STETSON LAW

March 12, 2026

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, DC, 20544
Email - RulesCommittee_Secretary@ao.uscourts.gov

Re: Comment in Support of Proposed Amendment to Federal Rule of Criminal Procedure 15 – Depositions in Criminal Cases

Dear Members of the Advisory Committee:

I write in support of the proposed amendment to Federal Rule of Criminal Procedure 15, to allow pre-trial depositions in criminal cases. I will not repeat the proposal as provided by Attorneys Michael Kelly and Sergio Acosta, a proposal I support, but will offer here some additional thoughts of why this reform is important to achieve the words of Justice Brennan, "*Justice is indeed well served when prosecution and defense are fairly evenly matched*."[1]

My focus will be on two points: 1) Pre-trial depositions add to efficiency in the criminal justice process; and 2) Pre-trial depositions add to fairness for those accused of crimes. As to this latter point, pre-trial depositions would address several deficiencies in the current criminal justice process —the delayed disclosure of *Jencks* material until after the witness has testified, and the continual claims of *Brady* violations, irrespective of whether those claims are valid.

I come with a unique background in expressing my opinion. Forty-nine years ago, I began my legal career as a deputy prosecutor in Lake County, Indiana, serving in a jurisdiction that included the high-crime communities of Gary and Hammond. In that role, I tried felony cases such as homicides, burglaries, robberies, and more. After 2.5 years as a prosecutor, I practiced law in a firm with a high percentage of the work being criminal defense. My career includes past positions on the Board of Directors of the National Association of Criminal Defense Lawyers (NACDL) and as a board member of the Innocence Project of Florida. Following law practice, I have spent the last approximately thirty-nine years as an academic, teaching courses including criminal law, criminal procedure adjudication, and white collar crime, and authoring articles and books in these areas.

[1] William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. L. Q. 279, 232 (1965).

My dual experience as both a deputy prosecutor and criminal defense attorney in Indiana, a state that allows defense counsel to take pre-trial depositions,[2] combined with academic scholarship addressing criminal discovery[3] are what forms my belief that limited pre-trial depositions will provide a more efficient and fairer criminal justice system.

Efficiency in the Criminal Justice System

One of the most compelling arguments for expanding Rule 15 is simple efficiency. It might seem counterintuitive that adding depositions to a prosecutor's time might add efficiency, but providing complete discovery allows both the prosecution and defense to better evaluate the case, reach pleas sooner, and avoid unnecessary trials.

Allowing pre-trial depositions allows counsel from both the prosecution and defense to evaluate the witnesses, including their demeanor, memory, and most importantly their truthfulness in relaying events of the alleged criminal activity. From the perspective of a prosecutor, you may be able to see the direction and theory of the defense, which allows for better assessment of whether a plea, dismissal, or reduced charges may be more appropriate. It also allows one to see gaps in the evidence. No prosecutor wishes to convict an innocent person, and if there are deficiencies in the case, illuminating them early on is beneficial. Depositions assist in this regard.

Fairness to Those Accused of Crimes

Prosecutors rely on the evidence presented to them by law enforcement to determine whether to charge, what to charge, who to charge, where to charge, and who will receive immunity or a plea offer. Whether intentionally or through oversight, federal agents do not always provide all important details to Assistant United States Attorneys. Interviews by FBI agents seem to have instances where the agent "puts the pen down" (now likely computers) and fails to record everything the witness is saying. Further, FBI 302s, which are summaries of these interviews, are limited to the questions asked, as opposed to questions that might be important for a full assessment of the case.

Reliance on law enforcement carries a risk that depositions would help to address. Depositions might provide favorable statements, qualifications, recantations, and most importantly context. They would allow the attorneys to exceed the agents' summary of the evidence, which may be incomplete. Depositions would also allow the parties to hear, directly, what witnesses actually know — including what might never have made it into the report.

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[2] *See* Indiana Code § 35-37-4-3 ("The state and the defendant may take and use depositions of witnesses in accordance with the Indiana Rules of Trial Procedure.")

