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06 - CR - 017

February 12, 2007

Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposed Amendment to Fed. R. Crim. P. 29

Dear Mr. McCabe:

I am writing to support revision to Fed. R. Crim. P. 29 to permit appellate review of pre-verdict judicial acquittals. I believe that amendment of the existing Rule is necessary and appropriate to foster both the fair administration of justice and the appearance of fairness.

In September 2004, I wrote an article published in the Boston Bar Journal entitled "Naked and Arbitrary Power: Judicial Judgments of Acquittal." The title derived from Judge Bailey Aldrich's concurring opinion in *In the Matter of United States of America*, 286 F.2d 556 (1st Cir. 1961), in which the First Circuit held that an unquestionably improper grant of a judgment of acquittal after only three government witnesses had testified was beyond the trial judge's power and therefore a nullity. Judge Aldrich stated:

> While courts can do, and must be permitted to do, unwise and even foolish things, I think there must be some limit to naked, arbitrary power. As against a defendant's right to be free from double jeopardy, there is the interest of the public in the prosecution and conviction of criminals. . . . Whatever may be the correct philosophy of judicial power, I am unwilling to think that such a totally arbitrary act in the course of trial with no semblance of justification behind it, should deprive the government of its day in court.

The Supreme Court, however, disagreed, stating in its *per curiam* reversal, "The Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation. Nevertheless, '[t]he verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the constitution.'" *Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

I submit that a Rule that permits or even tolerates such an outcome is bad. It should be fixed.

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There is no good reason to permit district court judges to wield unreviewable power over the ultimate disposition of a case. This grant of authority is antithetical to democratic principles that underlie our jury system and our legal system. It is an invitation to some courts to abuse that power. It feeds mistrust and suspicion of the courts even when the power is appropriately exercised. There is nothing about the Rule which promotes faith in the fair and blind administration of justice.

Not only is the current Rule 29's grant of unreviewable authority to a single district judge to overrule the prosecution and the grand jury inappropriate, but it treads on the toes of another participant in the system of justice: the jury. Shortly after my article was published, a district court judge in the District of Massachusetts disposed of a case by means of a pre-verdict acquittal. Someone alerted an outraged juror to my article and she contacted me. She was appalled that she had sat on a jury for however many days and the judge had supplanted his decision on the evidence for hers and her fellow jurors.' And the juror believed the judge to be entirely wrong about the inferences the evidence supported. She was aghast and she was not alone.

Why do we tolerate, indeed invite, this outcome? That a defendant who has been properly indicted by a grand jury must see the process through to the end seems like an appropriate price to pay for a system in which all parties are ensured of a just process, if not result.

I first became aware of Rule 29 as a problem during my service as a prosecutor in the District of Massachusetts. Despite the well-worn adage that where one stands depends on where one sits, my point of view on this issue has not changed one iota in my four years as a criminal defense appellate lawyer. Countless examples have shown me that Rule 29 is a pernicious rule. Judges make mistakes. Some of those mistakes are not in the public interest. Review and accountability are essential not only to ensure justice in the individual case but public faith in the system. I do not see this issue as a prosecution vs. defense issue or as a power struggle between the executive and judicial branches of government. I see the issue, quite simply, as an administration of justice issue and I always have. In order for district court judges appointed to lifetime tenure to be held accountable, their outcome-determinative decisions must be subject to review. It is that simple.

Quite possibly, abuse of Rule 29 is not a problem in many, if not most, districts. Indeed, I understand from former colleagues around the country that Rule 29 acquittals are almost unheard of in many districts. But that is no reason to ignore the instances of real abuse as well as the Rule's potential for abuse. That the public, with the exception of jurors and criminal law practitioners, have no ability to weigh whether a judge is abusing the Rule, is not a good reason to do nothing about the problem. Neither jurors nor attorneys can take on the judge publicly.

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But, make no mistake: when the Rule is used to throw out an indictment short of a verdict, the press and public, if they notice it at all, immediately ask: Was the fix in? Is the judge corrupt? Both questions have been posed to me personally. I cannot see how it is in the judiciary's interest to continue to invite this sort of speculation by retaining a Rule that has no pedigree in jurisprudence or logic or fairness.

Thank you for the opportunity to express my views on the proposed amendment of Rule 29.

Very truly yours,

Jeanne M. Kempthorne

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