of the rule. To protect that constitutional imperative that before the person's liberty goes to a jury, the judge intervenes if the information is constitutionally defective.

So, in addition, the government hasn't appealed 30 to 40 percent of the drafts of MJOA's even after 12 jurors found guilt and the judge overrode that. Which again suggested even the government agrees that there wasn't sufficient evidence in those kinds of cases. So the frequency issue, I think is grossly overstated, and -- well, I don't know that it's overstated, it's just, there is no frequency issue here and I believe Chief Judge Holderman's view that first of all, the information provided by the government isn't reliable as

accurately.

Even if you give it every benefit of the doubt, and you give them, you know the lion's share of the 159 cases, what it amounts to is less than one acquittal per district per year. Which is not the sorts of frequency that -- and most of those, undoubtedly, that were granted were granted because they should have been granted. So, it's not a problem, frequency wise.

And common sense tells us that there's no abuse by the courts either, and that's where I want to focus my comments for the next few seconds, for the next few moments. And I hope you have the opportunity to review Appendix B of our submission, it is the most important part of our submission, because when the government decided to give to you anecdotal information, we decided to investigate that information. And we did it because, like Mr. Sullivan, and as Jonathan says, when there's an issue out there, we do surveys also.

And the fact is, by way of confession in preparation (indiscernible) brief, and Rita Clayborne

cases in front of the Supreme Court now, we nailed all of the federal defenders on the planet, and said, give us those cases that tell us how your clients are getting mishandled in the courts under the sentencing guidelines, so that we can use this information to advance our cause in the Rita Clayborne litigation in the Supreme Court.

And we got a lot of response, but you know, it was worthless. It's worthless because, by its very nature, it's subjective. And there's no way you can really create an argument that furthers some of the macro issues that are involved before the Supreme Court with that kind of anecdotal information. And in this case, the survey is even more subjective in the sense that what you're talking about is, explain to me how it is that this judgment of acquittal is wrong.

And you're asking an AUSA who's just still burning probably, from that MJOA, to tell you how it is that this was an injustice. And it's not a reliable source. De facto not a reliable source. And the government, in its 2004 submission focused on

some kinds of crimes that are really emotional to us as judges and lawyers, that we do want to see justice brought. And they talk about civil rights violations, and money laundering violations by lawyers. I mean, these are the kinds of things that we've got to send a signal out to the community that we're protecting them from this sort of misconduct.

And when the judge does something like grant an MJOA, we're undermining the confidence that the community should have in our system of justice. So, they gave the United States the Collins case as an example of a civil rights problem in a prosecution. I'm going to name the judges who were involved in these cases, I don't know any of them except for one. But this was Judge Graham Collins, from the western district of North Carolina --

MS. BUCKLEW: Could you tell me where you are in your Exhibit B?

MR. HILLIER: Yes, page 15.

MS. BUCKLEW: Thank you.

MR. HILLIER: And, in that case, we more fully amplify the facts that were before the court.

And as our submission indicated, the government in this case said that the judge misconstrued the law in this case in granting a judgment of acquittal. The transcripts show the opposite. The transcripts show that the judge was aware of the Screws (phonetic spelling) case before Circuit case law that relates to that particular statute. He referred to it when he was granting the motion.

And more importantly, what the transcripts show is that the government in this case chose to present only four witnesses, all of whose testimony was contradictory, and it was because of that inherent conflict, judge granted a motion for a judgment of acquittal. And the judge told them that, contrary to the claim that he didn't understand the law, and he applied a wrong law to this particular set of facts.

Turning to the problem of lawyers being involved in money laundering, the government cites to Unites States v. Foster, the Massachusetts case that was tried by Judge Joseph Toro -- I hope I'm pronouncing that correctly -- and in this case, the

government claims that Judge Toro applied an incorrect legal standard for proving knowledge, and that this was a (indiscernible) opinion, and that it should not have occurred. In fact, as we pulled from the transcript, the government attorney, when trying to explain why the MJOA Rule 29 shouldn't be granted, conceded that the testimony presented by his witnesses was not particularly compelling and he says, as you saw, we got stuck with what we got stuck with.

And that's typically what happens in these kinds of cases. The witnesses don't turn out to be quite as good as the government would have preferred, and the judge recognizes that and the judge grants the motion. And in this case, the government quotes the frustration of one of the jurors after sitting through a lengthy trial, and I'm sure this juror was frustrated as an indicator that we've got to vindicate the jurors and our citizen's confidence in our system by not letting this happen.

