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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
Via Email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Consideration of a Rule Change to Permit
Depositions in Federal Criminal Cases

Dear Ms. Dubay:

Please accept this letter in support of the Committee's consideration of a rule change that would permit pretrial depositions in federal criminal cases. This year I will, God willing, have the honor and privilege of practicing law for 43 years. As such, my practice and my law firm's main area of concentration has been litigation, criminal and civil, state and federal. I have had the benefit of practicing in Florida where our state discovery rule, i.e. Rule 3.220 Fla. R. Crim. Pro., allows for the taking of pretrial discovery depositions in all felony cases and grants the Court discretion in misdemeanor cases to allow for the taking of depositions. The process is not only fair to both sides, but also quite simple and efficient, and now with the advances in technology many depositions are taken via Zoom or through other virtual technologies.

At the federal level in civil cases, discovery depositions are routine and the rules provide for sanctions and protective orders for any abuses by witnesses and/or attorneys. I have always wondered under these circumstances where depositions are permitted in civil proceedings but not in criminal proceedings, whether the bill of rights set out in our Constitution to protect citizens from governmental abuse take a back seat to the dollar bill? In my opinion, there is no logic to allowing depositions in federal civil cases but not criminal cases.

Currently, under the federal rules of criminal procedure, the defense sometimes doesn't even get copies of any investigative reports prior to trial, even though our US Attorney's Office has a policy of requiring reports to be turned over in discovery. That's because some prosecutors take the position that the *Jenks Act* (18 U.S.C. 3500) trumps any office policy. As the Committee may

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be aware, the *Jenks Act*, created in 1957, requires the government to provide criminal defendants with prior written or recorded statements of government witnesses, but only after those witnesses have testified on direct examination in federal trials. Any criminal defense lawyer knows it is virtually impossible to make use of reports of witness statements provided in the middle of a trial and provide effective counsel to a defendant. Moreover, a Federal Judge will not require the turning over of reports pre-trial when the government takes the position that “office policy cannot be enforced by a defendant” especially when the *Jenks Act* doesn’t require disclosure pre-trial. We have litigated that issue many times over and lost every time.

In Florida, under our Discovery Rule, reports and anything in the State’s possession that is material to the case must be turned over. *See, Rule 3.220 Fla. R. Crim. Pro.* There are provisions and procedures for confidential matters, safety of witnesses and other issues. Each side must provide a witness list with addresses so that the witness can be subpoenaed for deposition, or the State can submit the witnesses’ names and agree to produce the witnesses and not provide their address. The process is fair and it works and has worked for decades. Each side walks into a trial on the same playing field with no surprises and no delays because reports are provided mid-trial.

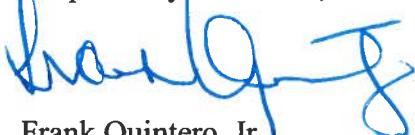
Allowing discovery depositions in federal criminal cases would be one of the best ways to level the current playing field. Furthermore, in Florida, they lead to quicker and fairer resolutions and avoid trials in most cases. It would, in my opinion, do the same at the federal level.

Opponents of this potential rule change have already begun to argue to the Committee that this change would endanger and further traumatize victims of crimes, most of whom lack legal representation to fight the invasive demands. This is a proverbial “red herring”. As I previously stated, in Florida the discovery rules have permitted pre-trial depositions for decades and there are and have been procedures in place to prevent the things that opponents are arguing to the Committee that should cause the rule to remain the way it is.

For the above reasons, I respectfully recommend that the Committee adopts a rule that permits pretrial discovery depositions in federal criminal cases, subject to a set of safeguards, procedures and judicial oversight.

Thank you for taking the time to consider my comments on this very important issue.

Respectfully submitted,



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