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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

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Dear Members of the Committee:

We are pleased to see that the Committee is open to studying whether Federal Rule of Criminal Procedure 15 should be amended to permit defendants to take a limited number of pretrial discovery depositions. We write in strong support of this important proposal.

For context, one of us is a law professor at the University of North Carolina,[1] where she studies the structure of the criminal justice system. One major area of her research has been plea bargaining in criminal cases. The other of us is a law professor at the University of Alabama, where one major area of his research considers how criminal procedure could and sometimes should more closely track civil procedure.

As we explain in more detail below, incorporating a right to pretrial depositions would greatly improve plea bargaining in the federal criminal system. That is why we support the proposed reform.

[1] We submit this letter in our individual capacities. Neither of us speaks on behalf of our institution.

I. The Need for Information in a System of Plea Bargains

Federal criminal adjudication today is defined almost entirely by plea bargaining. The Supreme Court has recognized that plea negotiations are central to the functioning of the criminal justice system. *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (noting "the reality that criminal justice today is for the most part a system of pleas, not a system of trials"). Data from the federal courts bears this out. For example, in fiscal year 2018, fewer than 2% of federal criminal defendants went to trial, 8% had their charges dismissed, and the remaining 90% of defendants pleaded guilty. John Gramlich, *Only 2% Of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RESEARCH CENTER (June 11, 2019). While some of those defendants make an independent decision to plead guilty, the federal government estimates that 75% of those who plead guilty do so only after some negotiation with the prosecutor. AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, PLEA BARGAIN TASK FORCE REPORT 12 (2023).

At the same time that the Supreme Court has recognized plea bargaining as "an essential" and "highly desirable part" "of the [criminal] process" "for many reasons," it has also insisted that the benefits of plea bargaining depend upon "fairness in securing agreement between an accused and a prosecutor." *Santobello v. New York*, 404 U.S. 257, 261 (1971). This constitutional vision of plea bargaining assumes a negotiation grounded in knowledge, evaluation, and fair dealing. According to this vision, plea negotiations are a process in which defendants can meaningfully assess the strength of the government's case and decide whether the bargain reflects what would likely occur at trial. Yet in practice, defendants must make irrevocable decisions without meaningful access to the government's evidence, without the ability to test witness reliability, and without even basic opportunities to clarify factual disputes. Although due process requires that the government disclose material exculpatory evidence to defendants, the government need not do so as part of plea bargaining and can instead wait until trial, *United States v. Ruiz*, 536 U.S. 622, 633 (2002)—a trial that rarely comes.

Scholars have long explained that plea bargaining functions as an exercise in prediction: Parties attempt to approximate the expected trial outcome. *See, e.g.*, Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004). But that same literature makes clear that predictions are essentially impossible if defendants lack access to the evidence. *See* Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 TEX. L. REV. 539 (2023).

Plea bargaining can serve as a legitimate substitute for trial only if the process approximates the evidentiary accuracy that trials were designed to provide. At present, modern plea bargaining suffers from profound informational deficits—deficits that distort outcomes. Rule 15 depositions would directly address these defects. They would allow defendants to evaluate the government's

evidence, test witness credibility, and thus better predict the likelihood of a conviction or acquittal at trial. In short, depositions would move plea bargaining closer to the process *Santobello* contemplates—a fair negotiation grounded in the realities of the case.

II. Lessons from Civil Settlement Procedures

Both the civil and criminal systems resolve most cases through negotiated settlements. But because of decisions made during the initial adoption of the Federal Rules of Criminal Procedure, the two systems facilitate settlement through fundamentally different means. Civil cases encourage settlement through procedure, while criminal cases encourage settlement through leverage. *See* Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607 (2017).

The Federal Rules of Civil Procedure encourage settlement through procedures that ensure access to information, while at the same time ensuring that settlements are fair by attempting to remove meritless cases—cases that plaintiffs would lose at trial—from the system. At the beginning of a case, the civil rules ensure defendants' access to information through pleading standards that require factual specificity and plausibility. Merely reciting the elements of a claim and the relevant dates does not suffice. After the pleadings, motions to dismiss ensure that specific facts are provided in complaints and seek to eliminate cases based on erroneous legal theories.