But what they didn't quote was another juror from that same article; a juror whose name was

Alex Kevorkian -- and this is at the top of page 19 -- and I'll quote this because it's so profoundly important. "If you honestly don't believe there's a case against a person, why leave it up to chance? Make sure they get acquitted. It seems like not only a waste of money, but a waste of time, and a detriment to the defendant to have it always go to a jury." Which are the exact policy underpinnings for the MJOA, the exact constitutional underpinnings for the MJOA, from a person in society who actually understood what the judge was doing, and why the judge was doing it.

But something that was omitted from the government's submission in hope of persuading you that public confidence is shattered, or weakened when this sort of acquittal occurs. And the second lawyer money laundering case we set out in a lot of detail with respect to the fact, and it's safe to say that there was a strong dispute between the defendant and the government as to whether or not a crime occurred. And ultimately, the judge decided that a crime didn't occur.

The government observed that this happened because of, quote, a fundamental misunderstanding of the elements of the offense. Yet, the record reflects that the government and defense counsel argued and argued and argued about what the MJOA was all about and ultimately found against the government. The government went on to say that he created his own personal incorrect standard, in order to, quote, return a lawyer to practice, close quote.

Whereas a few months later, in a bivens (phonetic sp) action, the District Court for the southern district of New York indicated that, as to the money laundering count the defects would require dismissal should have been apparent to any prosecutor prior to the start of the trial. So, I think this is a slam on that judge that was completely unnecessary and unwarranted and ultimately that the court in another case indicated that the government's case was not compelling and that the dismissal was appropriate.

The government, in a number of cases indicates that the judge granted the motion for a

judgment of acquittal because, for example, in United States v. Cunningham, Judge Edward Nottingham did it because, quote, based on his dislike of this type of prosecution. And this was a gun case. So I guess what we're talking about is that AUSA's view that this judge likes guns so he doesn't like this kind of a prosecution. But if you look at our submission, what we have here is utter failure by government counsel to present admissible evidence in support of its claim.

I have the privilege of sitting on the evidence committee the last six years, and Judge Nottingham was exactly correct in saying that an ATF agent can't come in and testify that this gun was made out of state when he's basing that testimony on something he read. That's hearsay. And I know from our practice in Washington, and my friend Judge Tallman when he was an AUSA if he was trying this case, he would have had documents from that manufacturer with ribbons and seals and bells, and all sorts of things, saying this thing came from the state of Connecticut, it didn't come from the state

of Colorado. This guy didn't do that.

So what this is an example of, this is an example of bad lawyering and a disgruntled lawyer who now is saying to you and the government is quoting it, this is based upon this judge's personal agenda. And again, and again, and again, we see this in our submission, and in the hope of getting you up to schedule I won't go into detail any more except for one other case, which I suppose, in some ways -- well, let me speak to two. United States v. Dugan, which is out of the central district of California where Judge Florence Marie Cooper finally granted an MJOA after taking it under consideration in this case. After a couple of denials.

Then she says, I will tell you, I've been on the bench for twenty years, I've never before even given more than two minutes attention to a motion for directed verdict, or a Rule 29 motion, whatever it is. The government claims in this case that the prosecutor was surprised by this, that it was granted on an unraised legal ground. The record says loudly the contrary. She heard the government again, and

again, and again and finally granted it against all her instincts because the evidence was not compelling.

And finally, United States v. H which is a child support case, I think a deadbeat dad kind of case. And Judge Jack Weinstein was the judge in this case. He's the only judge that I know of all of those that were involved in these cases. I know him because I met him at the funeral of a colleague of mine two years ago who used to be a federal defender in Brooklyn. And Judge Weinstein was at that funeral, somebody pointed him out to me and I went up and introduced myself to him because I wanted to meet him and I wanted to meet him because he's a giant in our profession.

The government claims that he dismissed this prosecution because of dislike for this type of prosecution. Judge Weinstein found that he didn't find that the statute applied in this case and he gave his reasons why. And nothing in what he had to say suggests he dislikes this kind of prosecution -- in fact, the told the defendant in this case -- my

acquittal here does not relieve you of the threat of prosecution because you are in violation of the State of New York.

