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October 7, 2025

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Via email to RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposal to Amend Federal Rule of Criminal Procedure 15 Rule Suggestion 25-CR-B

Dear Ms. Dubay:

I write to most respectfully support the pending Proposal to Amend Federal Rule of Criminal Procedure 15 to allow criminal defendants, upon motion and in the interests of justice, to take the depositions of prospective witnesses in criminal cases in order to prepare for trial; the Proposal would allow for more than five such depositions only under "exceptional circumstances." I understand that this Proposal has been placed on the Study Agenda of the Advisory Committee on Criminal Rules and will next be taken up by the Committee on November 6, 2025. I here provide this brief letter to set forth the basis for my support of this appropriate, and indeed wise, Proposal.

First, by way of very brief introduction, I am the long-time Chair and current Co-Chair of the White Collar and Investigations of Gibbons P.C., where I am headquartered in Newark, New Jersey. I am also the long-time Director of the John J. Gibbons Fellowship in Public Interest & Constitutional Law at Gibbons, which has, for the last 35 years, litigated cutting-edge cases including in the criminal arena and more particularly, including cases that presented important issues regarding discovery in criminal cases. Before joining Gibbons, I was an Assistant Federal Public Defender for the District of New Jersey for five years, after clerking in that Court. I have, among many other activities, been President of the Association of Criminal Defense Lawyers of New Jersey and of the Association of the Federal Bar of New Jersey, and Co-Chair of the Criminal Litigation Committee of the American Bar Association, Section on Litigation. My firm bio can be found here. Lawrence S. Lustberg | Professionals | Gibbons P.C.

Second, I have read the very thorough suggestion submitted by Michael Kelly and Sergio Acosta ("the Rule Suggestion"), upon which the Committee acted in placing this matter on the Study Agenda, as well as other correspondence to the Committee from extremely distinguished members of the bar, all supporting that suggestion. These submissions eloquently and effectively set forth the benefits of the proposed amendment to Rule 15 for the system of justice and helpfully document the experience with such depositions in other states.

Most fundamentally and significantly, as these others have written, the proposed Amendment would serve to level the playing field that is the federal criminal justice system. That system has, for some time, been under attack, and is accused by both sides of the political spectrum of being "weaponized" for political purposes. Such allegations gain at least some credibility when the system is one-sided, as ours is when it comes to discovery—indeed, more so when compared to the extremely robust discovery available in civil cases under Federal Rules of Civil Procedure 26 through 37, allowing as they do, not only depositions, Fed. R. Civ. P. 27-32, but also interrogatories, Fed. R. Civ. P. 33, requests for production of documents, Fed. R. Civ. P. 34, physical or mental examinations of parties, Fed. R. Civ P. 35, and requests for admission. Fed. R. Civ. P. 36. Courts and commentators have, not surprisingly, frequently asked how it could be that a system provides for such extensive discovery—and the resulting pretrial preparation—in civil cases when so little is allowed in criminal cases.

And lest there be any doubt about it, discovery in criminal cases is, as the Committee knows, very limited indeed.[1] Federal Rule of Criminal Procedure 16 allows for only very limited discovery, including the defendant's statement, Fed. R. Crim. P. 16(a)(1)(A)-(C); the defendant's prior record, Fed. R. Crim. P. 16(a)(1)(D); certain documents, including documents obtained from the defendant, within the Government's possession custody or control, Fed. R. Crim. P. 16(a)(1)(E); reports of any examinations or tests, Fed. R. Crim. P. 16(a)(1)(f); and expert disclosures. Fed. R. Crim. P. 16(a)(1)(G). Notably, the Rule specifically provides that reports of Government agents, or of witness statements are not provided in discovery. Fed. R. Crim. P. 16(a)(2). Meanwhile, Federal Rule of Criminal Procedure 17 allows for the pretrial production of subpoenaed materials exclusively with leave of the Court, which is granted only upon a demanding showing that a subpoena is targeted at specifically identified evidence, and that a defendant is unable to properly prepare for trial without those documents. *United States v. Nixon*, 418 U.S. 683 (1974). Bills of particulars, under Federal Rule of Criminal Procedure 7(f), are almost always denied, even when they should not be.[2] And, most importantly, unlike the procedures in many states (including my home state of New Jersey, *see* N.J; Ct. R. 3:13(b)(1)(G)-(H), where defendants are entitled to "open file discovery") in federal cases, witness statements do not have to be provided until after a witness testifies on direct examination, *see* 18 U.S.C. § 3500.[3] Though the Government—often at the direction of the Court—provides this "Jencks Act"

