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Carolyn A. Duby
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

RulesCommittee_Secretary@ao.uscourts.gov

RE: *Proposed Amendment to Fed. R. Crim. P. 15*

Dear Ms. Duby,

I am writing in support of the proposed amendment to Rule 15 of the Federal Rules of Criminal Procedure to allow discovery depositions under limited circumstances in criminal cases. Simply, this amendment would further the fundamental fairness of criminal proceedings while also promoting judicial efficiency.

For over thirty years, I have handled civil and criminal trials in state and federal courts, and I am always stuck by the difference in discovery between a serious federal criminal case and simple civil personal injury matter. In civil cases, the parties know and understand the evidence that will be presented at trial. In criminal cases, defendants are often surprised by the evidence at trial. As a matter of fundamental fairness, we should care deeply about whether a criminal defendant receives a full and fair adjudication of their case, but there would also be several pragmatic benefits to allowing discovery depositions in criminal cases.

Discovery Depositions Benefit Both the Prosecution and the Defense

One of the greatest challenges for defense counsel is educating criminal defendants on the scope and strength of the government's case. However, this challenge places defense counsel in a difficult position. Criminal defendants need to feel that their attorney is fighting for them. When defense counsel merely tells a defendant the evidence is overwhelming, many defendants feel their attorney is not working for them.

Allowing discovery depositions would not only provide criminal defendants with more information upon which to make a trial decision but would also provide an opportunity for a criminal defendant to challenge and understand the government's evidence. When a criminal

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defendant fully understands the evidence likely to be presented, they feel more comfortable making the right decision as to whether to proceed to trial.

Discovery Depositions Promote Judicial Efficiency

The lack of discovery depositions frequently results in situations where a criminal defense attorney must file a pre-trial motion on disputed evidentiary issues if only to obtain a record of the witness's anticipated testimony. For instance in *Daubert* challenges on expert testimony, the result is a lengthy testimonial hearing as a substitute for a discovery deposition, which is a waste of valuable judicial resources.

The simple and practical solution is to allow discovery depositions so that each side may examine the bases of testimony or opinions in a cost-effective manner. If true admissibility disputes arise, the courts can examine the deposition transcripts. Presently, rather than merely taking a deposition, courts must schedule a costly "deposition" in the form of a testimonial, pretrial hearing.

Discovery Depositions are Cost-Effective

Considering approximately ninety percent of criminal defendants are represented by federal defenders or court-appointed counsel, a drawn-out criminal process is becoming increasingly expensive. Discovery depositions would help resolve criminal cases more economically.

Allowing discovery depositions will result in greater efficiency because sharing more information gives criminal defendants a better understanding of the case against them earlier in the process. Instead of guessing as to a witness's testimony, a criminal defendant would have a more definitive and accurate understanding of it. It wastes already scarce judicial resources for a criminal defendant to suddenly discover at a jury trial the strength of the government's case.

In contrast to federal criminal cases, the use of discovery depositions in civil cases allows the fair examination of each side's case and almost always results in a negotiated resolution. Simply put, more information leads to better results and more negotiated resolutions.

Thank you for considering my letter. I hope that the Committee will appreciate the important, practical effects of permitting discovery depositions under limited circumstances in federal criminal cases.

Sincerely,



Tom Marjerison