So if anything, he's giving a signal to the U.S. Attorney to call his friend in the Brooklyn DA's office and say nail this guy, because we don't have jurisdiction here. As it turns out, he was wrong in his interpretation of the law, and a few months later, the Second Circuit in a different case decided that his construction of the word domicile was incorrect. So some of these cases do speak to a fair debate between the defense and the prosecution on whether or not the MJOA should be granted. Most of them are obvious MJOA's, none are based on an abuse of judicial discretion of any sort.

So I think we come back to Mr. Sullivan's idea, if it's not broken, it doesn't need to be fixed. And the government's whole point here seems to be that, indeed the courts are abusing their discretion, when in fact, their own submission speaks loudly to the contrary.

MR. TALLMAN: Is there a distinction

between those cases that (indiscernible), as opposed to a failure of the sufficiency of the evidence? Let's take the matter of H, where there may very well be a legitimate dispute of the interpretation or application of the statute in the case, and as I understand the government's concern, it is that under the present system there's no way to get that issue to the court of appeals for a definitive ruling.

And I don't mean to comment being protective of my role as an appellate judge, but it turns out that we have to wait until the second circuit got that issue, and some other people, unrelated people before we ever got a ruling on what the answer was, other than what Judge Weinstein, (indiscernible) that he is, had to say about the ruling. Is that a different case in terms of our analysis of Rule 29? Sort of a judge simply saying, I've heard the evidence of the government, these are the elements and at times the case just doesn't make it, based on facts (indiscernible).

MR. HILLIER: I think in that case, Judge Weinstein found that this particular element means

this. And I see your point, Your Honor. I think that this would be a very rare example of where there may be a problem and it may be that -- and I can see that the government in this case was ultimately correct. As a matter of law, at least as the Second Circuit sees, at least on this particular set of facts.

But I don't see how you can parse that out. I suppose, typically, in a case, if a defendant felt that there was a jurisdictional issue related to the way the case has been charged, you're going to file that motion to dismiss based upon your perception of the law, and that's going to be appealable.

MR. TALLMAN: The only other example that I've had experience with, in the Ninth Circuit, and you may remember the case is the one we went en banc on, involving federal firearms license fees. Who was licensed in California, but went to Arizona to a gun show, and transferred firearms at the gun show, and was prosecuted federally. And the issue was over the interpretation of the ATF regulations with regard to whether or not a violation of the terms of the FFL

license was geographical.

If he could go to any gun show in California, but he couldn't do that in Arizona without transferring the firearms through an Arizona licensed dealer. And in that case, we found that -- the court rendered a MJOA, and we found that the government couldn't challenge the issues because there was no (indiscernible).

MR. HILLIER: I guess I don't -- I would have to look at the case to understand more about the -- and I don't know the case, Your Honor, so I think that if the judge believed that the government had failed to present or had failed to prove the element of that offense as it was described in the indictment, and he explained why --

MR. TALLMAN: Especially with, what is the element? In other words, is the crime defined by a geographical limitation on the reach of a federal firearms license, or is it nationwide or is it restricted to the state? And that, that really dealt with -- it's a pure legal question, and nobody was disputing the fact that the guy was licensed in

California, but transferred firearms to Arizona.

MR. HILLIER: Well, actually, wouldn't there have been a vehicle to get that appealed though? Because if the defendant had made a motion to dismiss the case, saying these are going to be the undisputed facts and you can do a very limited pre-trial hearing, we're not going to try the whole case. And the judge had dismissed it based on that interpretation, Department of Justice could have appealed the dismissal.

MR. TALLMAN: No question about it. But as I recall, the motion was made and denied pre-trial, but it was renewed (indiscernible), and granted after the courts had heard the evidence.

MR. HILLIER: It seems that at this point, the government can try another case like that, and invite briefing in advance, and ask the court, based on precedent to dismiss so that it can then get the merits of that issue before the court. So, at the worst at this point, you have one guy who was selling guns in violation of -- if you believe -- if you disagree with the District Court's decision in the

long run.

But it seems, having laid that groundwork, the government now has a vehicle available for it to address the problem in the next case. So it's not a kind of situation that's going to create a recurring problem that indicates that there's an abuse of the authority that's out there, such that constitutional rights ought to be waived at hearing.

MS. BUCKLEW: Mr. Hillier, could I ask you a question? We heard Mr. Sullivan say that (indiscernible). He also mentioned that defense attorney's would never do that.

