06-CR-007
Testify

STEVEN M. UMIN
JOHN W. VARDAMAN
PAUL MARTIN WOLFF
J. ALAN GALBRAITH
JOHN G. KESTER
WILLIAM E. McDANIELS
BRENDAN V. SULLIVAN, JR.
RICHARD M. COOPER
GERALD A. FEFFER
JERRY L. SHULMAN
ROBERT B. BARNETT
DAVID E. KENDALL
GREGORY B. CRAIG
JOHN J. BUCKLEY, JR.
TERRENCE O'DONNELL
DOUGLAS R. MARVIN
JOHN K. VILLA
BARRY S. SIMON
KEVIN T. BAINE
STEPHEN L. URBANCZYK
PHILIP J. WARD
F. WHITTEN PETERS
JAMES A. BRUTON, III
PETER J. KAHN

LON S. BABBY
MICHAEL S. SUNDERMEYER
JAMES T. FULLER, III
BRUCE R. GENDERSON
CAROLYN H. WILLIAMS
F. LANE HEARD III
STEVEN R. KUNEY
GERSON A. ZWEIFACH
PAUL MOGIN
HOWARD W. GUTMAN
STEVEN A. STEINBACH
MARK S. LEVINSTEIN
MARY G. CLARK
VICTORIA RADD ROLLINS
DANIEL F. KATZ
WILLIAM R. MURRAY, JR.
EVA PETKO ESBER
STEPHEN D. RABER
DAVID C. KIERNAN
LON E. MUSSLEWHITE
ROBIN E. JACOBSOHN
HEIDI K. HUBBARD
GLENN J. PFADENHAUER
GEORGE A. BORDEN

LAW OFFICES
WILLIAMS & CONNOLLY LLP
725 TWELFTH STREET, N.W.
WASHINGTON, D. C. 20005-5901
(202) 434-5000
FAX (202) 434-5029
WWW.WC.COM

EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

ROBERT J. SHAUGHNESSY
DAVID S. BLATT
ARI S. ZYMELMAN
DANE H. BUTSWINKAS
LAURIE S. FULTON
DENNIS M. BLACK
PHILIP A. SECHLER
LYNDA SCHULER
PAUL K. DUEFFERT
R. HACKNEY WIEGMANN
ROBERT M. CARY
KEVIN M. HODGES
DAVID M. ZINN
JOSEPH G. PETROSINELLI
STEVEN M. FARINA
KEVIN M. DOWNEY
THOMAS G. HENTOFF
PAUL B. GAFFNEY
EMMET T. FLOOD
ROBERT A. VAN KIRK
MARCIE R. ZIEGLER
KENNETH C. SMURZYNSKI
JOHN E. SCHMIDTLEIN
CRAIG D. SINGER

JAMES L. TANNER, JR.
J. ANDREW KEYES
GILBERT O. GREENMAN
M. ELAINE HORN
ENU MAINIGI
MICHAEL F. O'CONNOR
PAUL T. HOURIHAN
WILLIAM J. BACHMAN
MARGARET A. KEELEY
MEGAN E. HILLS
EDWARD J. BENNETT
TOBIN J. ROMERO
BETH A. LEVENE
THOMAS G. WARD
WILLIAM T. BURKE
LISA M. DUGGAN
JOHN E. JOINER
NICHOLAS J. BOYLE
ADAM L. PERLMAN
ANDREW W. RUDGE
DENEEN C. HOWELL

OF COUNSEL
VINCENT J. FULLER
RAYMOND W. BERGAN
JEREMIAH C. COLLINS
DAVID POVICH
ROBERT P. WATKINS
ROBERT M. KRASNE
JACQUELINE E. MAITLAND DAVIES

December 27, 2006

By E-mail and First Class Mail

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Criminal Procedure 29

Dear Mr. McCabe:

I am writing to request that a member of the law firm of Williams & Connolly LLP be provided an opportunity to testify at the January 26, 2007 hearing in Washington, DC regarding the proposed amendment to Federal Rule of Criminal Procedure 29. Our firm will select a speaker and provide a written submission in advance of the hearing.

Thank you for your attention to this matter.

Very truly yours,

Tobin J. Romero

LAW OFFICES
WILLIAMS & CONNOLLY LLP
725 TWELFTH STREET, N.W.
WASHINGTON, D. C. 20005-5901
(202) 434-5000
FAX (202) 434-5029

BRENDAN V. SULLIVAN, JR.
(202) 434-5800
bsullivan@wc.com

EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

January 22, 2007

By E-Mail and Hand Delivery

Advisory Committee on Federal Rules of Criminal Procedure
Attn: Mr. Peter G. McCabe, Secretary
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendment to Federal Rule of Criminal Procedure 29

Members of the Committee:

I write to express objections, on behalf of many attorneys at my law firm who engage in criminal defense work, to the proposed amendment to Rule 29 of the Federal Rules of Criminal Procedure. We share the views expressed in the submissions of Chief Judge James F. Holderman and Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers, and I shall try not to repeat the points that they have made so well already.

