

1 WILLIAM G. MONTGOMERY
2 MARICOPA COUNTY ATTORNEY
3 (FIRM STATE BAR No. 00032000)

4 MARK FAULL
5 CHIEF DEPUTY
6 301 WEST JEFFERSON STREET, SUITE 800
7 PHOENIX, ARIZONA 85003
8 TELEPHONE: (602) 506-3800
9 (STATE BAR NUMBER 011474)

10 IN THE SUPREME COURT OF THE STATE OF ARIZONA

11 PETITION TO DELETE RULE 20,
12 TO ADD RULE 24.1 AND TO
13 RENUMBER RULES 24.1, 24.2, 24.3,
14 AND 24.4, ARIZONA RULES OF
15 CRIMINAL PROCEDURE

R-16-_____

MARICOPA COUNTY ATTORNEY'S
PETITION TO DELETE RULE 20, ADD RULE
24.1 AND RENUMBER RULES, 24.1, 24.2,
24.3, AND 24.4, ARIZONA RULES OF
CRIMINAL PROCEDURE

16 The Maricopa County Attorney hereby asks this Court to delete Rule 20,
17 Arizona Rules of Criminal Procedure and to move the post-verdict provisions of that
18 rule to Post-Verdict Proceedings as new Rule 24.1. This request is made to enforce
19 the State's right to a jury trial and a Crime Victim's rights to justice and due process
20 while retaining sufficient protections for defendants who may be convicted in cases
21 with insufficient evidence.

22 Respectfully submitted this 8th day of January, 2016.

23 WILLIAM G. MONTGOMERY
24 MARICOPA COUNTY ATTORNEY

25 By 
26 MARK FAULL
27 CHIEF DEPUTY
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1 **I. Introduction**

2 The right to trial by jury is protected by both the Bill of Rights of our Federal
3 Constitution and the Arizona Constitution. The right is rooted in the idea that the
4 collective wisdom of members of our community is more likely to be correct than the
5 beliefs of any one person. For this reason, in Arizona, criminal juries must always be
6 unanimous to render a verdict and the number of jurors required increases as the
7 severity of the case increases. ARIZ. CONST. art. II, § 23.
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10 Despite the importance of the right to trial by jury and a Crime Victim’s rights
11 to justice and due process, the Arizona Rules of Criminal Procedure provide a
12 mechanism where the decision making function in a criminal jury trial can be
13 stripped from the jury and the entire case decided by one person – the trial judge – in
14 a manner that permanently ends the case without any appellate review to correct any
15 legal error or an injustice to a Crime Victim. The procedure is so counter to the
16 concept of the right to trial by jury and the right to fair process through review by a
17 higher court that it is surprising that it has remained a part of our criminal procedure
18 for so long. Despite its long history, Rule 20 needs to be abandoned to enforce the
19 State’s right to trial by jury and the right of meaningful due process through appellate
20 review of a lower court decision that would otherwise permanently end a criminal
21 prosecution and potentially deny justice for the State and victims.
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1 **II. Argument**

