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To: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Richard C. Tallman, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **May 12, 2008 (Revised July 6, 2008)**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 27–28, 2008 in Washington, D.C., and took action on a number of proposed amendments to the Rules of Criminal Procedure.

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This report addresses a number of action items:

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(3) approval for publication and comment of proposed amendments to Rules 6,[1] 15, and 32.1.

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[1]The Standing Rules Committee approved for publication a proposed amendment to Criminal Rule 6, but deferred publication temporarily.

III. Action Items—Recommendations to Publish Amendments to the Rules

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B. ACTION ITEM—Rule 15

The Committee recommends publication for notice and comment of an amendment to Rule 15 permitting depositions, held outside the United States, at which the defendant cannot be present, provided a showing is made that the case meets a list of strict criteria. This proposal has been under study by the Committee since 2006 when the Department of Justice brought to the Committee's attention problems arising in the prosecution of transnational crimes. In recent years the Department has encountered many instances in which critical witnesses lived in, or had fled to, other countries. Witnesses who are outside the United States are beyond the subpoena power of the federal courts, and it is not always possible to secure their voluntary attendance in the United States for the trial or for a pretrial deposition. In some cases, a witness agrees to be deposed outside the United States, and the defendant can be transported to the deposition. In other cases, however, a witness agrees to be deposed outside the United States, but it is not possible for the defendant to be present at the deposition. This may occur, for example, because the country in which the deposition will be held will not admit the defendant. In other cases, it is not possible to transport a defendant who is in custody to the place of the deposition in a secure fashion.

Although Rule 15 permits depositions of witnesses in certain circumstances, the current Rule does not specifically address cases in which an important witness is not in the United States and it would be impossible to securely transport the defendant to the witness's location for a deposition. Despite the absence of specific authority in Rule 15, several courts of appeals have authorized depositions of foreign witnesses without the defendant being present in limited circumstances. For example, in *United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988), a witness held in custody in France was deposed while the defendant was in federal custody in the United States and could not be securely transported abroad. The deposition was completed through several rounds of submitting and translating questions and answers, pursuant to French law, while the defendant was accessible by phone in the United States. *Id.* at 947–48. The Second Circuit found that taking the deposition in this manner did not violate Rule 15 because the Rule is intended "to facilitate the preservation of testimony." *Id.* at 949–50. The court suggested a dual approach to the application of Rule 15: "In cases involving depositions conducted within the United States—where it is within the power of the court to require the defendant's presence and within the power of the government to arrange it—a strict application of Rule 15(b) may be required." *Id.* at 949. By contrast, "[i]n the context of the taking of a foreign deposition, we believe that so long as the prosecution makes diligent efforts, as it did in this case, to attempt to secure the defendant's presence, preferably in person, but if necessary via some form of live broadcast, the refusal of the host government to permit the defendant to be present should not preclude the district court from ordering that the witness' testimony be preserved anyway." *Id.* at 950.

Similarly, the Third Circuit approved a government requested deposition of two witnesses in Belgium who were unavailable for trial where the defendant had one telephone line that allowed him to listen to the live proceedings and another telephone line that allowed him to speak privately with his attorney, and the proceedings were videotaped. *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990). The court held that an "absolute rule [requiring the defendant's presence] would transgress the general purpose of Rule 15, which is to preserve testimony 'whenever due to exceptional circumstances of the case it is in the interest of justice' to do so." *Id.* at 265 (quoting Fed. R. Crim. P. 15(a)).

Additionally, the Ninth Circuit held that "[w]hen the government is unable to secure a witness's presence at trial, Rule 15 is not violated by the admission of videotaped testimony so long as the government makes diligent efforts to secure the defendant's physical presence at the deposition and, failing this, employs procedures that are adequate to allow the defendant to take an active role in the deposition proceedings." *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998). In that case, the court approved the deposition of Canadian witnesses without the defendant's presence, because the witnesses refused to voluntarily come to the United States to testify at trial and U.S. officials could not assure the secure transportation of the defendant to and from Canada for the deposition. *Id.*

The Committee concluded that Rule 15 should be amended to deal expressly with the issue raised in these cases. In considering this proposal, the Committee was mindful of the recent history of the 2002 proposal to amend Rule 26 to permit the taking of testimony "[i]n the interests of justice" by contemporaneous two-way video when the court finds there are "exceptional circumstances," "appropriate safeguards" are used, and the witness is unavailable within the meaning of Fed. R. Evid. 804(a)(4)–(5). The Supreme Court declined to transmit the proposed rule to Congress. Justice Scalia filed a statement in which he concurred. Justice Breyer dissented in a statement joined by Justice O'Connor. These statements are included at the end of this report, along with the Committee's proposed rule.

Justice Scalia concluded that the Rule 26 proposal was contrary to *Maryland v. Craig*, 497 U.S. 836 (1990), because it did not "limit the use of testimony via video transmission to instances where there has been a 'case specific finding' that it is 'necessary to further an important public policy.'" Statement of Justice Scalia, Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, at 1 (2002). He drew a sharp distinction between virtual confrontation and physical confrontation, commenting that "[v]irtual confrontation might be sufficient to protect virtual confrontation rights; I doubt whether it is sufficient to protect real ones." *Id.* at 2. He also observed that "serious constitutional doubt" is an appropriate reason for the Court to decline to transmit a recommendation of the Judicial Conference. *Id.* at 1. In response to the argument that the proposed rule admitted video testimony only in cases in which the deposition of an unavailable witness could

be read into the record, Justice Scalia noted that Rule 15 gives a defendant the opportunity for face-to-face confrontation during a deposition.[2] *Id.* at 2.