MR. HILLIER: Well, I -- that's a very good question, Your Honor. And I think I would answer it similar to Mr. Sullivan, frankly. Because I don't want my client to have to continue to endure that (indiscernible), no matter what. If he's equipped we're going to get out there. But I'm going to be making a record about that waiver, and I'm going to be challenging it. So we're going to go to the extent of, on appeal, it seems to me it'd be a terrible waste of time and it undermines the

efficiency and the economies that are at the heart of Rule 29, or at least part of Rule 29.

So, it's just another wave of litigation and hopefully, as he said, we're going to win there. I'm going to do it for sort of, humanistic reasons. I think there are other lawyers out there that are going to do it differently, probably some of my colleagues here.

MS. BRILL: (Indiscernible), am I correct in my question, (indiscernible), of all the points that are raised today that is one of the most fascinating to me as a practitioner. But I just want to point out that there's someone like Mr. Hillier who is a representative of the federal defenders, and there's someone like Mr. Sullivan, who represents, by name a whole other class of people, and then there are people in between, that simply can't endure a trial, and (indiscernible) trial. (Indiscernible) - -

MR. HILLIER: That's very true. I mean, I have the resources to pick it up on appeal, I like these kinds of issues, I love to try them. You know,

and Mr. Sullivan, of course, he has a paying client. So I think --

MS. BRILL: I have a paying client, but it's not like Mr. (indiscernible) -

(Laughter.)

MR. HILLIER: Might not be like Mr. Sullivan's either.

MS. BUCKLEW: Any more questions? Johnathan?

MR. RABLEJ: Yes Tom, first of all, thanks for being here, for flying across the country, and thanks for the submission. We recognize the amount of work that went into finding all of the information about all of the cases. And one thing that I'm not sure you're aware of, based on your submission, that the Department did submit, in its 2004 submission to the committee, the standing committee, hundreds and hundreds of pages of transcripts.

There were, obviously the surveys were probably the beginning point, but there was a whole lot of additional information, and if you are interested in getting any of that information, we're

happy to provide it. I want to ask the same question that I asked Mr. Sullivan. Which is about deferral. You seem to indicate in your submission, that the current rule that allows for deferral is appropriate, and deferral is appropriate in certain cases. Could you expound on that a little bit?

Clearly, Mr. Sullivan indicated, talked about, there's 200 count cases, 189 counts dismissed, it's time for the judge to -- but there's several cases that you talk about in here, where the case is short, four witnesses, one witness, two witnesses, it's primarily a legal issue, as to whether what the department and the justice department provided is sufficient to meet the legal burden. The additional burden of deferral seems to be small. Could you describe what criteria you think is appropriate for a judge to use in a deferral situation?

MR. HILLIER: I think it's a question better posed to the judge, but I see judges who react to that request, or before that request is offered, who are sort of torn at that point when the initial MJOA is made as to whether they should grant it or

not. And they are torn, both because they're not all that convinced about the sufficiency of the evidence, but there's a fair debate here, and we've had a jury sitting here for a couple of days, and he wants them to have the opportunity to make that decision.

So I think it's sort of a courtesy, almost that the court's doing that. It's in the rules so we're living with it, and I think the reason -- I think the constitutional underpinning for it were the government can appeal if it's well founded because they will not be put back in jeopardy if he's already been found guilty once. So, it operates sort of for the benefit of everybody in a circumscribed number of cases. But I think the judge has a duty where if he feels, fundamentally, this information is constitutionally defective that they say so, and to make that ruling. And I would hope that in the majority of cases where there is a -- that that's what the judge would do if he felt that way or if she felt that way.

MR. RABLEJ: And tell me why you think there's the obligation at that moment -- I'm not

saying that the judge doesn't have the obligation at some point. But in a small case, where the defendant has been under the charge for months, and it's a case that's going to take two or three days to try, the government's part is over, the jury selection part is over, there's a very small part, and this committee has said, 10 to zero in 1994, and in it's advisory committee note, that there is a public interest involved in appealing these decisions. Explain to me why a judge in those circumstances, and why the committee shouldn't write a rule that in certain circumstances, the judge should defer.

MR. HILLIER: Well how can you write that rule? I mean, how can you describe that circumstances are? The kind of case that you're describing, and I think the kind of case that the judge ought not to defer, those short cases, are usually the kinds of cases that are packed with emotion, packed with prejudice.

It's a two day cocaine case with a Columbian defendant. Where, it gets to the jury, you know, Columbian defendant's guilty, where as the

judge sees it, there's a flaw in the prosecution here. The judge should step forward and say not guilty, in effect, as a prophylactic, as Mr. Sullivan said. Not just for the government bringing a case that's not good, but for the emotional response, the prejudicial value that that case might have. I think that really, that small cases are the kind of cases the judge ought to step up on.

