



ST. MARY'S  
UNIVERSITY

Digital Commons at St. Mary's University

---

Faculty Articles

School of Law Faculty Scholarship

---

2006

## Criminal Procedure Rules Pending Public Comment

David A. Schlueter

*St. Mary's University School of Law*, [dschlueter@stmarytx.edu](mailto:dschlueter@stmarytx.edu)

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Law Commons](#)

---

### Recommended Citation

David A. Schlueter, Criminal Procedure Rules Pending Public Comment, 21 *Crim. Just.* 45 (2006).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu), [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu).

## Criminal Procedure Rules Pending Public Comment

Under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, amendments to the Federal Rules of Procedure and Evidence are initially considered by the respective advisory committees that draft the rules, circulate them for public comment, and forward the rules for approval to the Judicial Conference's Standing Committee on the Rules. If the rules are approved by the Judicial Conference of the United States they are forwarded to the U.S. Supreme Court, which reviews the rules, makes any appropriate changes, and, in turn, forwards them to Congress. If Congress makes no further changes to the rules, they become effective on December 1. That process—from initial drafting by the advisory committee to effective date—typically takes three years.

In January and June 2006, the Standing Committee on the Rules authorized publication for comment on a number of Rules of Criminal Procedure. The comment period ends February 15, 2007.

**Rule 1. Scope; Definitions.** The amendment to Rule 1(b)(11) includes a new definition of "crime victim" and is designed to incorporate the statutory definition of that term, located in the Crime Victims' Rights Act, 18 U.S.C. § 3771(e). The new provision also makes it clear that a person accused of a crime is not a victim of that offense.

**Rule 12.1. Notice of an Alibi Defense.** The proposed change to Rule 12.1(b)(1) focuses on government disclosure of victims' names in those cases where the government wishes to rebut an alibi defense by calling witnesses to testify that the accused was at the scene of the crime. As published for comment, the proposed rule requires the government to provide the victim's name and address, but only if the defense first makes the case that it needs that information; the court may then order the production of the victim's information or,

in the alternative, devise a reasonable procedure that protects the victim's interests but also permits the defense to prepare its case. The advisory committee is interested in hearing comments from the public on whether the burden should be on the defense to show the need for such information.

**Rule 17. Subpoena.** Proposed new Rule 17(c)(3) provides that a subpoena requiring confidential information about a crime victim cannot be served on a third party without a court order. The proposed rule would permit a court to do so ex parte and would also permit the court to require that notice be given to the victim and that the victim also be given an opportunity to modify or move to quash the subpoena.

**Rule 18. Place of Prosecution and Trial.** The proposed change to Rule 18 would require the court to consider the convenience of "any victim" in deciding where to hold the trial within the district where the offense was committed.

**Rule 29. Motion for a Judgment of Acquittal.** The proposed amendment to Rule 29, which has been the subject of extensive debate and discussion at the advisory committee, would permit the government to appeal preverdict rulings granting a defense motion for a judgment of acquittal. The amendment was proposed by the Department of Justice, which believed that it is an anomaly because if the court grants a Rule 29 motion before a verdict is returned—no matter how erroneous the ruling—it is nonappealable. The proposed amendment would permit preverdict rulings on a Rule 29 motion, but only in those cases where the defendant has waived his or her double jeopardy protections, which, in turn, will permit the government to appeal the ruling and retry the defendant if the appeal is successful.

**Rule 32. Sentencing and Judgment.** The amendments to Rule 32 address the ability of a victim of a crime to be heard at any sentencing proceeding. The material currently in Rule 32(a) would be deleted and other provisions would be amended to provide that a sentencing court must permit the victim to "be reasonably heard." The material currently in Rule 32(i)(4)(B), concerning the right of a victim's representative to be heard, would be removed.