The Committee drafted the proposed rule to require "case specific findings" that the deposition is "necessary to further an important public policy." Specifically, the amendment—which is applicable only to depositions outside the United States—requires the court to find that all of the following criteria are met:

(1) the witness's testimony could provide substantial proof of a material fact;
(2) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
(3) the witness's presence for a deposition in the United States cannot be obtained;
(4) the defendant cannot be present for one of the following reasons:
    (a) the country where the witness is located will not permit the defendant to attend the deposition;
    (b) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or
    (c) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and
(5) the defendant can meaningfully participate in the deposition through reasonable means.

Although the Advisory Committee recognized that approval by the Supreme Court is by no means certain even with these limitations, the Committee strongly supports the proposal and voted unanimously in favor of recommending it for publication.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 15 be published for public comment.

C. ACTION ITEM—Rule 32.1

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a)—to which the current Rule refers—to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion arose because several subsections of § 3143(a) are ill suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

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[2]Justice Scalia also drew a distinction between the confrontation clause standards applicable to out-of-court statements and those applicable to live testimony, but that discussion predated the Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

The current rule also provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger, but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law.

The Committee voted, with one dissent, to recommend publication of the proposed amendment.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32.1 be published for public comment.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[*]

Rule 15. Depositions

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2 **(c) Defendant's Presence.**

3 **(1)** ***Defendant in Custody.*** The officer who has

4 custody of the defendant must produce the

5 defendant at the deposition in the United States

6 and keep the defendant in the witness's presence

7 during the examination, unless the defendant:

8 (A) waives in writing the right to be present; or

9 (B) persists in disruptive conduct justifying

10 exclusion after being warned by the court that

11 disruptive conduct will result in the

12 defendant's exclusion.

13 **(2)** ***Defendant Not in Custody.*** A defendant who is

14 not in custody has the right upon request to be

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[*]New material is underlined; matter to be omitted is lined through.

15 present at the deposition in the United States,
16 subject to any conditions imposed by the court. If
17 the government tenders the defendant's expenses
18 as provided in Rule 15(d) but the defendant still
19 fails to appear, the defendant — absent good cause
20 — waives both the right to appear and any
21 objection to the taking and use of the deposition
22 based on that right.

23 (3) ***Taking Depositions Outside the United States***
24 ***Without the Defendant's Presence.*** The
25 deposition of a witness who is outside the United
26 States may be taken without the defendant's
27 presence if the court makes case-specific findings
28 of all of the following:

29 (A) the witness's testimony could provide
30 substantial proof of a material fact;

31 (B) there is a substantial likelihood that the

32 witness's attendance at trial cannot be
33 obtained;
34 (C) the witness's presence for a deposition in the
35 United States cannot be obtained;
36 (D) the defendant cannot be present for one of the
37 following reasons:
38 (i) the country where the witness is located
39 will not permit the defendant to attend
40 the deposition;
41 (ii) for an in-custody defendant, secure
42 transportation and continuing custody
43 cannot be assured at the witness's
44 location; or
45 (iii) for an out-of-custody defendant, no
46 reasonable conditions will assure an
47 appearance at the deposition or at trial
48 or sentencing; and

49 (E) the defendant can meaningfully participate in

50 the deposition through reasonable means.

51 * * * * *

Committee Note

This amendment addresses the growing frequency of cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

Recognizing that important witness confrontation principles and vital law enforcement and public safety interests are involved in these instances, the amended Rule authorizes a deposition outside of a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court of significant need and public policy justification. New Rule 15(c) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence. Several courts of appeals have authorized depositions of witnesses without the defendant being present in such limited circumstances. *See, e.g.*, *United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988); *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990); *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998).

The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — as to the elements that must be shown. Courts have long held that when a criminal defendant raises a constitutional challenge to proffered evidence, the government must generally show, by a preponderance of the evidence, that the evidence is constitutionally admissible. *See, e.g.*, *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987). Here too, the party requesting the deposition, whether it be the government or a defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof. Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means.

Finally, this amendment does not supercede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

It is not the intent of the Committee to create any new rights by enactment of this rule, which establishes procedures to procure testimony from foreign witnesses who may be located beyond the reach of federal subpoena power. The Committee recognizes that a request to admit testimony obtained under the new foreign deposition procedure may give rise to potential challenges. The Committee left the resolution of any such challenges to the development of case law.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

1 **(a) Initial Appearance.**

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3 **(6)** ***Release or Detention.*** The magistrate judge may
4 release or detain the person under 18 U.S.C.
5 § 3143(a)(1) pending further proceedings. The
6 burden of establishing by clear and convincing
7 evidence that the person will not flee or pose a
8 danger to any other person or to the community
9 rests with the person.

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Committee Note

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law. *See, e.g.*, *United States v. Loya*, 23 F.3d 1529, 1530 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).