MS. BUCKLEW: Any other questions? All right, thank you, Mr. Hillier.

MR. HILLIER: Thank you very much.

MS. BUCKLEW: And, Professor Beloof are you there?

MR. BELOOF: I am still right here.

MS. BUCKLEW: Let me talk into the mic. I hope you've been able to hear most if not all of this, and we welcome you and are anxious to hear your remarks.

MR. BELOOF: Well, thank you, Judge Bucklew and honorable members of the committee. I'm Doug Beloof, and I've been involved in victim law issues, first as a litigator, and now as a law professor, and

director of the National Crime Victim Law Institute for well over twenty years. And I hope – I guess there's one central thing I want to achieve, although I'll talk about some more specific things.

Congress had ten years of people walking the halls, of hearing the discussions that lead up to the CVRA. So over a ten year period they were educated in all the issues, they heard from defense counsel, they heard from judges, in fact they heard from Renquist, they heard from professors like myself, they heard from the justice department. And the task that this committee faces is challenging in the sense that you are in the position of going from zero to sixty in a much shorter period of time. So I want to start of by respecting the challenge that the committee faces.

And if there's any one message that I can convey to the committee, it is that I cannot impress upon the committee enough, that the CVRA was intended to change the legal culture to include victims as participants in certain limited aspects of the criminal justice system. And I think if there is any

shortcoming, of the proposed rules of the committee, it is that they have done a couple of things. First, they have weighed victims' interests too lightly.

Second, they have been reluctant to grapple with any standard for fairness other than to refer it to litigation. And I think along the way, the committee has flattened at least one of its own tires in trying to get up to sixty miles an hour. The committee has made choices – or, it would appear as I read in between the lines and the comments and the rule choices the committee made – that it has decided not to rely on the legislative history of the Crime Victims Rights Act. And I think this is a mistake for two reasons.

First, the legislative history clearly answers questions that the committee is puzzled over. For example, the legislative history provides, quote; it is not the intent that the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Yet, the committee refers that to litigation. So,

clarity is lost. And also, what is lost is the legislative history contains the values that underlie the specific and broad rights in the CVRA. And they don't appear in the CVRA.

And by failing to reference the legislative history, that very useful construct is lost to the committee. The third thing I'd like to talk about is that there is another approach to "fairness", even if the committee is determined not to reference legislative history. And that approach is to come up with an approach that is something somewhat short of complete hands-off fairness. And I have the following suggestion.

One is, if the victim is accommodated in the proposed rule, and that accommodation is not opposed by any significant countervailing value, the rule should be adopted. Now, that does move the committee from a position where it simply isn't going to engage fairness at all, but it is an incredibly conservative approach to utilizing fairness in the rulemaking process. My other two suggestions along those lines are, if the proposed rule informs and

requires consideration by the government, or court, of the victim's interests or views, it should also be adopted. And that is because public policy is better served by the government and courts being fully informed before they make decisions.

So, absent some countervailing value, some significant or important countervailing value, why shouldn't the prosecution and the courts be informed? The third piece of my methodology, if you can call it a methodology, I guess, is that inconvenience of the parties or the court should rarely be the basis for this committee not adopting the rule. And if these three points are taken as a guideline, very conservative guideline, bounding fairness, what one finds is that Professor Cassell's proposed rules said inside this conservative framework.

I can understand the committee's concern with the idea that using fairness in a way where there is no gravity to it is a concern. What are the limits of that? And there are limits, but admittedly those limits are quite broad, conceptually. So my suggestion to the committee, whether it likes my

language or picks it's own language is to come up with a methodology of revisiting Judge Cassell's proposed rules. That does something other than shut out the concept of fairness completely, and it approaches it from a conservative viewpoint that also embraces the notion that the Crime Victim's Rights Amendment was intended to change the legal culture concerning victims of crime.

One of the values that the committee is missing when it fails to reference the legislative history are the following. The victim's rights ultimately arise out of the harm suffered by victims in the criminal act, and based on this harm are two fundamental interests of the victim. One is the interest in justice. And the other is an interest in avoiding secondary victimization. And secondary victimization consists of adding insult via criminal justice processes that exclude victim consideration, deny a voice to victims, adds insult to that criminal injury.