As a case progresses, the parties in a civil case each have affirmative tools to glean all relevant evidence through liberal discovery rules. The civil rules ensure this access to information primarily through depositions, interrogatories, and document production, giving both sides access to the other's evidence. And once discovery has ended, summary judgment procedures ensure that a defendant need not incur the costs or risk of trial in cases where the plaintiff's case is not sufficiently supported by the evidence.

Taken together, the Federal Rules of Civil Procedure strive to create informed bargaining environments and ensure that any settlements before trial reflect the underlying merits of a case. Indeed, when faced with the prospect that class certification created too much pressure on civil defendants to settle meritless cases, the advisory committee amended the civil rules and "created a release valve to obtain further review of the class certification decision in some cases." Gold, Hessick & Hessick, *supra* at 1644 n.207 (citing FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment).

In contrast to the civil rules, the Federal Rules of Criminal Procedure do not ensure that negotiations between the parties are conducted with the benefit of relevant information, nor do they ensure that plea bargains reflect the underlying merits of a case. Criminal indictments need not provide detailed factual information about defendants' alleged crimes. *See* Gold, Hessick & Hessick, *supra*, at 1626-27. Instead, an indictment will be deemed sufficient if it sets forth the elements of the offense "in the words of the statute itself," *Hamling v. United States*, 418 U.S. 87,

117 (1974), and then states the approximate time and place that the defendant allegedly violated that statute.[2] Once a case gets past the pleading stage, criminal defendants have very few affirmative tools to gain access to the evidence against them. Quite unlike in civil procedure, defendants are largely limited to the information the other side chooses to produce. *See* Russell M. Gold, *Power Over Procedure*, 57 WAKE FOREST L. REV. 51, 76–80 (2022); Darryl K. Brown, *Disclosure, Security, Technology: Challenges in Pre-Trial Access to Evidence*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 101, 104 (Ronald F. Wright et al., eds., 2021). They cannot propound interrogatories or take discovery depositions.

The criminal rules do not provide for summary judgment motions. And while the rules do allow motions to dismiss an indictment, "the courts have gutted this rule and district courts deny these motions as a matter of course." James M. Burnham, *Why Don't Courts Dismiss Indictments?*, 18 GREEN BAG 2D 347, 349 (2015). As a result, a criminal defendant facing a case with legal or factual defects must roll the dice and proceed to trial to avoid conviction—a large gamble considering the sentencing differences between conviction after trial and conviction after a guilty plea.

What explains the differences between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure? Less than one might think. When the original Federal Rules of Criminal Procedure were drafted in the 1940s, the advisory committee initially explored far more robust discovery and pretrial mechanisms—drawing heavily on the new Federal Rules of Civil Procedure. *See* Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697 (2017). Despite significant support for adopting the civil-style rules, resistance—particularly from within the Department of Justice—led to the adoption of a criminal procedure code without such provisions.

That is why the current federal system does not include civil-style mechanisms for information exchange and judicial merits screening—because the institution that would have borne the costs of those mechanisms successfully lobbied against them. The result is that federal criminal defendants—many of whom are facing incarceration—are paradoxically in a worse position during pretrial negotiation than federal civil defendants, who face only monetary harms.

Allowing a limited number of pretrial depositions would help reshape plea negotiations, bringing it closer to the informed and fair process that the U.S. Supreme Court envisioned when it first affirmed the constitutionality of plea bargaining in *Santobello*. It would address part of the informational deficits that criminal defendants face. In addition to making plea negotiations fairer,

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[2] The Supreme Court has stated that the language of the statute "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Hamling*, 418 U.S. at 117-18 (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)). But the prevailing view appears to be that "an indictment that tracks the statutory language defining an offense is usually sufficient." *Indictments*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 245, 261 (2005).

it would also lead to more accurate outcomes, as the parties would be bargaining against the backdrop of more complete information. Finally, allowing depositions would be consistent with not only the current Federal Rules of Civil Procedure but also the intentions of the original drafters of the Federal Rules of Criminal Procedure.

For these reasons, we respectfully urge the Committee to continue its study and move toward adopting this important amendment.

Sincerely,

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