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By Email

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

Re: Proposals To Amend Federal Rule of Criminal Procedure 15 To Provide for Discovery Depositions

Dear Ms. Dubay:

We write in support of amending Rule 15 of the Federal Rules of Criminal Procedure to provide for discovery depositions. The absence of this critical, truth-seeking tool places criminal defendants at a distinct and unjustifiable disadvantage against the government. We encourage the Committee to study proposals to amend Rule 15 and ultimately to propose an amendment that corrects this flaw in our criminal justice system.

We agree with many of the points made by others who have written in support of amending Rule 15. We wish to make two brief points based on our firm's decades of experience defending federal criminal cases.

First, pretrial depositions are necessary to mitigate the government's unequal access to witnesses in the investigatory and pretrial phases of federal criminal cases. Only the government can deploy law enforcement officers with badges to knock on a witness's door, use grand jury subpoenas to compel testimony, obtain compulsion orders to overcome a witness's invocation of the Fifth Amendment, and lawfully make threats or inducements to convince a witness to sit for interviews. In our experience, these coercive tools typically permit the government to obtain as many witness interviews as it wants, often interviewing critical witnesses several times before trial. The defense can rely only on the voluntary cooperation of witnesses, and few witnesses volunteer for a defense interview, much less multiple interviews. There are many reasons for this phenomenon. Interviews are an inconvenience. By agreeing to a defense interview, a witness increases the likelihood the defense will call him or her at trial. And no one wants to sign up as a defense witness in a federal criminal trial. Some witnesses perceive, often correctly, that agreeing to a defense interview will put them on the government's bad side. The most disturbing reason some witnesses refuse defense interviews is that the government expressly or implicitly communicates that the witness should not agree to a defense interview. We do not know the frequency of such obstructive communications, but it happens, and we have proven it. For example,

in a state case where we obtained a pretrial deposition, a key witness testified that the prosecutor encouraged her to cancel a meeting with us after the witness had originally agreed to sit for a pretrial interview. In a federal criminal case, the government made a favorable defense witness unavailable by flying him across the country, when he was too ill to fly back for trial testimony. A criminal justice system that provides prosecutors expansive coercive powers to obtain access to witnesses, but provides no tools at all to defense counsel, is inherently unjust.

Second, to the extent the government's pretrial disclosures even include grand jury testimony, FBI 302s, or other purported summaries of government witness interviews, these materials are no substitute for direct defense access to witnesses. These documents reflect the government's questions, the government's focus, and its theory of the case. Our system is an adversarial one, where defense counsel needs to ask its own questions, and investigate its own theories, some of which may never have occurred to the government. As important, these sterile documents provide almost no insight into the demeanor, credibility, or persuasiveness of the witness—the types of things that can make or break a witness, irrespective of the words that come out of his or her mouth. In the case of FBI 302s or other purported summaries of witness interviews, these documents are not verbatim, are incomplete, are not fully accurate, and are not admissible as prior inconsistent statements under Fed. R. Evid. 801(d)(1)(A). Finally, in some cases, these summaries are affirmatively misleading. *See, e.g.*, Report of Special Counsel Henry F. Schuelke III, *United States v. Stevens*, No. 1:08-cr-00231 (D.D.C. Mar. 15, 2012), ECF 435 (report by court-appointed special prosecutor outlining government's discovery failures, available at https://tinyurl.com/3m94ue8w); *United States v. Omni Int'l Corp.*, 634 F. Supp. 1414 (D. Md. 1986) (dismissing indictment based on prosecutorial misconduct).

The result is that the defense frequently begins trial without having spoken to the critical witnesses, and without knowing what those witnesses will say when called or what their demeanor will be when they say it. The government, on the other hand, will have interviewed those witnesses as many times as it wants and practiced direct examinations with those witnesses as many times as it needs. That asymmetric access to information does not serve the truth-seeking function of criminal trials. Nor is it efficient for the parties or the courts, since lack of access to witnesses prevents the defense either from understanding the evidence that may be introduced against it at trial or from being able to demonstrate flaws in the government's evidence that might be able to avoid trial altogether. This system does not serve anybody well. And it may in part explain why only 2-3% of federal criminal cases go to trial. When the stakes are so high, and the sentences so long, asymmetric access to information about what witnesses will say makes going to trial an almost unbearable risk for most defendants.

In our witness-driven trial system, unequal access to witnesses is unequal access to justice. It remains one of the most puzzling features of our legal system that criminal cases, in which defendants may face the most severe consequences, provide significantly less witness discovery and a much more uneven distribution of power than the run-of-the-mill civil case. States around the country have successfully incorporated depositions into their criminal procedure. Federal prosecutors may well oppose the adoption of criminal discovery depositions, as they opposed *Brady* reform in the wake of the *Stevens* case and as they continue to oppose forensic science reform

following the National Academy of Sciences' 2009 report on that topic. But the States' experiences incorporating criminal discovery depositions confirm that successful reform in this area is possible, and necessary. We strongly believe the Committee should study, and eventually endorse, amendments that incorporate criminal discovery depositions in federal criminal cases.

Respectfully submitted,

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