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[1] *See, e.g., Degen v. United States*, 517 U.S. 820, 825-826 (1996) (noting that a criminal defendant is entitled to limited discovery in comparison to a party in a civil case); *United States v. Pouncy*, No. 23-20262, 2025 U.S. Dist. LEXIS 141922, at *1 (E.D. Mich. July 24, 2025) ("Discovery in criminal cases is more limited that the general discovery that is available to litigants in civil cases."); *United States v. Sampson*, 898 F.3d 270, 281 n.8 (2d Cir. 2018) (elaborating the "numerous rationales for more calibrated discovery in federal criminal, as opposed to civil, cases); *Osband v. Woodford*, 290 F.3d 1036, 1043 (9th Cir. 2002) (emphasizing the limits on criminal discovery when compared to civil cases).

[2] Abramowitz & Sack, *The Importance of 'Particulars' in Criminal Fraud Cases*, N.Y.Law J. (March 3, 2020) (noting that courts "generally do not order bills of particulars" in contras to, for example, civil fraud cases, in which plaintiffs must plead fraud with particularity under Fed. R. Civ. P. 9(b)).

[3] Moreover, the definition of a 'statement" for purposes of the statute is very narrow and does not, for example, include law enforcement memoranda, *see* 18 U.S.C. § 3500 (e), such as FBI 302s, summarizing what a witness said. *See, e.g., United States v. Price*, 542 F.3d 617, 621 (8th Cir. 2008) (holding that absent evidence that the witnesses "approved or adopted" the FBI 302s, "these documents are not discoverable under . . . the Jencks Act"); *United*

material shortly before trial,[4] that would not come close to accomplishing what the proposed Amendment to Rule 15 would in terms of providing meaningful discovery to the defense in criminal cases.

Nor is the benefit of this proposed rule limited to defendants. Federal prosecutors, too, often have little visibility into the defense case that they will face until trial.[5] But given that the Government bears the burden of proving guilt beyond a reasonable doubt, and the lack of any obligation by the defense to produce any defense evidence or put on any defense case,[6] the impact of the meager discovery provided in the Federal Rules of Criminal Procedure indisputably falls on the defense. After all, the overwhelming majority of any criminal case is always adduced by the Government, which knows what it has, while the defense does not. But beyond at least beginning to redress the disproportionality, and the unfairness which it engenders, the Proposed Amendment to Rule 15 also portends tremendous benefits for the system of justice as a whole.

States v. Jordan, 316 F.3d 1215, 1255 (11th Cir. 2003) (holding that FBI 302s "are not Jencks Act statements of the witness unless they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness").