And these are the fundamental values underlying the rights in the CVA. These rights

inform the right to fairness and respect for the victim's dignity and privacy. Now, I support Judge Cassell's proposals, and I'm not going to talk about each and every one, because there isn't time and all of you are very hungry. But Judge Cassell makes a concerted effort to integrate the rights into the rules, and I would argue, without overreaching.

He appreciates that the CVRA is designed to change the legal culture, and the committee does this in a few places, but it lumps much of the CVRA into its Rule 60. This lumping disconnects the rights from the individual procedural rules in which they are relevant, thus separating courts and practitioners from procedural moments in which victim's rights and interests are present. Perhaps nowhere is the committee's limited more of a problem than in the committee's decision not to include victims in Rule 2, which provides for the fair administration of justice.

Presently, the government and the defendant are provided a fair administration of justice. The CVRA grants victims the right to fairness and even

under the committee's decision not to further define fairness, it would seem that victims should be included in this rule. It is particularly surprising that that has not been the choice of the committee, particularly in light of Supreme Court precedent that requires courts to consider victim's interests. The court has acknowledged the interests of crime victims in Morris v. Slappy.

The court held, quote; in the administration of justice, courts may not ignore the concerns of the victim. And in Payne v. Tennessee, the court reaffirmed that quote. Justice, although due the accused, is also due the accuser. And, more recently, in the late ninety's in Calderon v. Thompson, the court explained that to unsettle expectations in the execution of moral judgment is to inflict a profound injury to the powerful and legitimate interests in punishing the guilty.

An interest shared, quote, by the state and victims of crime, alike. To me, it seems as if the choice to include fairness to victim's in Rule 2 is an obvious one. Its exclusion, along with other rule

choices made by the committee, to me is like the canary in the coal mine. The failure to adopt victim fairness in Rule 2 reveals to me that there is an undervaluation, or insufficient weighing of victim's interests as the committee takes the CVRA and incorporates it into rule.

MS. BEALE: Professor Beloof, could I just ask you a quick question?

MR. BELOOF: Sure.

MS. BEALE: When you're talking about – you are talking about the interpretation rule?

MR. BELOOF: Yes.

MS. BEALE: Does it actually (indiscernible) the Constitution (indiscernible)?

MR. BELOOF: Well, let me find it.

MS. BEALE: And since the rules aren't interpreted to provide (indiscernible), insure some (indiscernible) procedure and fairness of administration and to eliminate unjustifiable (indiscernible). So, what I wanted to ask you is, since it doesn't actually – did you hear that? I was speaking towards the telephone receiver and not the

regular mic. Would you like me to read that again? Because I do have it here.

MR. BELOOF: No, I'm finding it here. Well, go ahead. But I heard you.

MS. BEALE: So, I think your argument would be a lot stronger, in my mind - I don't actually have a vote - so your argument would be a lot stronger in my mind if it referred to prosecution and defense and said they had a right to fairness, and then it was, dot, dot, dot, and you would imagine putting victims in there. It actually doesn't refer to any of them, but it does refer to a general fairness in administration, and it's not clear to me that that doesn't incorporate any right that victims do have and witnesses and jurors and so on. And so I don't mean to argue with you --

MR. BELOOF: You should argue --

MS. BEALE: -- oral argument, but I just wondered, I wanted to make sure I was in the right place, because I thought that rule didn't, and then I picked it up and looked at it and, just wanted to sharpen that point.

MR. BELOOF: Well, you were right, and what I've done is misread an interlineations by Judge Cassell and his rule so I apologize for that. You are correct. So arguing with me is a good thing.

MS. BEALE: Okay.

MR. BELOOF: Privacy interests are also given short shrift in the committee's approach. Ex parte subpoenas may be more convenient for the parties in the court, but surely if the CVRA does anything for victims, it to place the victim's privacy interests above mere convenience. Moreover, these privacy interests should be valued more importantly than for serving some strategic choices the party, in not informing the victim that their records are being pursued.

Victim's privacy interests are again given short shrift in the committee's approach to releasing victim's name and addresses. No opportunity is exists for the victim to object to their release. This is particularly ill-advised because a communication from the victim to the court that the victim does not want to communicate with the defense

would, in most cases eliminate any need to disclose their contact information. There is, after all, no Constitutional or statutory requirement that the victim talk to the defense.

