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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	No. R-16-0031
PETITION TO DELETE RULE 20, TO ADD RULE 24.1 AND TO RENUMBER RULES 24.1, 24.2, 24.3, AND 24.4, ARIZONA RULES OF CRIMINAL PROCEDURE	COMMENT OF THE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND THE MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE IN OPPOSITION TO THE PETITION

The Arizona Attorneys for Criminal Justice ("AACJ") and the Maricopa County Public Defender's Office ("MCPD") respectfully submit this comment in opposition to the Petition of the Maricopa County Attorney's Office ("MCAO") to delete Rule 20, Arizona Rules of Criminal Procedure.

INTRODUCTION

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ is joined in its opposition by the Maricopa County Public Defender's Office. MCPD is the largest indigent defense firm in the State of Arizona with over 200 deputy public defenders providing indigent legal services in the Maricopa County Justice and Superior Courts. MCPD has reviewed this comment and joins in its position and reasoning.

ARGUMENT

I. Rule 20 Appropriately Balances the Risk of Wrongful Conviction Against the Risk of Unreviewable Error

The Due Process Clause requires that substantial protections counterbalance the high cost of a wrongful conviction. Among other things, criminal convictions must be based on legally sufficient evidence. *Tibbs v. Florida*, 457 U.S. 31, 45 (1982); *State v. Mathers*, 165 Ariz. 64, 71, 796 P.2d 866, 873 (1990). Since before statehood, Arizona has protected defendants' right to verdicts supported by legally sufficient evidence by allowing trial courts to render judgments of acquittal where the evidence is "insufficient to warrant conviction." Ariz. Penal Code § 946 (1901). The cost of this protection, as MCAO argues in its petition, is that, for the rare person granted a pre-verdict judgment of acquittal, Double Jeopardy will bar any retrial even when the trial court's judgment was granted in error. *See Smith v. Massachusetts*, 543 U.S. 462, 467 (2005). As a practical matter, pre-verdict judgments of acquittal are rarely granted, so rare that

MCAO files to note even a single instance of an improper grant in its petition. Further, although a pre-verdict judgment, once granted, is not subject to appellate review, the state could presumably seek a stay of the proceeding to allow it to challenge through a special action appeal a trial court's not-yet-entered pre-verdict judgment of acquittal. Finally, as a policy matter, this all too unlikely and clearly avoidable harm might result in some guilty persons going free, but that is a risk we long ago decided was acceptable to avoid the conviction of the innocent.

MCAO's Petition seeking the deletion of Rule 20 would, effectively, undermine two of the pillars of our criminal justice system -- the burden of proof and the right against self-incrimination. MCAO has not offered a convincing policy argument in support of this drastic change, nor has it identified a practical problem that deletion of the Rule would solve.

A. Rule 20 Requires The State to Meet its Burden of Proof While Protecting a Defendant's Constitutional Right Against Self-Incrimination

A Rule 20 motion tests the sufficiency of the state's evidence. *State v. Neal*, 143 Ariz. 93, 98, 692 P.2d 272, 277 (1984). "If no substantial evidence exists that the defendant committed the crime, then the trial judge *must* enter a judgment of acquittal." *Id.* (emphasis added). This judgment may be entered either before the verdict, Ariz. R. Crim. P. 20(a) ("after the evidence on either side is closed"), or after the verdict, Ariz. R. Crim. P. 20(b) ("within 10 days after the verdict was returned"). MCAO reasons that the existence of a remedy after a verdict has been returned obviates the need for a remedy before the verdict. This position misunderstands the relationship between a pre-verdict judgment of acquittal and the protections provided by the burden of proof and the privilege against self-incrimination.

It is well-established that the party pleading a fact has the burden of producing evidence necessary to prove that fact. *See, e.g.,* 2 McCormick on Evidence § 337 (7th. Ed., 2013). In a criminal case, this burden falls on the state. If the state is unable to

produce evidence that, if believed, demonstrates a defendant committed all necessary elements of a crime, the defendant must be acquitted. *See Neal*, 143 Ariz. at 98, 692 P.2d at 277. Indeed, the "requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense" is "[o]ne of the greatest safeguards for the individual under our system of criminal justice." *Cephus v. United States*, 324 F.2d 893, 895 (D.C. Cir. 1963).