[4] *See* Baldrate, *The Department of Justice's New Guidance on the Production of Exculpatory and Impeachment Evidence*, Bloomberg Law Reports, at 3, 8-9 (2010) (Baldrate-DOJNewGuidanceontheProdofExculpatoryandImpeachmentEvidence.pdf) (explaining the requirements of the Jencks Act and noting that "the production of Jencks material varies widely from jurisdiction to jurisdiction, with some jurisdictions requiring the turnover of material months before trial and others requiring the disclosure only at midnight on the day a witness is to testify"). Multiple Circuits have also held that the Jencks Act timetable also applies to exculpatory material that the Government is required to produce under *Brady v. Maryland*, 373 U.S. 83 (1963). *See United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979) ("When the defense seeks evidence which qualifies as both Jencks Act and *Brady* material, the Jencks Act standards control."); *United States v. Scott*, 524 F.2d 465, 467 (5th Cir. 1975) (holding that prosecutor's failure to disclose a witness's exculpatory statement before trial did not violate *Brady*, because such evidence falls under the ambit of the Jencks Act, and "the rule announced in *Brady* . . . was not intended to override the mandate of the Jencks Act"). Specifically, this timetable almost always applies to exculpatory information that falls into the category of impeachment material under *Giglio v. United States*, 405 U.S. 150 (1972). That is, while that information is technically *Brady* information, *United States v. Bagley*, 473 U.S. 667, 679 (1985) (holding that impeachment material qualifies as *Brady* material), Courts, including the Third Circuit where I practice, have held that this information can be turned over on the eve of trial. *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983); *United States v. Pflaumer*, 774 F.2d 1224 (3d Cir. 1985). *See also United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988) ("If impeachment evidence is within the ambit of the Jencks Act, then the express provisions of the Jencks Act control discovery of that kind of evidence.").

[5] It is, at least in part, for this reason, that the Government, even when under a Court Order to do so, *see, e.g.*, United States District Court for the District of Columbia Standing *Brady* Order (StandingBradyOrder_November2017.pdf), often fails to provide *Brady* information prior to trial (if it does so at all) because it might not, until it is apprised of the defense, be able to ascertain what is exculpatory.

[6] *Nelson v. Colorado*, 581 U.S. 128, 135-36 (2017) ("Axiomatic and elementary, the presumption of innocence lies at the foundation of our criminal law.") (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)); *See also* Third Cir. Model Jury Instruction 3.06 ("The presumption of innocence means that [a defendant] has no burden or obligation to present any evidence at all or to prove that [he or she] is not guilty. The burden or obligation of proof is on the government to prove that [the defendant] is guilty and this burden stays with the government throughout the trial."); 8th Cir. Model Jury Instruction § 3:05; 1st Cir. Model Jury Instruction § 3:02, *cf.*, *Griffin v. California*, 380 U.S. 609 (1965) (Government cannot comment on a defendant's decision not to testify).

First, although, as noted above, the Amendments would level the playing field as between the prosecution and the defense, the truth is that it would provide very significant benefits to the Government as well as defendants: Assistant U.S. Attorneys would be provided with otherwise unavailable insight into the effectiveness and credibility of their witnesses, whose live testimony they would have the opportunity to test in the crucible of cross-examination—"the greatest legal engine ever invented for the discovery of truth"[7]—but without the downside of having this occur for the first time in front of a jury. Indeed, prosecutors would gain the truly extraordinary opportunity to get a preview of not only defense counsel's examination of Government witnesses, but inevitably, the defense approach to the case as a whole.

The result, then, for both sides, is to gain previously unattainable insight in the strengths and weakness of the litigation positions. And, as others have pointed out, that insight holds the potential for—indeed, the inevitability of—the disposition of cases without the necessity of trial, which has obvious benefits for a system of justice in which caseloads are often unmanageable for a judiciary that it already overextended.[8] Even more profoundly, the benefits in terms of promoting the legitimacy of a system of criminal justice that is, as polls show, more disparaged and less respected than ever before in American history,[9] are truly invaluable for every participant—judges, attorneys, litigants and witnesses—in that system. Criticism that the system is unfair, allowing for "trial by ambush," and can accordingly be used for political purposes, will be diminished as a result of more robust, and less one-sided, pretrial disclosure. Due process challenges, based upon the kind of unfairness that sometimes is revealed in post-trial *Brady* motions,[10] will be fewer and, given *Brady*'s materiality standard,[11] less likely to succeed, thus

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[7] *California v. Green*, 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 *Evidence* § 1367, at 29 (3d ed., 1940)).

