EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

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FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 5, 15, and 58[1], and new Rule 37, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments to Rules 5 and 58 and new Rule 37 were circulated to the bench and bar for comment in August 2010. Scheduled public hearings on the amendments were canceled because no one asked to testify. The proposed amendment to Rule 15 was circulated to the bench and bar for comment in August 2008 and approved by the Judicial Conference in September 2009, but remanded to the advisory committee by the Supreme Court for further study in April 2010. The advisory committee revised the language in the proposed amendment to Rule 15 and the accompanying committee note and determined that republication was unnecessary.

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The proposed amendment to Rule 5(c) clarifies where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country. The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition. The rule applies even if the defendant first arrives in another district. Interrupting an extradited defendant's transportation to hold an initial appearance in the district

[1] The Supreme Court declined to approve the proposed amendments to Criminal Rules 5(d) and 58. Because the proposed amendments to Rules 5(d) and 58 will not be transmitted to Congress, the discussion of those amendments is not included in the report.

of arrival can impair the defendant's ability to obtain and consult with trial counsel and to prepare a defense in the district where the charges are pending.

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The proposed amendment to Rule 15 authorizes the taking of depositions outside the United States without the defendant's presence in specified limited circumstances and with the district judge's approval. The amendment addresses cases in which important witnesses — for both the government and the defense — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. The amendment does not apply if it is possible to bring the witness to the United States for trial or for a deposition at which the defendant can be present, or if it is feasible for the defendant to be present at a deposition outside the United States. The amendment authorizes only the taking of pretrial depositions; it does not speak to their admissibility. Questions of admissibility are left to the courts to resolve on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

The proposed amendment requires that before such a deposition may be taken, the judge must make case-specific findings regarding: (1) the importance of the witness's testimony; (2) the likelihood that the witness's attendance at trial cannot be obtained; (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States; and (4) the ability of the defendant to meaningfully participate in the deposition through reasonable means.

After the proposed amendment was published for public comment in August 2008, the advisory committee received four comments. The Magistrate Judges Association endorsed the proposal. The General Counsel of the Drug Enforcement Administration raised some drafting issues. The Federal Defenders and the National Association of Criminal Defense Lawyers (NACDL) opposed the proposed amendment, primarily because of concerns about the effect of the proposed amendment on the defendant's rights under the Sixth Amendment's Confrontation Clause. NACDL argued that the amendment would create a right to introduce a deposition obtained through the new procedure, thereby exceeding the authority of the Rules Enabling Act,

and that the proposed amendment would be a back-door means of achieving the goals of a failed attempt to amend Rule 26 in 2002. To address the concerns raised during the public comment period, the advisory committee revised the proposed amendment by explicitly limiting it to felonies and amending the committee note to clarify that the decision to allow the taking of the deposition in no way forecloses or predetermines challenges to admissibility, whether based on the Confrontation Clause or on the Rules of Evidence. With these changes, the advisory committee approved the amendment for submission to the Standing Committee. The Standing Committee approved it in June 2009, and the Judicial Conference approved it in September 2009. In 2010, the Supreme Court remanded the proposed amendment to the advisory committee for further consideration.

At its April 2011 meeting, the advisory committee reconsidered the proposed amendment. The advisory committee made no change in the text of the amendment approved in 2009, but revised the committee note to further clarify that compliance with the procedural requirements for obtaining the deposition testimony does not predetermine its admissibility at trial. Following its April 2011 meeting, after consultation with the reporters and chairs of the Standing Committee and the Evidence Rules Committee, the advisory committee voted unanimously to revise the text of Rule 15(f) to state explicitly in the text of the rule that authorization to take a deposition does not determine admissibility. The advisory committee also approved a further revised committee note that describes the amendment to subdivision (f) and clarifies the relationship between the authority to take a deposition under Rule 15(c)(3) and the admission of the deposition testimony at trial. Because the changes simply move to the text a point previously made in the committee note, further emphasize the point in the committee note, and are in accordance with the comments previously received, republication was unnecessary. The Standing Committee approved the revised amendment to Rule 15, with a few stylistic changes, at its June 2011 meeting.

Proposed new Rule 37 clarifies that the procedure described in Appellate Rule 12.1 and Civil Rule 62.1 for obtaining “indicative rulings” also applies in criminal cases. The proposed rule establishes procedures facilitating the remand of certain postjudgment motions filed after an

appeal has been docketed in a case where the district court indicated it would grant the motion. After considering public comments, the advisory committee recommended approval of the proposed new rule as published.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 5, 15, and 58, and new Rule 37, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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