I am a partner at the law firm of Williams & Connolly LLP in Washington, D.C. I have nearly forty years of litigation experience in federal courts throughout the country. A major focus of my practice has been criminal defense. Many of the criminal cases that I have tried have been lengthy. For example, over the past three years, a client of mine was forced to endure three punishing federal trials, the first lasting nine months, the second lasting five months, and the third lasting a month. I know too well the "embarrassment, expense and ordeal" suffered by a defendant who is compelled "to live in a continuing state of anxiety and insecurity." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977)

(quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)). That is an evil that the Double Jeopardy Clause of the Fifth Amendment was designed to prevent. *See id.* The proposed amendment threatens this important constitutional objective.

The proposed amendment, if adopted, would prohibit a trial court from entering an acquittal at the close of the government's case or following a hung jury *even if the evidence were constitutionally defective,* unless the defendant agreed to waive a significant constitutional right by permitting the government to appeal. The proposed amendment would, thereby, mandate what could be lengthy and costly defense cases and retrials that compel innocent defendants to live in a continuing state of anxiety and insecurity, and that put a severe drain on the court system; on the citizens who serve as jurors; on defendants' families and counsel; and on the government. A defendant who is constitutionally *entitled to an acquittal* but who fails to receive one—because he or she happens to be tried before an irrational or lawless jury or because he or she refuses to waive another constitutional right—is worse off than a defendant tried before a jury that demands constitutionally sufficient evidence. Indeed, he or she is worse off than a *guilty* defendant who is acquitted by a jury due to mistakes of fact or law. *Cf. Richardson v. United States*, 468 U.S. 317, 327 (1984) (Brennan, J., concurring in part and dissenting in part).

I am particularly aware of the practical issues, often acute in multi-defendant and multi-count cases, that have led the Committee to hesitate to take the steps the Department of Justice urges. The Committee has noted the critical role of pre-verdict acquittals in enabling the trial judge to manage such situations efficiently. For example, in one case, which I tried in 1997, eight defendants proceeded to trial on more than 200 felony counts. The District Judge granted a Rule 29 acquittal on 189 money-laundering counts at the end of the government's case, thereby enabling the jury to focus on the approximately 20 serious felony charges remaining. All defendants were acquitted on all counts, but I am not confident that that would have been the result if the jurors had been presented with the overwhelming number of counts originally brought, with the danger of juror compromise. The proposed amendment as a practical matter would not only diminish the fairness to defendants in some major trials, but would also erode the authority of District Judges to manage their criminal dockets and focus criminal proceedings on the central issues.

With respect, the reasons presented by the Department of Justice in support of such a significant change to the criminal justice system are not persuasive. The Department argues that "it is anomalous and highly undesirable to insulate erroneous preverdict acquittals from any appeal." Memorandum of Honorable Susan C. Bucklew to Honorable David F. Levi, May 20, 2006, revised July 20, 2006 (hereafter "Comm. Mem."), at 2. But limitations on appeals by the

United States in criminal cases are far from anomalous. They are, in fact, the historical norm. The Supreme Court "has long taken the view that the United States has no right of appeal in a criminal case, absent explicit statutory authority." *United States v. Scott*, 437 U.S. 82, 84-85 (1978). No such authority existed during the first century of our country's existence. It was not until Congress enacted the Criminal Appeals Act, Act of Mar. 2, 1907, ch. 2564, 34 Stat. 1246, that the United States was permitted to seek a writ of error in the Supreme Court from any decision dismissing an indictment on the basis of "the invalidity, or construction of the statute upon which the indictment is founded." *See Id.*

Even today, the United States is not permitted to take an appeal in a federal criminal case "where the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731. As the Committee Memorandum notes, "[i]f the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial." Comm. Mem. at 2. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '(a) verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.'" *Martin Linen Supply Co.*, 430 U.S. at 571 (alterations and ellipses in *Martin Linen*) (quoting *Ball v. United States*, 163 U.S. 662, 671 (1896)). Indeed, it was a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 W. Blackstone, Commentaries 335-36. So the purportedly "anomalous" limitation under attack by the Department is one rooted firmly in history and in the United States Constitution.

The reasons for the constitutional prohibition of a retrial following an acquittal are powerful:

> 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. [S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single

> criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.

Martin Linen Supply Co., 430 U.S. at 569 (internal citations and quotations omitted); *see also United States v. DiFrancesco*, 449 U.S. 117, 129 (1980)(quotation omitted):

> An acquittal is accorded special weight. The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal for the public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation.

The trial judge's role in the criminal process is a protection as ancient as that of the jury. For more than two centuries, it has been the function of a United States District Judge in this country to determine the sufficiency of the evidence, and to grant acquittals when the evidence is insufficient, in earlier times by granting "directed verdicts" and more recently by entering "judgments of acquittal." *See Martin Linen Supply Co.*, 430 U.S. at 573; *see also Ex parte United States*, 101 F.2d 870, 876 (7th Cir.) ("From time immemorial, in the common law courts of England, it has been the function of the trial court to determine the legal sufficiency of the evidence [by directing verdicts and by recommending pardons post-verdict]."), *aff'd by equally divided court*, *United States v. Stone*, 308 U.S. 519 (1939). The proposed amendment is an unwarranted and unnecessary incursion on this historical judicial function and the trial court's role as a bulwark against irrational or unsupported jury verdicts. Heretofore, the United States has not been permitted to appeal a pre-verdict acquittal because Congress has never authorized such review, and the Double Jeopardy Clause prohibits a retrial following an acquittal.