[8] U.S. Courts, *Federal Judicial Caseload Statistics 2024*, https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024 (finding that there were 66,035 criminal filings in U.S. district courts in 2024).

[9] Gallup, *Americans Pass Judgment on Their Courts*. Dec. 16, 2024 (https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx) (noting that Americans' confidence in the U.S. judicial system dropped to a record-low 35% in 2024).

[10] *See, e.g.*, *United States v. Rozier*, 746 F. Supp. 3d 569 (N.D. Ind. 2024) (holding that Government's failure to disclose interview of codefendant that contradicted testimony and provided additional details of alleged scheme violated *Brady* obligations, and granting new trial); *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149 (2d Cir. 2008) (finding that the Government suppressed material evidence by withholding documents directly relevant to defendant's intent to bribe); *Spicer v. Roxbury Correctional Inst.*, 194 F.3d 547 (4th Cir. 1999) (prosecution failed to disclose witness's prior inconsistent statement that he did not see the defendant); *Schledwitz v. United States*, 169 F.3d 1003 (6th Cir. 1999) (Government witness portrayed as neutral and disinterested had actually been investigating defendant for years); *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995) (failure to disclose "continuous stream of unlawful favors" given by Government to witness).

[11] Favorable evidence is material, and constitutional error results from its suppression by the Government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

serving legitimate interests in finality.[12] And even guilty pleas will be much less subject to challenge—for example, on the basis of ineffective assistance of counsel[13]—if counsel is, as a result of such a process, more fully apprised of the evidence against the defendant; arguments that pleas were coerced would ring much more hollow.

Nor, as others have pointed out, would the Proposed Amendment be so limitless in its application that it would be subject to abuse. By its terms, the Proposed Amendment would allow depositions only upon motion to the Court, which would grant the motion only where justified by the interests of justice. As the Rule Amendment suggestion makes clear, *see* Rule Suggestion at 16, those interests of justice would not be served and a motion would be denied, where for example, identifying and deposing a witness would pose a potential danger to witnesses or to the administration of justice; this, of course, is consistent with existing jurisprudence,[14] as well as with Court's well-established authority to enter appropriate protective orders to address these, or other appropriate concerns.[15] And, in any event, as with all discovery, depositions would be limited to non-privileged information related to the case.[16] Finally, the proposed Amendment would limit depositions, other than in "exceptional circumstances," to five (5), further preventing any abuse.

Courts, of course, are more than capable of assuring that any depositions proceed in an appropriate fashion; they have done so for years under Federal Rule of Criminal Procedure as it currently stands, albeit only "in order to preserve testimony for trial," which occurs primarily in cases, where—whether for health reasons or otherwise—a witness is not otherwise available ofr trial.[17] Moreover, as the Committee knows from both the Rule Suggestion itself and several of the letters supporting it, a number of states have provisions similar to the Proposed Amendment, whereby depositions may take place, including Florida, Indiana, Arizona, Iowa, Missouri, Nebraska, North Dakota and Vermont. *See* Rule Suggestion at 17-21. *See also* Letter of John D.

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[12] *Shinn v. Ramirez*, 596 U.S. 366, 391 (2022) (emphasizing the interest in "finality that is essential to both the retributive and deterrent functions of criminal law"); *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984) (noting the "profound importance of finality in criminal proceedings").

[13] *See generally Missouri v. Frye*, 566 U.S. 134, 144 (2012) (holding that the Sixth Amendment right to effective assistance of counsel applies to the entry of a guilty plea).

[14] *See, e.g.,Roviaro v. United States*, 353 U.S. 53 (1957) (holding that the Government must disclose an informant's identity if it is essential to a fair defense unless doing so would endanger the informant).

[15] Fed. R. Crim. P. 16(d)(1) (empowering courts to issue protective orders and "deny, restrict, or defer discovery or inspection"); *see also United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) (a court's ability to enter a protective order derives from its inherent Article III judicial power).