Thus by excluding the victim from participation, the rule promulgates what will most typically be an unnecessary hearing, and provide contact information of a victim who has no information in communicating with the defendant. A substantial number of Judge Cassell's proposals which have not been adopted insure the courts and prosecutors are fully informed and consider victim's views before making decisions in certain context in which there is a relevant CVRA right.

For example, the court should address any victim present in court, determine whether the victim has views on pleas and considers those views. The CVRA mandates the victim is reasonably heard at least. It is difficult to understand the central opposing value against which the victim should be allowed to address the court under the CVRA, and in the absence of a strong opposing value, it seems that

the rule should be adopted. Another example of this type of rule proposed by Judge Cassell is the rule that the government consider the victim's views on the plea.

The CVRA gives the victim the right to consult with the prosecutor. Nothing is more important to the victim than the disposition of the case. At a minimum, victims should be consulted concerning a plea. What weighty value stands in opposition to this rule? The convenience to the prosecutor perhaps, not to be bothered with consulting the victim of the plea. In failing to adopt these kinds of rules, convenience has been placed over victim's interests and views. It should not be.

MR. TALLMAN: Professor Beloof, this is Judge Tallman. I'm curious as to how you handle the problems that I posed to Judge Cassell. And that, particularly with regard to plea negotiation and pre-filing cases.

What do we do if there is no proceeding then pending? And, particularly in the white collar,

or criminal arena involving fraud, are typically disclosed to us by negotiations that can be quite protracted, before the grand jury has even returned an indictment, or anyone has been arrested. How do we insure that the victim's rights are made plain when there is no actual (indiscernible) then pending before the court?

MR. BELOOF: Well, at some point there's a case or controversy. Someone is going to have to plea on some kind of information or indictment. And so, it seems the appropriate thing to do in a case like that is to ask the prosecution if they have consulted the victim about the plea?

MR. TALLMAN: And who would do that? The judge, if the rule allowed them the policy? Because there are many crimes where lawyers on both sides of the case aren't sure if the plea is actually going to go down until the defendant stands up in court and says, "I'm pleading guilty because I am in fact guilty."

MR. BELOOF: Yes, now you're asking a different type of question. The question is, can out

of expediency under the CVRA a plea go forward without notice to the victim and without the victim's opportunity to be heard. And I would argue that absent certain exceptions in the statute for national security matters and I think there's one other in that statute, the answer would be no. So the prosecutor and the court both have an obligation to insure that those rights are complied with.

MR. TALLMAN: What if the prosecutor thinks that the defendant is so skittish that the prosecutor may not get a plea if the prosecutor has to delay the proceedings in order to entertain any submissions from the victim?

MR. BELOOF: Well, except again, in certain limited cases involving national security, and I believe organized crime, the answer is skittishness is not sufficient to overcome the requirement to consult with the victim.

MR. TALLMAN: I don't know too many prosecutors who wouldn't rather take the plea and get the case disposed of.

MR. BELOOF: Which is exactly why the CVRA

was enacted.

MR. TALLMAN: Then how do you square that with the provision that says that it is not intended to interfere with the discretion of the prosecutor?

MR. BELOOF: It's not intended to interfere with the discretion of the prosecutor to make critical decisions in criminal cases. Which also comports with the Senate's due process limits on the victim's ability to participate. The victim cannot make critical decisions in the criminal process. Either judicial critical decisions, or prosecutorial critical decisions.

Under two due process cases out of the Fourth – the Fifth and Sixth Circuit – I believe. So, the way its squared is that discretion, the prosecutors keep their discretion to make critical decisions. They do not retain their discretion to ignore the victim's rights under the CVRA.

MS. BUCKLEW: Is it sort of like an environmental impact case somewhat, right? That you have to know about (indiscernible).

MR. BELOOF: Absolutely. There is nothing

in the fairness type rights, the due process type rights, where a victim controls any decisions, by either the judicial branch of government or the prosecutorial branch of government. The emphasis of these rights in that context is to ensure that the government listens to these people who have been harmed by crime.

And that's one of the driving forces behind this, is that victim's have not even been listened to about their concerns. Once they're listened to, the judge can decide to do whatever they like. Once they're listened to, the prosecution can make whatever decision the prosecution is going to make concerning what plea they're going to offer, or what they're going to do.

It is a moment of listening, is centrally what's involved, and many of Judge Cassell's proposals help to create that moment of listening and consideration. None of those proposals, the due process fairness type proposals, that talk about the victim being able to speak, or having its views considered, none of them control the decisions of the

courts, none of them control the decisions of prosecutors.

