**AMERICAN BAR ASSOCIATION**

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06 - CR- 016

February 12, 2007

The Honorable Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Dear Mr. McCabe:

The American Bar Association through its Section of Criminal Justice welcomes the opportunity to present its views to the Committee on Rules and Procedure of the Judicial Conference of the United States. The views expressed herein were approved by the ABA House of Delegates at the February 2007 Midyear meeting of the Association in Miami.

An amendment has been proposed to the Federal Rules of Criminal Procedure that the American Bar Association believes will have a dramatic and detrimental impact upon criminal justice. The following is a discussion of the proposed changes to Rule 29 and the reasons why we oppose their enactment.[1]

## I

## PROPOSED LIMITATIONS UPON THE COURT'S AUTHORITY TO GRANT A MID-TRIAL JUDGMENT OF ACQUITTAL CONSTITUTES A SUBSTANTIVE CHANGE IN THE LAW WHICH IS BOTH UNWARRANTED AND

[1] On February 1, 2007, the Association submitted comments on proposed Criminal Procedure Rule 17. It may also be filing separate comments regarding proposed Federal Rule of Evidence 502 and 502(b).

**UNCONSTITUTIONAL**

Federal Rule Criminal Procedure 29(a) currently states as follows:

> **(a) Before Submission to the Jury.** After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

Under the proposed change, a court will be precluded from granting a Rule 29 judgment of acquittal during trial unless the defendant waives the Fifth Amendment right not to be twice placed in jeopardy rights. Proposed section (b)(2) states:

> **Granting Motion; Waiver** The court may not grant the motion before the jury returns a verdict (or before the verdict in any retrial in the case of discharge) unless:
>
> (A) the court informs the defendant personally in open court and determines that the defendant understands that:
>
> (i) the court can grant the motion before the verdict only if the defendant agrees that the government can appeal that ruling; and
>
> (ii) if that ruling is reversed, the defendant could be retried; and
>
> (B) the defendant in open court personally waives the right to prevent the government from appealing a judgment of acquittal (and retrying the defendant on the offense) for any offense for which the court granted a judgment of acquittal before the verdict.

The constitutional protection against being twice placed in jeopardy embodied in the Fifth Amendment is a codification of the common law. *United States v. Sanges*, 144 U.S. 310 (1892), at 315, quoting, *State v. Jones*, 7 Ga. 422, 424, 425 (1849):

> 'These principles are founded upon that great fundamental rule of the common law, *nemo debet bis vexari pro una et eadem causa;* which rule, for greater caution and in stricter vigilance over the rights of the citizen against the state, has

> been in substance embodied in the constitution of the United States, thus: 'Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb.'

For purposes of the Fifth Amendment, an acquittal by a judge is no different than an acquittal by a jury. *United States v. Sisson*, 399 U.S. 267, 290 (1970). The only exception to this rule is made where a judge enters a judgment of acquittal following a verdict of guilty by a jury. In that case, overturning the judge's ruling does not place a defendant twice in jeopardy, since the jury's verdict is simply reinstated. No further factual finding is required. *United States v. Wilson*, 420 U.S. 332 (1975). Where, however, a court grants a judgment of acquittal after a hung jury, double jeopardy does preclude a further trial, since a retrial would require further factual findings beyond those already found by the court. *Richardson, v. United States*, 468 U.S. 317 (1984); *United States v. Jenkins*, 420 U.S. 358, 370 (1975).

The words used by the court to discharge the defendant from further prosecution are not dispositive of a defendant's rights under the Fifth Amendment. The issue is whether the court has made a factual determination. *United States v. Martin Linen Supply Company*, 430 U.S. 564, 571 (1977). While a pretrial dismissal entered as a result of a defect in the indictment or suppression of evidence does not implicate the Double Jeopardy Clause, a finding that the evidence does not support the charge, whether made in the form of a directed verdict or a judgment of acquittal, does. *Hudson v. Louisiana*, 450 U.S. 40, 44,45 n. 5 (1981). Once it is determined that such a finding was made, the acquittal prevents the government from seeking "another opportunity to supply evidence which it failed to muster" before jeopardy was terminated. *Burks v. United States*, 437 U.S. 1, 11 (1978).