2 **THE COURT’S PROCEDURAL POWER TO DIRECT AN ACQUITTAL**
3 **SHOULD ONLY ARISE AFTER CONVICTION.**

4 The right to a jury trial in criminal cases in Arizona is held by both the accused
5 and the State. ARIZ. CONST. art. VI, § 17; A.R.S. § 13-3983; *Phoenix City*
6 *Prosecutor’s Office v. Ybarra*, 218 Ariz. 232, 234, ¶ 10, 182 P.3d 1166, 1168 (2008);
7 *State v. Poehnelt*, 150 Ariz. 136, 147, 722 P.2d 304, 315 (App. 1985). Additionally,
8 and no less important, a victim of crime also has a right to justice and due process.
9 ARIZ. CONST. art. II, § 2.1. Yet, Arizona’s Rules of Criminal Procedure allow a
10 trial judge, on his or her own motion, to direct a verdict of acquittal in a criminal case
11 after the State has rested if, in the court’s view, there is “no substantial evidence to
12 warrant a conviction.” ARIZ. R. CRIM. P. 20. “If reasonable persons can accept the
13 evidence presented as sufficient and adequate to support a conclusion that the
14 defendant is guilty beyond a reasonable doubt, the evidence is ‘substantial.’” *State v.*
15 *Axley*, 132 Ariz. 383, 393, 646 P.2d 268, 278 (1982). “A directed verdict should not
16 be granted if the evidence is such that reasonable minds may differ on the inferences
17 to be drawn therefrom.” *State v. Mosley*, 119 Ariz. 393, 402, 581 P.2d 238, 247
18 (1978) (citing *State v. Latina*, 25 Ariz. App. 66, 540 P.2d 1285 (1975)). A court
19 directed verdict of acquittal may be entered before or after a jury’s verdict, but only a
20 post-verdict directed verdict of acquittal can be appealed. ARIZ. R. CRIM. P. 20;
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1 *Evans v. Michigan*, 133 S. Ct 1069, 1081, fn. 9, 185 L.Ed.2d 124 (2013); *State v.*
2 *West*, 226 Ariz. 559, 562, 250 P.3d 1188, 1191 (2011).

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4 Despite the stringent standard for granting a Rule 20 motion – no reasonable
5 person, when viewing the evidence in a light most favorable to the prosecution, could
6 conclude that the defendant is guilty beyond a reasonable doubt – the limited case law
7 shows that reasonable minds differ on when a directed verdict of acquittal should be
8 granted. Of course there is no case law dealing with cases where a Rule 20 motion is
9 granted before the verdict is entered; such appeals are barred by the prohibition
10 against double jeopardy and preclude review even in instances of manifest error. *See*
11 *e.g. Evans*, 113 S. Ct. at 1081. Nevertheless, the cases where appellate courts have
12 addressed post-verdict Rule 20 motions are illustrative of the very real dangers of
13 improper pre-verdict judgments of acquittal.
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17 In *State v. Miramon*, for example, the Court of Appeals reversed a conviction
18 and directed that a judgment of acquittal be entered on the extremely fact intensive
19 question of whether the defendant “exercised dominion and control” over drugs. 27
20 Ariz. App. 451, 452-53, 555 P.2d 1139, 1140-41 (1976). In that case, the trial judge,
21 the jurors, and even one dissenting judge on the Court of Appeals all believed that the
22 evidence was sufficient to sustain the conviction. Of the four judges who assessed
23 the evidence, half of them believed the evidence was sufficient and the other half
24 disagreed. The case proves that reasonable minds can differ about the strength of
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1 evidence and the conclusions that can be drawn from that evidence so it is impossible
2 to conclude that Rule 20 motions are only granted in the most extreme cases of
3 insufficient evidence. Numerous other Arizona cases also show that when
4 considering the strength of evidence judges disagree about when the evidence is
5 sufficient for reasonable minds to find an element proven beyond a reasonable doubt.
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8 *See e.g. State v. Just*, 138 Ariz. 534, 545-46, 675 P.2d 1252, 1364-65 (App. 1983)
9 (three appellate judges disagreed with the trial judge regarding evidence supporting
10 premeditation); *State v. Paoletto*, 133 Ariz. 412, 416, 652 P.2d 151, 155 (App. 1982)
11 (three judges reversed a post-verdict judgment of acquittal finding that “the trial court
12 erred in invading the province of the jury by granting the defendant’s motion for
13 acquittal based on his belief that the victim’s testimony was not credible.”). These
14 cases show that even judges disagree on the strength of evidence and that fact is the
15 reason we have juries. We should not have a procedural rule that permits one person
16 to completely usurp the jury’s role and forever preclude any review of the propriety
17 of the decision let alone a simple case of mistaken analysis.
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21 The recent decision in State v. Fischer, 2015 WL 5880536 (App. 2015) is
22 similarly instructive. Although that case involved the grant of a motion for new trial
23 not a directed verdict of acquittal, the case demonstrates the problems and dangers of
24 permitting one person’s view of the facts of a case to control the ultimate outcome of
25 a case. In that case, following a conviction for Second Degree Murder, the trial court
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1 reassessed the evidence and granted a new trial. As the Court of Appeals noted,
2 when considering a motion for new trial, a trial court has considerably more
3 discretion to weigh the evidence than a court does when considering a motion under
4 Rule 20. *Id.* at ¶¶ 18-20. Nevertheless, despite the broader discretion afforded in this
5 circumstance, three judges disagreed with the trial court's view of the evidence and
6 reinstated the jury's verdict. *Id.* at ¶ 82. Consider the injustice that would have
7 occurred had the trial court granted a pre-verdict Rule 20 motion based on its opinion
8 of the evidence – a killer would have escaped punishment, a victim would have been
9 denied justice, and the State would have had no ability to appeal that result.

