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### Courts Putting Hot-Button Words on Ice

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Call it the age of the Loaded Word.

A steadily increasing number of courts across the United States are prohibiting witnesses and victims from uttering certain words in front of a jury, banning everything from the words "rape" to "victim" to "crime scene."

Prosecutors and victims' rights advocates nationwide claim the courts are going too far in trying to cleanse witness testimony, all to protect a defendant's right to a fair trial. Concerns and fears over language restrictions have been percolating ever since judges in Nebraska and Missouri last year banned the word "rape" during rape trials.

But that was just the tip of the iceberg, claim critics, who say courts telling witnesses what words they can and can't say is a much larger trend than they had realized. In addition to "rape," courts also have banned the terms "homicide," "drunk," "victim," "murderer," "killer" and "crime scene."

"I've gotten a flood of e-mails saying, 'Wow, you should see the number of times that this is happening in our jurisdiction,' " said Joshua Marquis, vice president of the [National District Attorneys Association](#), who strongly objects to censoring witnesses, especially victims. "It's absurd. It's dangerous. And it's growing."

#### INSULTING WITNESSES?

Marquis, who is the district attorney in Clatsop County, Ore., said courts telling witnesses and victims how to tell their story insults them, as well as the intelligence of jurors.

"You have a woman who's been raped and she has to say that she had sexual intercourse with the man, rather than calling him her attacker?" Marquis said. "I think this is going 50 years back in our legal evolution."

Not quite, counter criminal defense lawyers, who argue that certain words like "victim" and "rape" and "murder" conflict with the presumption of innocence, and therefore, should be kept out of trial.

"I've had wise judges frequently order that prosecutors and witnesses not refer to certain individuals as 'victims' or locations as 'crime scenes.' Such orders are required by the presumption of innocence," said

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criminal defense lawyer Daniel E. Monnat of Monnat & Spurrier in Wichita, Kan.

Monnat convinced a judge to exclude the terms "victim" and "crime scene" in a pending homicide case. *Kansas v. Floyd*, No. 06CR17 (Stanton Co., Kan., Dist. Ct.).

Monnat said that words like "victim" and "crime scene" contradict the presumption of innocence by assuming a conclusion that a jury is supposed to arrive at on its own.

"It only makes sense. You don't want the witnesses and officers of law enforcement talking as if it was a foregone conclusion, almost drumming it into the jurors' minds that a crime was committed by virtue of the fact that there is a victim," Monnat said. "I think that courts are more and more open to restricting terminology like this because of the number of wrongful convictions that have been demonstrated to have occurred in the U.S."

Attorneys with the Cook County Public Defender's office in Chicago have had similar luck with requests to bar witnesses from using certain words, including "victim," "rape" and "crime scene."

And, at least once, a prosecution witness violated the order and a mistrial was declared, said attorney Scott Slonim, chief of the professional development division of the Cook County Public Defender. *People v. Gonzalez* (Cook Co., Ill., Cir. Ct.).

"We try to keep out loaded words that could unfairly affect the trial," Slonim said.

Slonim said that his office has taken language restrictions in the courtroom to another level: They've also moved to bar the identification of them as public defenders.

"Not that we aren't proud to be public defenders, we are, but there might be some jurors who'd think a client to be 'less innocent' if they had a public defender instead of a paid, private lawyer," Slonim said.

Language also matters to white-collar criminal defense lawyers.

Efrem M. Grail, a white-collar defense attorney in Reed Smith's Pittsburgh and Philadelphia offices, said words like "embezzle" and "defraud" also raise eyebrows in white-collar crime cases.

"As a defense lawyer, I am an advocate for my clients, and any word that I believe is going to unfairly import itself on the jury's conscience, then I will object to it on any legal grounds that I can conceive," he said. "Your tool is the language that is used in front of the court. The words are swords and shields."

Attorney Jack King, spokesman for the National Association of Criminal Defense Lawyers, defended the defense bar's efforts to ban certain words during trial.

For example, he said, there are several instances where defense lawyers are justified in trying to bar the use of the word "rape." They include: if they are claiming the act was consensual; they are claiming there was no rape at all; or they are claiming the alleged victim was under the influence of a drug, or mentally ill, and therefore confused about what really happened.

"Sometimes it's not ludicrous," King said, responding to criticisms of attempts to keep certain words, such as rape, out.

"There are some things you can't say in the courtroom," he said. "You might have the right to say things on the courtroom steps but not in a courtroom while on trial. And I dispute any constitutional scholar that says the First Amendment trumps due process in the courtroom. It never has. It never will."

But not allowing a rape victim to say she or he was raped is "a travesty to our criminal justice system," countered James P. Fox, president of the National District Attorneys Association and district attorney in San Mateo County, Calif.

"Their testimony is censored in order to protect the presumption of innocence, and that is outrageous," Fox said. "It's an example of the pendulum swinging, I think, to the side of the defendant -- the poor defendant is presumed innocent and we're not going to give much of a concern to the victims of these crimes."

Fox added: "I'm sorry, but the presumption of innocence argument only lasts as long as there's no other evidence to the contrary."

#### **RIGHT TO TELL A STORY**

Wendy J. Murphy of the New England School of Law, who is representing a Nebraska rape victim opposing the judge's barring of the word "rape," said the major battle facing prosecutors and victims now is fighting judges' censorship orders.

To date, she said, there has been no federal court ruling on the matter.

"Prosecutors are begging for federal court comment on this," Murphy said.

Murphy tried when she appealed the Nebraska judge's decision to bar a rape victim from using the word rape. She lost the case, and is now appealing to the U.S. Supreme Court. *Bowen v. Honorable Jeffrey Cheuvront*, No. 4:07CV3221 (D. Neb.).

For Murphy, it is all about preserving the victim's right to tell her story freely and candidly in court. Telling someone not to speak is one thing, she said. But telling witnesses and victims what to say "is the ultimate anti-American thing to do."

First Amendment lawyer Rex Heinke, a partner in the Los Angeles office of Akin Gump Strauss Hauer & Feld, wonders where all this is going. "It strikes me as a little odd that you can't use that term [rape]," he said. "Does that mean you can't use murder, robbery, breaking and entering?"

He added: "It's pretty hard to prosecute a murder case without being able to say the word murder."