Another point I'd like to make is that, in a couple of the rules that the committee talks about, they do not adopt Judge Cassell's rule directing prosecutors to inform courts when victims have an objection to a plea. And certainly this rule is in the interest of, not only the victim, but the court has an interest in being fully informed. Yet the alleged discretion of the prosecution to withhold this information from the court is the committee's basis for not adopting this rule.

And I say alleged discretion, because the withholding of relevant information from the court is not – and at least I'm not aware of a case – where it is something within the lawful discretion of the prosecution to do. Except, perhaps, in certain kinds of unusual cases involving terrorism, national security, and other kinds of cases.

There is a Utah Supreme Court case on this point where the victim's desire to object was withheld from the court from the prosecution, even

absent the rule, and the court admonished the prosecutor stating, quote, the prosecutor has failed in his duty to the court. Because he failed to bring relevant information to the court's attention. So I think that this alleged discretion is essentially a false value that's being balanced against the victim's ability to have their information heard by the court.

One way of gaining insight is whether this discretion really exists or not is whether the government would be required to respond to a direct inquiry of the court as to whether the victim objected to the government's position. Surely the government would have to answer the judge's inquiry. Thus, the committee's rejection of the rule reduces things in this context to a game of hide and seek, where the court doesn't get access to relevant information unless it actively pursues it.

Rule 21 has a similar problem. It says, in appropriate cases, the attorney for the government should apprise the court of the victim's views. In this rule, the committee says, in appropriate cases

the government for the attorney would apprise the court of the victim's views. This sentence reveals that the committee believes that the information about the victim's views can be relevant. But what confuses me is how it is relevant in one case and not another to the court.

Why shouldn't the court always be fully informed and why shouldn't the court instead of the prosecutor make the ultimate decision about whether what the victim has to say should bear on the judicial decision or not. So what emerges from an examination of the committees proposed rules and a decision not to adopt many of the rules proposed by Judge Cassell is an engagement in various kinds of balancing different values on the one side against victim's interests and rights on the other.

And because victim's interests and rights are generally undervalued, the result is a minimalist approach to integrating the CVRA into the rules. Which is why I suggest that the committee, either use my or devise another conservative methodology that respects fairness but in a very conservative fashion

to review what rules are appropriate. So with that I'm done and happy to answer any questions.

MS. BUCKLEW: All right, thank you, Professor. Are there any questions from any members of the committee?

MS. KING: I have just one

MS. BUCKLEW: All right. Could you pull that mic over?

MS. BUCKLEW: This is Professor King.

MS. KING: Hi.

MR. BELOOF: Hi.

MS. KING: Judge Cassell's submission includes a footnote with a long list of state statutes that authorize the disclosure of --

MR. BELOOF: I'm sorry, I can hardly hear you, Professor King.

MS. KING: I'll speak up. There's many states that require pre-sentence reports to be disclosed to defendants - to victims. And I was wondering if you could tell us, briefly, what the state experience has been with that. Are those - have courts cut back on those, is it a matter of

routine? In your state, is it done? It would help, since you are before us and have the expertise to get this information while we have the chance.

MR. BELOOF: Well, yes. I have had experience. My state has allowed the pre-sentence report to be disclosed to the victim for at least eighteen years. And I am actually not a person who thinks everything in the pre-sentence report should ultimately be disclosed. I am a person who thinks information relevant to a victim's ability to articulate what their position is on sentencing should be disclosed.

But just as the victim has certain rights to privacy, I believe that there are certain things in pre-sentence reports about defendants that is appropriate for the courts or other government agencies -however that mechanism works – to withhold. Not to deny the victim necessary information, but in order not to reveal certain things. For instance, why would the victim get a defendant's name and address, for example? Or, other kinds of information about their children, or other kinds of things that

really have no relevance to the victim's statement.

So my state allows the pre-sentence report, and many states do, simply to go directly to the victim. I'm not sanguine about that approach. And I guess reasonable minds can differ about where the line is drawn in the grey area.

MS. KING: Alright, thank you.

MS. BUCKLEW: All right, are there any other questions? All right, Professor, maybe because it's late in the day I don't think we have any other questions. We thank you for not only appearing by telephone, but also sitting through the rest of the testimony on the telephone. I hope you've been able to hear at least most of it.

MR. BELOOF: Well thank you. I'm very grateful for the opportunity.

(End of audio.)