**Rule 41. Search and Seizure.** The proposed addition of new Rule 41(b)(5) is intended to fill a



David A. Schlueter is a law professor at St. Mary's University Law School in San Antonio, Texas. He served as the reporter for the Advisory Committee on the Federal Rules of Criminal Procedure from 1988 to 2005. He is an associate editor to *Criminal Justice* magazine.

perceived gap in the authority of magistrate judges to issue search warrants for property located outside the United States but within the jurisdictional control of the United States. The rule would authorize a magistrate in the District of Columbia or a magistrate judge in any district in which criminal activities have occurred to authorize a search of property that is located in any territory, possession, or commonwealth of the United States, the premises, and buildings of U.S. diplomatic or consular missions in other countries, or other property used by U.S. diplomatic or consular missions in other countries.

**Rule 60. Victim's Rights.** Rule 60 is a new rule covering a wide range of victim's rights issues in federal criminal proceedings. The rule implements a number of provisions in the Crime Victims'

Rights Act, 18 U.S.C. § 3771. New Rule 60(a) would cover notice requirements, attendance at proceedings, and the right to be heard. Rule 60(b) would include enforcement provisions for the requirements in Rule 60(a). The new rule provides that failure to provide the rights set out in subdivision (a) would never provide the basis for a new trial; but failure to do so may provide a basis for reopening a plea or a sentence, if the victim met certain procedural requirements.

**Rule 61. Title.** Finally, current Rule 60, which merely reflects the title of the Rules of Criminal Procedure, would be renumbered as Rule 61.

The proposed rules, and instructions for filing written comments, can be viewed at [www.uscourts.gov/rules](http://www.uscourts.gov/rules). ■

---

## LESSONS OF INJUSTICE *(Continued from page 19)*

I was living in a dream world. I woke up fast. For one thing, there was no TV anymore. My new school was grandly named Jamaica College—"JC." It was a British "public school" that was not public at all. It was for spoiled rich children who couldn't go to the really classy schools like Eton and Rugby back in England. The staff included a lot of colonial British numskulls who had failed back in their mother country and had washed up in Jamaica, where they could still pretend to be somebody.

We had to salute the British flag every morning and sing *God Save The Queen* on festive occasions. There were very cruel beatings, which they called "canings," and which were administered all the time. British author P.G. Wodehouse has written about canings he himself suffered back in England, and the cane that, in the words of the *Bible*, "biteth like a serpent and stingeth like an adder." But until you have felt the cane across your legs and bottom, you don't know what injustice is. To feel physical pain, and to be utterly powerless to make it stop, or to reason it away—that is true injustice.

Even worse was the prejudice. To this day I can't understand what those British teachers had against me, unless it was that we Americans had declared our independence from Britain in 1776. I wasn't Mel Gibson in *The Patriot*. I was just a middle class kid from the Connecticut suburbs! But somehow, for some reason, I was singled out for special mistreatment.

There was one teacher in particular who seemed to hate me—my math teacher. He detested me, I

guess, just because I was an American. Nothing I could do could please him. I recall him deliberately making a fool out of me, forcing me to stand in front of the classroom, trying to explain the intricate arithmetic of British money: pounds, shillings, guineas, and even pence. My fellow students smirked and giggled.

For your information, one pound was worth about \$2.40 in those days. That meant it had 240 pennies or "pence" in it. But it also had 20 shillings in it, each shilling worth 12 pence. Half a shilling was sixpence. A guinea was a pound plus a shilling. A pound coin was called a "sovereign." A paper pound banknote was called a "quid." Something worthless was "not worth tuppence," or two pence. It was the craziest money system I've ever had to deal with in my life!

Yet I owe that hateful teacher something, and I am going to pay the debt now. By showing me injustice, he taught me to love justice. By teaching me what pain and humiliation were all about, he awakened my heart to mercy. Through these hardships I learned hard lessons. Fight against prejudice, battle the oppressors, support the underdog. Question authority, shake up the system, never be discouraged by hard times and hard people. Embrace those who are placed last, to whom even bottom looks like up.

It took me some time to find my mission in life—that of a criminal defense lawyer. But that school, and that teacher, put me on my true path. So do not be discouraged. Even thorns and thistles can teach you something, and lead to success. ■