The existence of the pre-verdict judgment is the procedural embodiment of that safeguard. If the state has not proven its case upon the close of its evidence, the accused may move for a judgment of acquittal without having to present any evidence of his own. "The defendant must decide whether or not to defend himself affirmatively. He should not be forced to make his decision in ignorance of the sufficiency of the state's case." Ariz. R. Crim. P. 20, cmt. Whether the state has presented a legally sufficient case is especially important in the instance where a defendant is in the unenviable position of putting on a defense that may provide corroborative evidence to the state. If he rests without presenting evidence, a jury might fault him for failing to put on a defense. If he proceeds with his defense, "he runs the risk of curing any deficiency in the state's case through introduction of his own evidence." *State v. Eastlack*, 180 Ariz. 243, 258, 883 P.2d 999, 1014 (1994).

This dilemma is illustrated in *Rain v. State*, 15 Ariz. 125, 134, 137 P. 550, 554 (1913). After close of State's evidence, the defendant moved for a directed verdict of acquittal. When the motion was denied, the defendant provided his own evidence, after which he was convicted of burglary. On appeal, the Supreme Court said:

> The appellant complains that the court should have granted his motion, and should have instructed the jury to acquit when the state rested its case in chief, for the reason the state had failed, when it rested its case in chief, to produce evidence sufficient to support a conviction. The appellant waived that error, if any, when he proceeded with the trial, after the motion was denied. In order to preserve the right to have such order reviewed, he should stand upon his motion. Having voluntarily proceeded with the trial of the case, during the course of such proceeding other evidence was received; we must consider the whole case regardless of the state of the case when the prosecution rested.

In other words, if the defendant had rested without presenting evidence, the appellate court could have considered only the evidence provided by the state, putting the state to its burden of proof beyond a reasonable doubt.

For this same reason, some courts have concluded that a trial court errs when it reserves a ruling on a motion for acquittal made at the close of the government's case. The Fifth Circuit, for instance, has said that "[t]he reservation to a defendant of the right to offer testimony after the denial of a motion for acquittal made at the close of the Government's case would be a futile thing if the court could reserve its ruling and force the defendant to an election between resting and being deprived of the benefit of the motion." *Jackson v. United States*, 250 F.2d 897, 901 (5th Cir. 1958) (ruling on a motion under Fed. R. Crim. P. 29). Although Arizona has not adopted the rule in *Jackson*, it has recognized the precarious position in which a trial court places a criminal defendant by reserving a ruling on motion for acquittal and forcing him to choose between resting and putting on a defense. *State v. Villegas*, 101 Ariz. 465, 467, 420 P.2d 940, 942 (1966) (After court reserved ruling on Rule 20 motion, defendant took the stand and admitted to his presence at the scene of the crime).

When forced to put on a defense, the defendant is deprived the combined benefit of putting the state to its burden of proof and the important constitutional protection against having to "give evidence against himself." Ariz. Const. art. 2, § 10. *see also* U.S. Const. amend. V. The pre-verdict motion for acquittal allows a defendant to have a judge decide whether the State has satisfied its burden of sufficiency of the evidence before making the important and life-altering decision to waive this crucial constitutional right.

B. The State Has no Constitutional Right to an Appeal and the Claim that Pre-Verdict Rule 20 Motions Will Lead to Incorrect and Irreversible Verdicts is Unsubstantiated.

While a criminal defendant has a long-standing and well-established privilege against self-incrimination that would be severely burdened by the elimination of the pre-

verdict Rule 20 motion, the state would suffer little, if at all, from retaining such motions. MCAO argues that the pre-verdict Rule 20 motion makes it harder to obtain convictions by taking away the opportunity to appeal some judgments of acquittal. MCAO's concerned are unfounded. Moreover, the state's right to appeal is not equivalent to the defendant's privilege against self-incrimination. Far from being a long-standing bedrock of our system of criminal justice, the state's ability to appeal an adverse ruling in a criminal case is a relatively modern invention. *See Carroll v. United States*, 354 U.S. 394, 400 (1957) ("[A]ppeals by the Government in criminal cases are something unusual, exceptional, not favored."). Congress did not provide a statutory mechanism for the appeal of directed verdicts until 1942. *Id.* at 402. Arizona did not provide for a State to appeal such a verdict until 1980. 1980 Ariz. Sess. Laws, Ch. 50, § 6 (34th Leg., 2d Reg. Sess.).

