

# 06 - CR - 013



**James  
Ishida/DCA/AO/USCOURTS**  
02/01/2007 08:52 AM

To Jennifer Noell/DCA/AO/USCOURTS@USCOURTS, Gale  
Mitchell/DCA/AO/USCOURTS@USCOURTS  
cc  
bcc

Subject Fw: Rule 29

CR comment

----- Forwarded by James Ishida/DCA/AO/USCOURTS on 02/01/2007 08:52 AM -----



**Kmntpn@aol.com**  
01/31/2007 05:58 PM

To Rules\_Comments@ao.uscourts.gov  
cc

Subject Rule 29

Dear Honorable Commission Members:

I will keep my comments brief. I am wholly at a loss to understand why we should reverse a hundred years of legal history exclusively for the benefit of the DOJ, not justice, not the people, not victims, not defendants, but the DOJ, without concomitantly restoring the other aspect of Sparf, i.e., jury nullification. Simply put, if we are going to do away with the sanctity of the judges as the sole arbiters of the law, (one precious aspect of Rule 29 which would be eviscerated by the proposed Rule) then we should simultaneously reinvigorate the jury's now moribund role as legal arbiters through jury nullification. Part of the beauty of Sparf was it explicitly recognized this policy trade off, a trade off the DOJ is eager to undue, but without reinstating the other part of the policy. If you are going to strip judges of this long held power then it should be put back where it was until Sparf, namely, in the wise hands of the jury. Further, predicating acceptance of the proposed Rule on a defendant's constitutional waiver of double jeopardy is both constitutionally suspect at best (*see*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. rev. 1413 (1989)) and simply repugnant to this American. Asking a defendant to waive a constitutional right after his or her own government has failed to prove its case against them so the government may try again to convict may qualify for a sequel to The Trial but it most certainly does not qualify as a sound constitutional or policy argument. Serving justice is extremely difficult, much more difficult than merely fighting for convictions at any cost. And that is why we need the Rule to stay unchanged and for lawyers interested in justice, not just convictions, to continue to serve as prosecutors.

In closing, a few quick comments. I am not an academic. I am not a judge. I am not part of any organization or group which has a dog in this fight. I am simply a practicing attorney who knows three things about this proposed Rule: 1. the change is harmful to judges, and individuals, and the system of justice at large for the reasons noted above; 2. the proposed change is unnecessary as the harm it seeks to purportedly redress is statistically infinitesimal, and; 3. my government, our government, should try, except possibly in the most dire of circumstances, to not ever condition the exercise of any constitutional right upon the waiver of another constitutional right.

Thank you for your time and solicitude.

Sincerely, Terence Noonan

Terence P. Noonan, Esq.  
Noonan & Noonan  
430 Hunnewell St.  
Needham, MA 02494  
781-455-8300