[3] Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. L. REV. 651 (1999); PETER J. HENNING, CYNTHIA E. JONES, ELLEN S. PODGOR, KAREN MCDONALD HENNING, & SANJAY K. CHHABLANI, MASTERING CRIMINAL PROCEDURE, Vol. 2-The Adjudicatory Stage (3rd Ed. 2020), Ch. 8, Discovery 141-155.

Grand jury proceedings are *ex parte*, and the government is not required to present exculpatory material[4] to the grand jurors. Keep in mind that not presenting a potential defendant's favorable evidence to the grand jury may not have been a deliberate choice of the prosecutor. It may have been an omission because the prosecutor was unaware of this evidence. Thus, increased information (pre-trial depositions) can assist both the government and the accused post-indictment of any possible omissions that might exist in their case. Depositions can also play a role in making certain that favorable evidence is provided to counsel.

One needs only to do a simplistic search to see the high number of appeals alleging *Brady* violations.[5] The government's constitutional obligation under *Brady v. Maryland*[6] to disclose material exculpatory evidence is often considered, as a practical matter, on appeal. At that stage, courts can assess materiality by asking whether there is a reasonable probability that disclosure would have produced a different result. Pre-trial this is more difficult, as prosecutors cannot truly ascertain what constitutes *Brady* material without full information as to the defense theory of the case. The result is that prosecutors may not be providing information because they are unaware of how that information would be favorable to the accused. Providing the opportunity to question a witness pre-trial may allow for more accurate assessments of what evidence is material.

The *Jencks Act,* and the accompanying 18 U.S.C. § 3500, compound this lack of fairness to the accused as prior statements of government witnesses need not be produced until after the witness testifies on direct examination. Although most prosecutors provide *Jencks* material in advance of trial, my study published in 1999 found that there were some jurisdictions that did not, and others that provide it the weekend prior to the trial.[7] The practical effect is to deprive defense counsel of the ability to prepare meaningful cross-examination in advance. Depositions would effectively render *Jencks* concerns moot for any deposed witness, because the prior statement would have the benefit of the deposition itself, which would then be available to both parties in advance of trial.

Keep in mind that the government may be investigating an individual for several years prior to presenting it to a grand jury. The defense, typically informed of the charges only at the time of indictment, is left to reconstruct events from memories that have faded and witnesses whose recollections have been shaped by years of government contact. Depositions would give the defense a structured mechanism for the uneven investigation time period of the parties, especially in high document cases like those involving white collar crimes.

A formal deposition also provides a protected forum in which defense counsel can discharge their obligations to their clients without fear of prosecution under an obstruction of justice type statute. A private investigation of the alleged crime may place defense counsel and their investigators with concerns of witness tampering.

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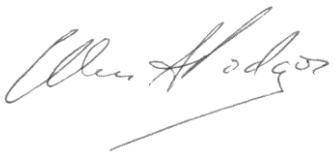
[4] United States v. Williams, 504 U.S. 36 (1992) (noting that courts do not have within their inherent supervisory authority to require prosecutors to present substantial exculpatory material to a grand jury).
[5] *See* Brandon L. Garrett, Adam M. Gershowitz, & Jennifer Teitcher, *The Brady Database*, 114 J. CRIM. L. & CRIMINOLOGY 185 (2024).
[6] 373 U.S. 83 (1963).
[7] *See* Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. L. REV. 651 (1999).

Witness or victim harassment, intimidation, and safety are of course important concerns. Judicial oversight in precluding a specific deposition for these reasons can easily be encompassed within a rule that does not allow a pre-trial deposition when fears of this nature arise.

The proposed amendment to Rule 15 is an important reform to level the playing field in the criminal justice process and reduce wrongful convictions. It has worked in high crime areas in Indiana and can easily work and offer benefits for the federal system.

I respectfully urge the Committee to approve the proposed amendment.

Very truly yours,



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Gary R. Trombley Family White Collar Crime Research Professor
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[8] This letter is written in my personal capacity and not as part of my institutional role.