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January 25, 2007

Via Federal Express

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

Re: Testimony and Comments on Proposed Amendments to Rule 29 of the Federal Rules of Criminal Procedure, Published for Comment in August 2006

Dear Mr. McCabe:

On behalf of the Committee on Federal Criminal Procedure of the American College of Trial Lawyers (the "College"), I write to convey to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Standing Committee") comments on the proposed amendments to the Federal Rules of Criminal Procedure published for comment by the Advisory Committee on Criminal Rules (the "Advisory Committee") in August 2006. Inasmuch as hearings are scheduled for January 26 and February 2, 2007, I ask that this submission be accepted both as comment and as written testimony on behalf of the Committee. The views in this submission reflect a consensus of our Committee members in opposition to the proposed amendments to Rule 29.

The College is a professional association of lawyers skilled and experienced in the trial of cases and dedicated to maintaining and improving the standards of trial practice, the administration of justice, and the ethics of the profession. The Federal Criminal Rules Committee (the "Committee") is charged with the responsibility of monitoring the operation of the Federal Rules of Criminal Procedure and other federal criminal procedural developments generally, to determine the adequacy of the operation of the rules and procedures in federal criminal cases, to evaluate proposed changes, and to make recommendations with regard to theses matters. The Committee consists of approximately fifty Fellows of the College including prosecutors, defense counsel, and judges from throughout the United States.

Rule 29 of the Federal Rules of Criminal Procedure permits trial courts to grant acquittals under circumstances where the Double Jeopardy Clause precludes appellate review: if the court grants a Rule 29 motion before the jury has returned a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial; but if the court defers ruling until the jury has reached a verdict and then grants a motion for judgment of acquittal, appellate review is permitted because the jury verdict can be reinstated if the acquittal is reversed upon appeal. The May 20, 2006, Report of the Advisory Committee reflects that the proposed revision is the result of "an unusually long history" and that the Advisory Committee has passed the proposal by a narrow 6-5 vote, "reflect[ing] serious reservations regarding the merits of the proposed amendment". Our Committee consensus also questions the merits of the proposed amendments to Rule 29, particularly insofar as the amendments appear to address a perceived problem that may in fact not exist.

First, we note that Judicial acquittals under Rule 29, particularly those rendered before a jury verdict, are extremely rare. We are not aware of any systemic abuse or misuse in our federal trial courts to which the proposed amendment is a response. Current Rule 29 has been in effect for over 60 years and, far from being a "historical accident", is based upon common law and constitutional principles relating to the authority of the judiciary.

In addition, Rule 29 serves a vital role in providing a procedural mechanism through which courts can exercise their inherent powers. This is particularly important in criminal cases, where the plaintiff – the government – has within its grasp the full resources of the Executive Branch to muster and present its evidence. Reserving the trial court's ability to exercise its inherent power in those cases where the government has clearly failed to present legally sufficient evidence against a defendant allows a court to ensure that the defendant not be subjected to the further "embarrassment, expense and ordeal" of continuing the trial, and precluding the possibility that "even though innocent [the defendant] may be found guilty." *Green vs. United States* 355 U.S. 184, 187-88 (1957). It also allows the court, in complex cases and multi-defendant cases, to focus the jury on whatever legally viable issues remain, thus enhancing the efficiency and accuracy of the process. The proposed amendments threaten to undermine these principles unnecessarily. For example, the proposed amendments would impede trial courts from separating viable issues from those lacking credible foundation when instructing the jury, thereby increasing the likelihood of jury confusion, unreliable jury verdicts, and negative public perception of a justice system that requires defendants, judges and jurors to bear the inefficiency and costs of an ill-conceived prosecution. And the Rule does not address issues such as the court's jurisdiction to continue the trial as to other defendants or counts following a pre-verdict acquittal, whether a defendant could be held pending appeal (for instance, because he poses a flight risk) despite the fact that he has been acquitted of the crime with which he was charged, or the impact of prolonged trials and appeals (not to mention successive trials) on an already-overburdened court docket.

Most fundamentally, by requiring that the trial court reserve decision even on a clearly meritorious Rule 29 motion, the amendment would subvert the purpose of the rule: to protect an innocent defendant's immediate interest in finality, a right protected by both the Due Process and Double Jeopardy Clauses. This difficulty is not solved by permitting a pre-verdict judgment of acquittal upon a defendant's waiver of Double Jeopardy. The proposed rule would allow the Department of Justice to do what the Double Jeopardy Clause would otherwise forbid: appeal every judgment of acquittal. While the Department of Justice is permitted to appeal post-verdict acquittals, that represents "a *single exception* to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury." (*See Smith v. Massachusetts* 543 U.S. 462, 467 (2005) (emphasis added).

We recognize that the Federal Rules of Criminal Procedure deserve ongoing review to ensure that justice is done in our trial courts. The proposed changes to Rule 29, which the Advisory Committee admits are both far from unanimously offered and subject to "serious reservations" among the Advisory Committee members, raise more issues than they purport to solve. Under the circumstances, therefore, we recommend that the proposed amendments be rejected.

Respectfully Submitted,

Douglas R. Young
Chair
American College of Trial Lawyers
Committee on Federal Criminal Procedure

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