A pre-verdict acquittal is unreviewable when a trial court enters an acquittal based on the insufficiency of the evidence. Pre-verdict dismissals on grounds unrelated to factual guilt or innocence are not "acquittals" and are subject to appellate review under the existing regime. *See Scott*, 437 U.S. at 97 ("Where the court, before the jury returns a verdict, enters a judgement of acquittal pursuant to Fed. Rule Crim. Proc. 29, appeal will be barred only when it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." (ellipses in *Scott* and quotation omitted)). Also, because a defendant is not entitled to a bench trial without the government's consent, the government has the power (and often exercises it) to force

a jury trial when public sentiment against a particular defendant or class of defendants is strong. Yet the Department suggests that unreviewable "erroneous pre-verdict acquittals" occur often enough to call for a change in this longstanding practice. Such acquittals would be "erroneous" in two circumstances: (1) if a District Judge acts in a lawless manner and grants a pre-verdict acquittal believing that the evidence is constitutionally sufficient; or (2) if a District Judge grants a pre-verdict acquittal honestly believing that the evidence is constitutionally defective, but an appellate court would disagree.

The former circumstances can be dismissed. There is no reason to believe that District Judges knowingly engage in lawless conduct, and I do not understand the Department to be suggesting that they do. Certainly I have never encountered a United States District Judge who would acquit a defendant without a good-faith belief that the evidence was insufficient. Indeed, many of the District Judges before whom I have appeared are former prosecutors, and none would be fairly characterized as "pro-defense."

With respect to the second hypothetical circumstance, the Department has failed to supply any reason to suppose that trial courts make good-faith errors in granting pre-verdict acquittals with any frequency, much less with sufficient frequency to justify the dramatic changes contemplated by the proposed amendment. I agree with Judge Holderman and Attorney Goldberger that the data supplied by the Department, as explained by Judge Holderman, are unreliable. I note as well that the statistics reveal some striking facts regarding acquittals that are granted after verdict and are therefore appealable: in 30%-40% of such cases, the Department did not appeal, suggesting that the government recognized that although twelve jurors voted to convict, no reasonable juror could have found guilt beyond a reasonable doubt. In nearly 30% of the cases in which the Department did take an appeal, the Court of Appeals affirmed that no reasonable juror could have found guilt beyond a reasonable doubt, even though twelve jurors had done so. And those defendants were forced to suffer additional stigma and trauma as the government pursued appeals, which seldom are decided in less than a year.

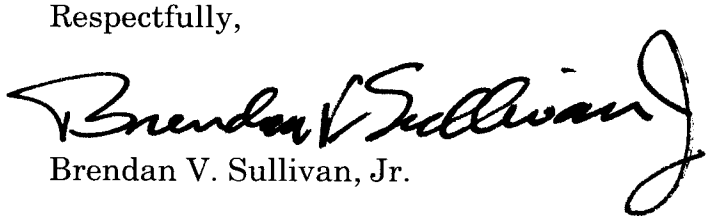
Even if trial courts occasionally do enter good-faith pre-verdict acquittals that a hypothetical appellate court might later disagree with, so what? When there is a good-faith dispute among judges about the sufficiency of the evidence, there is no guarantee that the appellate court is correct and the trial judge who saw the evidence got it wrong. Moreover, if a District Judge acting in good faith, and hearing all the evidence, believes that no reasonable jury could find guilt beyond a reasonable doubt, that should be enough to terminate a criminal prosecution. In a bench trial, the same judge could acquit applying a standard more favorable to the defendant, and that decision would not be subject to review.

Under the proposed amendment, a defendant would be allowed to waive his or her double-jeopardy protection to obtain an acquittal from the trial court at the close of the government's case, but in so doing he or she would also forgo the possibility that the jury would acquit. If the appellate court disagreed with the trial court, the government then could retry the defendant (even if the first jury would have acquitted) armed with the substantial advantage of having tried its case once—it learned the weaknesses in its case, and it gained knowledge of the defendant's questions and evidence used during cross-examination. This is another evil that the Double Jeopardy Clause was designed to prevent, but that the proposed amendment would encourage. *See DiFrancesco*, 449 U.S. at 128 ("[C]entral to the objective of the prohibition against successive trials is the barrier to affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." (quotation omitted)).

Finally, there is a serious question whether the proposed amendment contravenes the spirit and perhaps the letter of the requirement of the Rules Enabling Act that rules "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). By requiring the waiver of a constitutional right to obtain a pre-verdict ruling that District Judges have historically been able to make, and by undermining that right, the proposed amendment would fashion the sort of change that the act sought to avoid. At the very least, it appears to me that as a matter of policy as well as the separation of powers, such a dramatic curtailment of a criminal defendant's rights should be enacted, if at all, through the legislative rather than the rulemaking process.

Thank you for considering these comments.

Respectfully,



Brendan V. Sullivan, Jr.