06-CR-008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
JAMES F. HOLDERMAN
CHIEF JUDGE

TELEPHONE
312-435-5600

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

December 22, 2006

Re: Proposed Amendment to Federal Rule of Criminal Procedure 29

Dear Mr. McCabe:

I wish to express my concern and objection to the proposed substantive amendment to Federal Rule of Criminal Procedure 29 that has been circulated for public comment. Specifically, I believe that the proposed language for Rule 29(b)(2) which requires a defendant to waive the defendant's constitutional right against double jeopardy so the government may appeal a judgment of acquittal (and thus possibly to retry a defendant on the offense) when a district court judge directs a judgment of acquittal before a verdict has been reached is neither needed nor prudent.

The relevant proposed language for Rule 29 is:

(2) 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 can 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 grants a judgment of acquittal before the verdict.

Fed. R. Crim. P. 29(b)(2)(proposed 2006 amendment for comment).

I. Relevant Background

The narrow vote of 6-5 to recommend the publication of the above-quoted proposed amendment to Rule 29 by the Advisory Committee on Federal Rules of Criminal Procedure ("Advisory Committee") was based primarily on information presented by the U.S. Department of Justice ("DOJ") at the January 2005 meeting of the Standing Committee on Rules of Practice and Procedure ("Standing Committee"). *See* Hon. Susan C. Bucklew, Chair, Report of the Advisory Committee on Criminal Rules to the Hon. David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, 1-2 (May 20, 2006, revised July 20, 2006). In lobbying for the proposed amendment to Rule 29, the DOJ presented information about the purported statistical frequency of pre-verdict acquittals and several case studies of erroneous and unreviewable acquittals. *Id.* at 2. The narrowness of the Standing Committee's vote reflected reservations about the proposed amendment. *Id.* at 3. Prior to the DOJ's January 2005 presentation, the Advisory Committee believed the occurrence of problematic pre-verdict acquittals was a very small number. *Id.* at 2-3. Based on this belief, the Advisory Committee previously had voted in May 2004 to not amend Rule 29 because of concerns that the proposed changes would create problems in multi-defendant or multi-count cases or where the jury was unable to reach a verdict. *Id.* Those perceived problems still remain. *Id.* at 2. The DOJ's presentation was the impetus for the Standing Committee's request to the Advisory Committee to draft an amendment to Rule 29 that would address the concerns of the DOJ and to advise the Standing Committee on whether to adopt such an amendment. *Id.* at 2-3.

According to the minutes of the January 2005 meeting, then-Associate Deputy Attorney General Christopher A. Wray presented six selected case studies and statistical information about pre-verdict acquittals, although he recognized that the statistics he presented in the area of pre-verdict acquittals were "inherently imperfect." *See* Standing Committee on Rules of Practice and Procedure Meeting of January 13-14, 2005, San Francisco, CA, Minutes at 17-18. Former Associate Deputy Attorney General Wray stated that, over a four-year period, there were 259 pre- and post-verdict judgments of acquittal issued by federal district courts nationwide pursuant to Rule 29. *Id.* at 17. Former Associate Deputy Attorney General Wray told the Standing Committee that seventy-two percent of those 259 judgments of acquittal were pre-verdict acquittals, of the kind addressed by the proposed amendment (72% of 259=186.48). *Id.* He also said that 70% of those pre-verdict acquittals completely disposed of the case (70% of 186=130.2). *Id.* Acknowledging that the lack of appellate review for pre-verdict acquittals prevents direct analysis on their correct disposition, former Associate Deputy Attorney General Wray extrapolated that "there is strong reason to suspect that a significant number of the pre-verdict acquittals had been erroneous and would have been reversed on appeal." *Id.* at 18. He based this speculation on the fact that the DOJ appeals 60 to 70% of a post-verdict acquittals, and one published opinion a month over an 18-month period has reversed a "trial judge's post-verdict action." *Id.*