13 Usurping the jury's role in resolving factual disputes is just one problem with
14 permitting pre-verdict judgments of acquittal. Legal error is another. Our system has
15 appellate courts because, despite our best efforts and intentions, people make
16 mistakes. If, however, a judge makes a legal error in granting a pre-verdict judgment
17 of acquittal, our appellate courts have no ability to correct the error and victims of
18 crime have no recourse. *See Evans*, 113 S. Ct. at 1081. In *Evans*, it was undisputed
19 that the trial court erroneously directed a verdict of acquittal based on a
20 misunderstanding of the elements of the offense. *Id.* at 1073-74. Nevertheless,
21 despite the clear, uncontroverted fact that the judge erred as a matter of law, the
22 United States Supreme Court held that the prohibitions against double jeopardy
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1 barred any retrial of the defendant because the trial court entered its ruling before any
2 jury verdict. *Evans*, 113 S. Ct. at 1081.

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4 In *State v. Sabalos*, the trial court erroneously entered a post-verdict judgment of
5 acquittal based on a misunderstanding of DHS regulations and the breath test
6 evidence in a DUI case. 178 Ariz. 420, 421-23, 874 P.2d 977, 978-80 (App. 1994).
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8 Because it was a post-verdict judgment of acquittal the State had the ability to ask a
9 court to review and correct the error. Had the trial court granted the same motion on
10 the same incorrect grounds before the verdict was entered there would have been no
11 way to correct the error.
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13 It is easy to hypothesize other clear legal errors that a court may make that
14 would result in wrongful acquittals and leave the State with no legal recourse. For
15 example, for decades, courts operated under the belief that the State was required to
16 prove that a person possessed a usable quantity of an illegal drug to be convicted for
17 possessing that substance. This fact was due to this Court's holding in *State v.*
18 *Moreno*, 92 Ariz. 116, 374 P.2d 872 (1962). For more than 40 years courts believed
19 and juries were instructed that the State had to prove that "the substance must have
20 been in such quantity and quality to be susceptible of use as a [drug]." *State v.*
21 *Quinones*, 105 Ariz. 380, 382, 465, P.2d 360, 362 (1970); *See e.g., State v. Junkin*,
22 123 Ariz. 288, 291, 599 P.2d 244, 247 (App. 1979); *State v. Murray*, 162 Ariz. 211,
23 212-13, 782 P.2d 329, 330-31 (App. 1989). Eventually, this Court clarified its
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1 holding in *Moreno* and held that drug possession offenses did not require proof of a
2 useable quantity of drugs. *State v. Cheramie*, 218 Ariz. 447, 451, ¶¶ 21-23, 189 P.3d
3 374, 378 (2008). Given this history, it is easy to see how a judge who handled drug
4 possession cases for many years with the useable amount requirement could
5 mistakenly grant a pre-verdict Rule 20 motion if the State failed to elicit specific
6 testimony that the substance in question was a usable amount. Such a ruling would
7 be legally incorrect, but it would be completely unreviewable and our criminal rules
8 would have permitted a blatant injustice to stand uncorrected.
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12 In some cases the law may not yet be clear and a court may grant a pre-verdict
13 Rule 20 motion on unsettled legal grounds that will evade review. For example, there
14 was a time when burglary cases involving the issue of whether a piece of property
15 was “completely surrounded” could be defended by claims that the State could not
16 prove whether a particular gate was open or closed at the time of the offense. Thus,
17 the argument went, the State failed to prove the area was “completely surrounded.”
18 Because they cannot be appealed, it is impossible to know how many pre-verdict
19 Rule 20 motions may have been granted on such grounds, but today case law has
20 answered that question. *See State v. Lewis*, 236 Ariz. 336, 346, 340 P.3d 415, 425
21 (App. 2014), *review denied* September 1, 2015 (holding that an open gate or “ratty”
22 gate does not make a yard less enclosed). If the rules of procedure only permitted a
23 court to direct a verdict of acquittal after a conviction, appellate courts would be able
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1 to address these types of technical legal arguments much sooner and prevent
2 potentially numerous wrongful acquittals on specious legal arguments.