The critical role this authority plays in our system of justice was addressed by the Supreme Court in *Martin Linen Supply Company*, *supra*. In a passage that recognizes the great potential for oppression posed by any rule undermining the Double Jeopardy Clause, the Supreme Court stated:

> At the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression. The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused, 'thereby subjecting him to embarrassment, expense and ordeal and compelling

> him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.'

Quoting *Green v. United States*, 355 U.S. 184, 187-188 (1957).

Thus, a rule that permits the government to subject a defendant to a further trial despite a finding by a court that the evidence was insufficient is so contrary to the values underpinning the Fifth Amendment as to be unconstitutional. It also poses significant prejudice to the defendant's right to a fair trial.

Although the Fifth Amendment itself only speaks in terms of the right not to be "twice put in jeopardy" "for the same offense," the Supreme Court has held that this language guarantees that the individual will not be subject to a second trial after an acquittal, a second trial after conviction, or to multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). A second prosecution is precluded even when a trial court grants an acquittal on erroneous grounds. *Sanabria v. United States*, 437 U.S. 54 (1978). Moreover, in *Fong Foo v. United States*, 169 U.S. 141 (1962), the Supreme Court held that the authority of a court to grant a directed verdict in favor of a defendant was so integral to the Fifth Amendment, that the appellate courts were without authority to consider a petition for writ of mandamus contending that the trial court was without authority to grant such a motion. The suggestion that the courts' authority to grant judgments of acquittal is not derived from the Constitution cannot be reconciled with the decision of the Supreme Court in *Sanabria* and *Fong Foo*. As the Supreme Court observed in *Martin Linen Supply Company*,

> Since Rule 29 merely replaces the directed-verdict mechanism employed in Fong Foo, and accords the federal trial judge greater flexibility in timing his judgment of acquittal, no persuasive basis exists for construing the Rule as weakening the trial court's binding authority for purposes of double jeopardy.

*Id.* at 573.

As the Committee Notes to rule Rule 29 make crystal clear, the Rule was not intended to create any powers not already vested in the courts by the common law and the Fifth Amendment. Rule 29 simply replaced the legal fiction of directed verdicts with a more accurate description of the authority of the court to determine the sufficiency of the evidence independently of the jury. See Notes of Advisory Committee, 18 U.S.C. App. P. 4504 cited in *Martin Linen Supply Company*, supra

at 573. Only in the clearest cases of insufficiency, are such motions granted. This important authority to efficiently administer cases is rarely exercised by the courts and the authors of this amendment offer unconvincing evidence that there has been any abuse of the authority. Fundamentally, this amendment is unwarranted given the small number of judgments of acquittal granted each year and the important tool that the power gives to courts in complex and lengthy trials. The amendment is unwise given the circumstances which lead trial court to grant such motions in the few instances that they do and is likely to lead unintended consequences.[2]

Indeed such decisions often require an evaluation of the demeanor of the government's witnesses or the court to resolve conflicts in the evidence. But appellate courts are not competent to engage in such tasks. This is why they are loathe to reevaluate sufficiency of evidence claims, believing the trier of fact, be it a judge or a jury, is in the best position to make such determinations. *United States v. Sturm*, 870 F.2d 769, 777 (1st Cir. 1989); *United States v. Casese*, 428 F.3d 92, 104 (2nd Cir. 2005); *United States v. Flores*, 454 F.3d 149, 154 (3rd Cir. 2006); *United States v. Moye*, 454 F.3d 390, 396 (4th Cir. 2006); *United States v. Ragan*, 24 F.3d 657, 658 (5th Cir. 1994); *United States v. Martinez*, 430 F.3d 317, 330 (6th Cir.2005); *United States v. Hale*, 448 F.3d 971, 985 (7th Cir. 2006); *United States v. Triplett*, 104 F.3d 1074, 1080 (8th Cir. 1997); *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1358 (9th Cir.1993); *United States v. Copus*, 110 F.3d 1529, 1534 (10th Cir. 1997). Consequently reversals on appeal due to insufficiency of evidence are even rarer than mid-trial judgments of acquittal.