[16] *See, e.g.*, Fed. R. Crim. P. 26.2(c); 18 U.S.C. § 3500(b)-(c); Fed. R. Evid. 401.

[17] *See. e.g., United States v. Carter*, 801 F.3d 1199 (9th Cir. 2018) (Rule 15 depositions appropriate where witness was pregnant and could not travel for defendant's trial); *United States v. Ramos*, 45 F.3d 1519 (11th Cir. 1995) (reversing denial of Rule 15 motion to depose otherwise-unavailable witness in Columbia possessing material evidence); *United States v. Keithan*, 751 F.2d 9 (1st Cir. 1984) (affirming grant of Government's Rule 15 motion when witness was physically unable to leave their home);.

Cline (Sept. 2, 2025) (discussing experience in New Mexico where such depositions are permitted); Letter of David Oscar Markus (September 13, 2025) (discussing experience in Florida); Letter of Jonathan A. Bont (September 16 2025) (discussing experience in Indiana). In each of these jurisdictions, not only has there been no evidence of abuse of the process, but the benefits of it (discussed above), have been consistently realized—especially the efficiencies realized by the parties being able to evaluate the strength of their cases, facilitating plea negotiations and ultimately the resolutions of the prosecutions at issue.

Finally, pretrial depositions are today both more practicable and more necessary than ever. They are more practicable because in the wake of the COVID epidemic, more and more depositions whether in civil or in criminal cases take place remotely, using such platforms as Zoom, Teams and Webex, for example. Practitioners are accustomed to taking and defending such depositions and occur more smoothly and with far less inconvenience than ever.[18] The criminal justice system, as well as its civil counterpart can and should take advantage of this technological progress and of lawyers' facility in proceeding remotely. In sum, depositions in criminal cases ought to occur not only in the interests of fairness but because they are less burdensome than ever.

And they are also more necessary than ever in a world that is ever smaller, and in which federal criminal cases quite frequently involve issues and witnesses from all around the world who might not be willing or able to travel to the United States and to whom access might otherwise be denied without the enormous delay that is almost always occasioned by the use of such problem-plagued and time-consuming alternatives as the use of letters rogatory.[19]

The Proposed Amendment, then, is both fair and practical, and would be the unusual provision that promotes both justice and efficiency. We know from experience that it would be workable even as it enhanced the public image of a system of justice that is, these days, often under attack from all sides. Because I am proud of that system of justice, in which I have great faith and in which I have been privileged to participate, I support it this Proposed Amendment and am pleased and honored to do so. And I look forward to criminal practice under rules that allow the kind of transparency and fairness that this Proposed Amendment engender when, as I hope occurs sooner rather than later, it is the law of the land.

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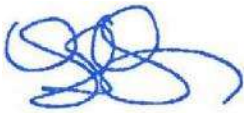
[18] Of course, any inconvenience is exacerbated by the fact that in criminal cases witnesses are subject to nationwide service of subpoenas, Fed. R. Crim. P. 17(e)(1), without the 100-mile limit that reduces such far flung witnesses, which is the law with regard to subpoenas in civil cases, Fed. R. Civ. P. 45(c)(1)(A).

[19] *See* Rebecca Wexler, *Life, Liberty, and Data Privacy: The Global CLOUD, the Criminally Accused, and Executive Versus Judicial Compulsory Process Powers*, 101 Tex. L. Rev. 1341, 1343, 1361-62 (2023) ("Most treaties for cross-border evidence gathering are exclusive to law enforcement . . . [D]efense investigators are left to use the unreliable, inefficient, and discretionary letters-rogatory process."). As Professor Wexler notes, this same problem may not present itself to prosecutors, who can avail themselves of Mutual Legal Assistance Treaties (MLATs) with many countries. *Id.*

Thank you for you kind consideration of this submission.

Sincerely yours,



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