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4 Our criminal justice system is designed around Blackstone's formulation that it
5 is better for ten guilty go free than for one innocent to suffer. For this reason, we
6 accept that some wrongful acquittals will occur, some guilty will escape punishment,
7 and that is a price we are willing to pay to secure our valuable rights. But in this
8 situation, the current Rule 20 does not protect any fundamental rights and permitting
9 appellate review does no harm to the goals of ensuring innocence is safeguarded and
10 the guilty held accountable. As the United States Supreme Court noted in *Evans*:
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13 Nothing obligates a jurisdiction to afford its trial courts the power to
14 grant a midtrial acquittal, and at least two States disallow the practice.
15 See Nev.Rev.Stat. § 175.381(1) (2011); *State v. Parfait*, 96,1814
16 (La.App. 1 Cir. 05/09/97), 693 So.2d 1232, 1242. Many jurisdictions,
17 including the federal system, allow or encourage their courts to defer
18 consideration of a motion to acquit until after the jury returns a verdict,
19 which mitigates double jeopardy concerns. See Fed. Rule Crim. Proc.
20 29(b). And for cases such as this, in which a trial court's interpretation of
21 the relevant criminal statute is likely to prove dispositive, we see no
22 reason why jurisdictions could not provide for mandatory continuances
or expedited interlocutory appeals if they wished to prevent misguided
acquittals from being entered. But having chosen to vest its courts with
the power to grant midtrial acquittals, the State must bear the
corresponding risk that some acquittals will be granted in error.

23 *Evans*, 133 S. Ct. at 1081, 185 L. Ed. 2d 124 (2013) (footnotes omitted). There is no
24 Arizona statute or constitutional provision that confers upon a criminal defendant the
25 right to a midtrial acquittal from the trial court. Rule 20 does not protect any
26 important rights or liberties and it allows a court to deprive the State of its
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1 constitutional right to a jury trial. In fact, this rule of procedure works to likely deny
2 a constitutional right to justice and due process to a victim of crime where a midtrial
3 acquittal is entered in error. It is an unnecessary rule that should be removed from
4 our procedural rules.
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6 **III. Proposed Rule Modifications**

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8 While there are numerous ways to accomplish the goal of limiting a court's
9 power to direct verdicts of acquittal to post-verdict situations, the simplest seems to
10 be the elimination of the current Rule 20 and the addition of a new Rule 24.1 that
11 allows a court to direct an acquittal after a conviction. This change would place the
12 new rule under "Rule 24. Post-Trial Motions." Because the new rule will only apply
13 after a verdict, it does not make sense to leave it in its current position where it would
14 precede the rules governing jury instructions and jury deliberations. For simplicity,
15 the proposed modification leaves "Rule 20" blank because that is easier than
16 attempting to renumber the remainder of the criminal rules. After the addition of the
17 new Rule 24.1, the remainder of the current rules in Rule 24 will be re-numbered to
18 maintain numerical order within the rule but the only substantive change is the
19 addition of Rule 24.1.
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24 **IV. Conclusion**