The proposed change also places defendants in a classic "Catch-22" situation. In order to preserve the right to challenge the sufficiency of evidence, defendants are required to move for a judgment of acquittal at the close of the government's case and renew the motion at the close of all the evidence. *United States v. Burton*, 324 F.3d 768, 770 (5th Cir. 2003); *United States v. Collins,* 340 F.3d 672, 677-78 (8th Cir. 2003); *United States v. Tank*, 200 F.3d 627, 632 (9th Cir. 2000); *United States v. Jones*, 32 F.3d 1512 (11th Cir. 1994). Under the new rule, the very act of preserving a challenge to the sufficiency of the government's evidence will force defendants to abandon their right to raise a double-jeopardy claim. Conversely, their refusal to waive double jeopardy will deny them the right to contest the sufficiency of the evidence on appeal. Conditioning a defendant's

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[2] An example being the unintended waiver of a prior claim to double jeopardy.

right to a judgment of acquittal on his waiver of his right not to be twice placed in jeopardy is thus a dubious waiver[3] which violates the principle that one cannot be forced to abandon one constitutional right to vindicate another. *Simmons v. U.S.*, 390 U.S. 377, 394 (1968). It is one that is compelled rather than intentional and voluntary in the true sense.

Prosecutors have great discretion in conducting investigations and in bringing charges. That discretion is virtually unfettered. Indeed, the courts are generally powerless to even police misconduct before the grand jury. The only opportunity a court has to prevent a miscarriage of justice is when the court is called upon to determine whether the government presented a prima facie case of guilt, the lowest standard of proof in our system of justice. Thus, putting aside the constitutionality of the proposed amendment, it presents a change of such substantive nature that it requires affirmative enactment by Congress. 28 U.S.C. §2072(b)[4].

It should be noted that the Rules Committee was evenly divided over the wisdom of the proposed amendment, voting 6-5 for its approval and submission for public comment. Those opposing the rule objected that it was inconsistent with the principles underlying the Double Jeopardy Clause, unduly restrictive of the court's

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[3]"'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. And as Mr. Justice Holmes observed, with regard to this same matter...: 'Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.'" *Green v. U.S.*, 355 U.S. 184 (1957)[internal citations omitted].

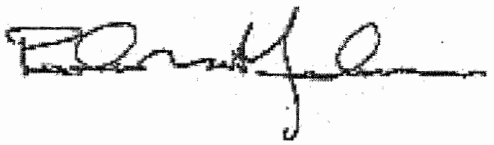
[4]"§ 2072. Rules of procedure and evidence; power to prescribe.

> **(a)** The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.**(b)** Such rules shall not abridge, enlarge or modify any substantive right."

authority, and not sufficiently supported by evidence of erroneous pre-verdict acquittals. See Report of Committee page 4, (July 20, 2006).

Finally, consideration should be given to the practical effects of the proposed amendment. Motions for judgment of acquittal are made in virtually every criminal case tried in federal court. The number of instances where such motions are granted is quite small; the number of cases where the government can arguably show the trial judge erred are even smaller. If, however, the amendment to Rule 29 is enacted, the courts will be flooded with appeals seeking to declare the rule unconstitutional. Once again an already overburdened judiciary will become embroiled in an unnecessary controversy, one that will just bleed off resources from more important concerns.

Sincerely,



Robert M. A. Johnson
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