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March 4, 2026

Carolyn A. Dubay
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE Room 7-300
Washington, DC 20544
Via Email: RulesCommittee_Secretary@ao.uscourts.gov

Dear Members of the Committee:

I write to you as a criminal defense lawyer practicing in the state of Alabama. I began my career as an Assistant Attorney General for the State of Alabama and then as a Deputy District Attorney for Tuscaloosa County, Alabama. I have tried both civil and criminal cases for nearly 50 years. I have tried hundreds of criminal cases in both the state and federal courts, including twenty-two death penalty cases to verdict. One of those was a federal death penalty trial that lasted nine weeks.

I strongly support the Committee's consideration of a rule change that would permit pretrial depositions in federal criminal cases, subject to appropriate safeguards and judicial oversight.

I've always lamented the contrast between the wide range of discovery in civil cases, where normally only money or property is in dispute, as opposed to the severely restricted and limited discovery in criminal cases, in which a citizen's freedom is at stake.

Any criminal defense lawyer who has been in the trenches for any amount of time has unquestionably faced the reality of "trial by ambush." The criminally accused lacks the resources, the knowledge, and the access to critical information-such deprivations compromise the Sixth Amendment guarantees to the effective assistance of counsel, adequate and thorough cross-examinations, and a transparent and fair trial.

Rule 16, while offering limited discovery, is much too narrow to achieve the objectives of a fair trial. Jencks also is way too restrictive. Even when judges suggest (they can't order it) early Jencks disclosure, it's often just days or perhaps even the weekend before trial- greatly hampering counsel's ability to formulate a meaningful cross-examination in the client's defense. It is inherently unfair for the defense to not have the capability of speaking to key witnesses, who, for

whatever reason, refuse to talk to the defense or in some instances do not want to offend the government. Indeed, in many instances, witnesses believe they cannot or should not speak with defense counsel – and prosecutors are often hesitant to set the record straight.

Brady and its progeny certainly offer the accused crucial protection. But lessons learned in the thousands of cases I've handled have shown that Brady violations are common. Sometimes this results because prosecutors apply a far too narrow definition of what constitutes exculpatory evidence. To some prosecutors, evidence is only truly exculpatory when it completely exonerates the defendant and when the prosecutor finds such information credible. Neither of these criteria exist in the applicable case law, but because a prosecutor's decisions about whether to disclose evidence typically occur without judicial oversight, there is no check on the prosecutor's subjective assessment of the information's value.

In other instances, well-intentioned prosecutors miss the significance of certain evidence because they fail to appreciate how it fits in the defense theory. Again, the lack of any meaningful check on the prosecutor's decision to disclose or withhold usually leaves the defendant unaware that the decision has even been made, and therefore completely unable to raise a challenge.

The challenges defendants face are further compounded by inconsistent case law which conflates the timing deadlines for impeachment and exculpatory evidence, ignoring completely the fact that the latter requires far more time to analyze, investigate and integrate into the defense theory.[1] On this issue, I note that numerous federal circuits hold that if certain exculpatory information falls within the category of Jencks and Brady, the government does not have to disclose the Brady information until it discloses it via Jencks. The earliest of these decisions arose in the context of the production of impeachment – rather than "core" Brady material – and thus made some sense because production of the information before cross – even immediately before cross – still allowed the defendant to make meaningful use of the information. But that is not true when the information is "core" Brady, e.g., information which tends to show that the defendant lacked the requisite mental state or that another person committed the offense. Unfortunately, subsequent rulings have often failed to appreciate this distinction, further compromising defendants' rights.

With respect to government interview summaries such as FD 302s, these are not actual statements of witnesses and thus have limited impeachment value in trials when the witness testifies. And there are instances where the agent's rough notes are not fully captured in the 302 summaries, exculpatory information is left out of the summaries, or the summaries weren't truly reflective of the rough notes detailing the interviews of the witnesses. Then there's the issue of witnesses that have been interviewed, but the government decides not to call these witnesses at trial, and thus Jencks would not require disclosure. Most problematic is that it is difficult in most cases for the defense to persuade the Government to even turn over the rough notes, which are typically far more accurate than an Agent's summary.

All of this could be alleviated with depositions guided by judicial oversight. Even a limited number of shorter depositions would significantly alter the landscape. In addition to leveling the playing

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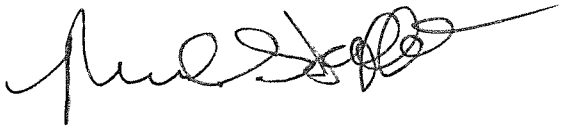
[1] I recently authored an article on this issue for The Champion, the official magazine of the National Association of Criminal Defense Lawyers. *See* W. Athanas and R. Jaffe (Sept./Oct. 2025), *Brady Wrapped in Jencks Packaging*, The Champion (https://www.nacdl.org/Article/SeptOct2025-BradyWrappedinJencksPackaging).

field, the use of depositions would no doubt promote informed settlement discussions and resolutions, focused trials by identifying evidentiary issues, reduce collateral proceedings relating to undisclosed information and otherwise support and enhance the ends of justice.

Finally, through judicial oversight and protective orders, courts would remain empowered to protect legitimate governmental concerns about unnecessary expenditure of resources, delay and unsupervised forays into irrelevant topics while at the same time increasing the likelihood of fair trials and accurate outcomes.

For all these reasons, and more, I respectfully request the committee carefully consider, and hopefully amend, Rule 15.

Sincerely,



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