25 The societal cost for the wrongful entry of a pre-verdict directed verdict of
26 acquittal is unusually high because it completely and permanently deprives the State
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1 and any victim of the right to seek appellate review and secure justice for the crime.
2 There is no logical or constitutional justification for a system that allows one side of a
3 criminal case to be decided by a jury of one in a non-reviewable manner. Such a
4 procedure runs counter to the State's right to a jury trial and a non-reviewable order
5 that ends the case offends basic notions of due process. To preserve the State's right
6 to a jury trial, a Crime Victim's right to justice and due process, and to provide for
7 appellate review of a trial court's decision to direct a verdict of acquittal, this Court
8 should modify the Rules of Criminal Procedure to require that directed verdicts of
9 acquittal be permitted only after a jury has returned a verdict of guilt. This modified
10 procedure will still permit a trial judge to direct a judgment of acquittal but it will
11 also afford the State and victims of crime the opportunity to seek appellate review of
12 that critical and currently final and unreviewable decision.
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17 Respectfully submitted this 8th day of January, 2016.

18 WILLIAM G. MONTGOMERY
19 MARICOPA COUNTY ATTORNEY

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21 By 
22 MARK FAULL
23 CHIEF DEPUTY
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1 PROPOSED MODIFICATIONS TO RULE 20 AND RULE 24, ARIZONA
2 RULES OF CRIMINAL PROCEDURE

3 RULE 20. JUDGMENT OF ACQUITTAL

- 4 ~~a. **Before Verdict.** On motion of a defendant or on its own initiative, the~~
5 ~~court shall enter a judgment of acquittal of one or more offenses charged in~~
6 ~~an indictment, information or complaint after the evidence on either side is~~
7 ~~closed, if there is no substantial evidence to warrant a conviction. In an~~
8 ~~aggravation hearing after the evidence on either side is closed, on a motion~~
9 ~~of a defendant or on its own initiative, the court shall enter a judgment that~~
10 ~~an aggravating circumstance was not proven if there is no substantial~~
11 ~~evidence to warrant the allegation. The court's decision on a defendant's~~
12 ~~motion shall not be reserved, but shall be made with all possible speed.~~
- 13 ~~b. **After Verdict.** A motion for judgment of acquittal made before verdict~~
14 ~~may be renewed by a defendant within 10 days after the verdict was~~
15 ~~returned.~~

16 RULE 24.1 ~~Motion for a new trial~~ Motion for judgment of acquittal

17 A. Power of the Court.

- 18 1. After Conviction. When the defendant has been found guilty by a
19 jury, the court on motion of the defendant, or on its own initiative, shall
20 enter a judgment of acquittal of one or more of the offenses if there is no
21 substantial evidence to warrant a conviction for that offense.
- 22 2. After Aggravation Hearing. After the jurors have found an
23 aggravating circumstance, on motion of the defendant or on its own
24 initiative, the court shall enter a judgment declaring that the aggravating
25 circumstance was not proven if it determines that there is no substantial
26 evidence to support the finding of the aggravating circumstance.
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1 B. Timeliness. A motion for judgment of acquittal shall be made no later than
2 10 days after the verdict of conviction has been rendered. A motion for
3 judgment of acquittal for an aggravating factor shall be made no later than 10
4 days after the aggravation finding has been rendered.
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8 Renumber remaining rules in Rule 24, so that current 24.1 becomes 24.2, 24.2
9 becomes 24.3, 24.3 becomes 24.4, 24.4 becomes 24.5.
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