In addition, on November 20, 2006, Assistant Attorney General Benton Campbell via email sent me at my request the materials that former Associate Deputy Attorney General Wray had relied upon for his January 2005 presentation. The materials are three memoranda prepared by the DOJ and sent on March 31, 2003 and September 15, 2003, respectively, to the Honorable Edward E. Carnes, Chairman of the Advisory Committee on Criminal Rules and on December 16, 2004, to the Honorable David F. Levi, Chairman of the Committee on Rules of Practice and Procedure.[1] The statistical information cited in the memoranda is summarized in the DOJ memorandum dated December 16, 2004. Relying in part on the Administrative Office of the Courts' ("AO") *Judicial Business of the United States Courts 2002*, Table D-4, the DOJ asserts that 336 defendants were acquitted by federal district judges from October 1, 2001 through September 30, 2002. *See* Dec. 16, 2004 Mem. at 7 & Ex. A. The reader should bear in mind that 78,835 defendants were prosecuted during that same period. So the 336 acquittals by the court constitute less than ½ of 1 percent of the dispositions of the defendants prosecuted during that period (336 ÷ 78,835=.0042). Moreover, the DOJ acknowledges in footnote 5 of its December 16, 2004 memorandum that the AO data "does not differentiate between pre- and post-trial judgments of acquittals and 'not guilty' verdicts in bench trials." *Id.* at 7 n.5. Hence, it is unknown from the data how many of the 336 acquittals were pre-verdict acquittals. The DOJ also included information in its December 16, 2004 memorandum culled from a survey of the U.S. Attorney's Offices covering from October 1, 1999 into 2003. *See* Ex. B to Dec. 16, 2004 Mem. The DOJ received responses from 83 out of 94 districts and found that during a 3 and a half year period there were 184 pre-verdict acquittals, which is about 2.2 per responding district for the entire 3 and half year period, or about .063 per responding district per year. *See* Dec. 16, 2004 Mem. at 8.

The DOJ in the materials provided to me by Assistant Attorney General Campbell also lists information regarding the reversal rates of post-verdict acquittals. In the December 16, 2004 memorandum, the DOJ stated that 72% of the cases authorized for appeal by the Solicitor General of the United States were reversed in 2000 and 2001. *See* Dec. 16, 2006 Mem. at 8. The December 16, 2004 memorandum also stated that "[t]here are at least 18 published appellate opinions in the 18 months ending June 30, 2003, which reverse judgments of acquittal entered after the verdict." *Id.* The DOJ considered this data "under-inclusive, as it does not include unpublished reversals." However, upon closer review it appears that, of the 18 cases the DOJ cited, 7 cases were unpublished, so it is unclear to what other unpublished opinions the DOJ was referring. *Id.* Finally, the DOJ in the three memoranda summarized approximately 10 case

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[1]*See* Eric H. Jaso, Counselor to the Assistant Attorney General & Ex Officio, Memorandum to Hon. Edward E. Carnes, Chairman, Advisory Committee on Criminal Rules Regarding Proposed Amendment to Criminal Rule 29, Mar. 31, 2003 (hereinafter "March 31, 2003 Memorandum"); Eric H. Jaso, Counselor to the Assistant Attorney General & Ex Officio, Memorandum to Hon. Edward E. Carnes, Chairman, Advisory Committee on Criminal Rules Regarding Proposed Amendment to Criminal Rule 29, Sept. 15, 2003 (hereinafter "September 15, 2003 Memorandum); James B. Comey, Deputy Attorney General, et al., Memorandum to Judge David F. Levi, Chairman, Committee on Rules of Practice and Procedure, Regarding Proposed Amendment to Criminal Rule 29, Dec. 16, 2004 (hereinafter "December 16, 2004 Memorandum").

studies which the DOJ characterized as particularly egregious examples of judges' entering pre-verdict acquittals over the four-year study.

II. Objection to the Amendment: The U.S. Department of Justice's Statistical Support

The statistical data does not support the DOJ's assertion that district court judges have been issuing too many pre-verdict acquittals and that these pre-verdict acquittals are frequently erroneous. Crucially, the DOJ's statistical information does not show the specific number of pre-verdict acquittals issued by district court judges and certainly does not show how many of those pre-verdict acquittals were conceded or agreed to by government counsel. In my own anecdotal experience of over 35 years as a federal prosecutor, defense lawyer, and federal district judge, judges are extremely careful when considering a pre-verdict acquittal either by motion or sua sponte, and that on occasion the government realizes that it did not prove one or more essential element of the crime charged and concedes or agrees to a pre-verdict acquittal. The DOJ should not now be heard to say that those acquittals conceded by the government were erroneous.

