06 - CR - 018

February 13, 2007

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

Re: Proposed Amendments to Rule 29 of
the Federal Rules of Criminal Procedure

Dear Mr. McCabe:

I write to express my continued opposition to the proposed amendments to Rule 29 of the Federal Rules of Criminal Procedure. As you know, I served as a member of the Advisory Committee on the Federal Rules of Criminal Procedure at the time various versions of this proposed amendment were discussed and debated. My recollection is that after thoughtful consideration the original proposal was rejected by the Committee and the current proposal ultimately was approved by the slimmest of margins -- the Committee was virtually split down the middle. I was opposed to the Rules changes then, and there is nothing in the current proposed amendments to Rule 29 and the committee note that persuade me that the proposed amendment is an improvement over the current system.

The Rule now permits judges to grant a motion for judgment of acquittal at the close of the government's evidence or, even where the court thinks the motion has merit, to reserve decision on the motion until after the jury returns a verdict. It strikes an appropriate balance between the defendant's interest in an immediate resolution of the motion and the interest of the government, particularly in close cases, to first obtain a jury verdict and still preserve its right to appeal in the event of a verdict of guilty. It also serves the interests of judicial economy and discretion in the rare cases where a particular count is wholly without merit and unsupported by the government's evidence.

The fact is that most Rule 29 motions are denied. Furthermore, in my experience, where a judgment of acquittal is appropriate (in whole or in part), judges exercise their judgment and discretion wisely, and most judges do in fact reserve ruling until after the jury returns a verdict. But judges should not be required to do so in all cases. The proposed amendment reflects an unwarranted concern that judges will not act wisely and with due regard to the government's interests, as well as the defendant's. The proposal is an overreaction to a handful of cases brought to the Committee's attention by the government based on scant anecdotal evidence. In my judgment, the evidence presented to the Committee on numerous occasions did not support such radical surgery to the existing rule of procedure, which is straightforward and almost always fairly enforced. I seriously doubt whether the evidence has gotten any stronger in the interim.

The proposed amendment unnecessarily burdens a defendant's double jeopardy right, codifies a forced waiver of that constitutional right, and substitutes a convoluted regime for a simple and straightforward Rule. Forced waivers should be discouraged, not expanded. This is true of waivers applying to constitutional rights, rights to appeal a sentence, or of the attorney-client privilege. In addition, the proposed amendment to Rule 29 inadequately considers the complex multi-defendant, multi-count indictment where some but not all of the counts, with respect to some but not all of the defendants, are implicated. The proper resolution of these difficult questions should be left in the hands of competent, thoughtful trial judges who, history shows, attempt in good faith to exercise their discretion wisely. The current proposed revision would put judges -- and, more importantly, defendants -- in the straightjacket of a complicated, rigid Rule that only works by forcing defendant to choose between the right to a fair consideration of his case by a jury and his right to be protected against double jeopardy.

Sincerely,

Paul L. Friedman