Former Associate Deputy Attorney General Wray's extrapolation of the frequency of erroneous pre-verdict acquittals based on the reversals of post-verdict acquittals is inherently flawed. A post-verdict acquittal occurs when a jury has found the defendant guilty and the trial judge still determines that no reasonable jury could find the defendant guilty based on the evidence. That a jury has found a defendant guilty despite the trial judge's determination that no reasonable jury could issue such a verdict would logically result in more reversals than a pre-verdict acquittal where the trial judge is not overruling a jury verdict. Furthermore, the statistics regarding the reversals of post-verdict acquittals do not shed much light on the actual rate of erroneous post-verdict acquittals entered by district judges. According to the DOJ's information, the twelve regional United States Courts of Appeals across the country collectively reverse a post-verdict acquittal about once a month. *See* Dec. 16, 2004 Mem. at 8. That is 12 times per year or an average of 1 reversal per year per circuit. Considering that the twelve regional United States Courts of Appeals are collectively reviewing decisions of approximately 900 active and senior district judges who preside in the 94 district courts of our country, 1 reversal per year per circuit is not a substantial reversal rate. In addition, the 72% reversal rate described in the December 16, 2004 memorandum of the cases specifically authorized to be appealed by the Solicitor General cannot be relied on; the Solicitor General presumably authorizes for appeal only those cases in which the Solicitor General believes reversible error has been committed, and as a result, those hand-picked cases should have a high reversal rate. *See id.* The information the DOJ furnished the Committee fails to provide a true estimate of how often federal trial judges issue post-verdict acquittals erroneously. Overall, former Associate Deputy Attorney General Wray's attempt to quantify the number of erroneous pre-verdict acquittals via statistics on post-verdict acquittals is, at best, speculative. Moreover, the statistics do not indicate the number of pre-verdict acquittals issued by federal trial judges that were conceded by the government at the trials. I appreciate the DOJ's difficulty of determining the amount of erroneous pre-verdict acquittals from the AO's statistical reports, but the DOJ certainly has the capacity to keep such statistics itself if it desires to do so by merely asking the U.S. Attorneys in each of the 94 districts to regularly report the pre-verdict acquittals in their districts. If the DOJ were to present actual data that supported its position that the proposed amendment is necessary to rectify a problem,

that data and the amendment should be considered. Until the DOJ presents such data, Rule 29 should remain intact.

In summary, after studying the materials provided to me by Assistant Attorney General Campbell and the minutes of the presentation by former Associate Deputy Attorney General Wray, it is clear to me, and I believe it should be clear to the Committee, that the DOJ's purported statistical data does not in fact support the DOJ's allegation that there is a problem with pre-verdict acquittals issued by federal district judges. The statistical data presented by the DOJ when analyzed does not support the DOJ's theory that there have been too many pre-verdict acquittals. This is significant because the Standing Committee directed the Advisory Committee to draft an amendment to Rule 29 after hearing from former Associate Deputy Attorney General Wray. *See* Bucklew, *supra*, at 2-3. Moreover, the Advisory Committee narrowly voted to approve the proposed amendments based primarily on the information provided by former Associate Deputy Attorney General Wray, which contradicted the committee members' perceptions about pre-verdict acquittals. *Id.* at 1-3. The flaws in the statistical information on which both the Advisory Committee and the Standing Committee relied when deciding to propose the amendment to Rule 29 undermines the rationale for the proposed amendment to Rule 29. To make a change in the law that would diminish an accused's constitutional rights in the manner contemplated by the proposed amendment of Rule 29 based on the speculative statistical information presented is not prudent and is contrary to good judicial policy.

Thank you for taking the time to review my correspondence.

Very Truly Yours,

James F. Holderman

James F. Holderman
Chief Judge, United States District Court
Northern District of Illinois

cc: Assistant Attorney General Benton Campbell