The power of the court to direct acquittal when the state has not met its burden of proof existed long before the Federal Rules of Criminal Procedure. The earliest cases date from the mid-nineteenth century, although such power was exercised by courts in civil trials for much longer. *See* Theodore W. Phillips, *The Motion for Acquittal: A Neglected Safeguard*, 70 Yale L.J. 1151 (1961). In Arizona, the pre-verdict motion for acquittal has been a part of the criminal procedure landscape since before statehood and was enshrined in the original 1901 Penal Code. Ariz. Penal Code § 946 (1901). To the extent it is at all legitimate, the state's apparent interest in obtaining more convictions through the expansion of this comparatively new innovation in our system does not trump the well-established protections laid out for criminal defendants in our state and federal constitutions.

MCAO's petition is an answer in search of a problem. MCAO has not presented a coherent policy rationale to do away with pre-verdict Rule 20 motions, nor has it shown why there is a practical need to do so.

Of the four cases MCAO cites for the proposition that "reasonable minds differ on when a directed verdict of acquittal should be granted," (Pet. at 4), three do not

involve the reversal of an erroneously directed verdict of acquittal. In *State v. Miramon*, 27 Ariz. App. 451, 555 P.2d 1139 (1976), for example, the court of appeals reversed a conviction and ordered the trial court to enter a verdict of acquittal. Likewise, in *State v. Just*, 138 Ariz. 534, 675 P.2d 1353 (App. 1983), the court of appeals upheld the denial of a post-verdict Rule 20 motion noting that, where the jury had been presented with evidence on both first- and second-degree murder and had convicted only on second-degree murder, there was little evidence of premeditation and perhaps a directed verdict of acquittal would have been appropriate on the first-degree charge, leaving the second-degree conviction intact. Finally, *State v. Fischer*, 238 Ariz. 309, 360 P.3d 105 (App. 2015), does not even involve a Rule 20 motion, but a Rule 24.1 motion for a new trial. In that case, the trial judge ordered a new trial because the verdict was against the weight of the evidence, but the order was reversed on appeal. That case is currently under review by this Court. No. CR-15-0380-CR. If anything, MCAO's failure to identify a single case in which a pre-verdict judgment of acquittal was granted -- properly or improperly -- suggests this Court should be concerned that trial courts are granting too few pre-verdict acquittals, not too many.

MCAO's final argument appears to be that deleting the pre-verdict Rule 20 motion would protect against instances in which the judge is wrong on the law, does not know the law, or the law is unclear. MCAO once again fails to demonstrate that there is a problem here that needs to be solved. That it is able to cite only one case in which a directed verdict was overturned because the judge simply did not know the law, *see State v. Sabalos*, 178 Ariz. 420, 874 P.2d 977 (App. 1994), illustrates this point.

The pre-verdict Rule 20 motion serves an important purpose. It allows a defendant to hold the state to its burden of proof before making the important decision whether to tender an affirmative defense at trial. In so doing, it preserves the burden of proof while safeguarding a defendant's right not to provide evidence against himself, two foundational concepts of our criminal justice system. The contravening interest that MCAO posits, the ability to appeal a motion of acquittal, is attainable through a special

action and, in any event, is not comparable to the right against self-incrimination nor is there any reason to think a right to appeal would lead to a groundswell of reversals.

II. The Right to A Jury Trial Belongs to the Defendant, not the State

MCAO argues that the pre-verdict Rule 20 motion inappropriately deprives it of its right to a jury trial. This argument misapprehends the historical purpose of the right to a jury trial, which the framers intended "to guard against a spirit of oppression and tyranny on the part of the rulers." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (internal citations omitted). This desire is reflected in the fact that a motion for a directed verdict is distinctly one-sided. Although a judge may direct a verdict for a defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict of guilty no matter how overwhelming the evidence. *Sullivan v. Louisiana*, 508 U.S. 275, 276 (1993).

The Sixth Amendment provides that the right to trial by jury should *adhere to defendants to protect against the encroachment of the state*. *See Apprendi*, 530 U.S. at 477. The State has no comparable right or interest. Rather, the state's interest is, at most, an interest in protecting the preference for jury trials. The United States and Arizona constitutions recognize that our system generally prefers trial by jury as the "normal and . . . preferable mode of disposing of issues of fact in criminal cases." *Patton v. United States*, 281 U.S. 276, 312 (1930) *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78 (1970). From that preference, the federal courts, and many state courts require that both a defendant and the government waive a jury trial. *Singer v. United States*, 380 U.S. 24, 35-7 (1965).

"As with any mode that might be devised to determine guilt, trial by jury has its weaknesses and the potential for misuse." *Id*. at 35. As such, a number of states allow a defendant to waive a jury without government approval. *See id*. at 36-37 (noting that Georgia, Washington, Connecticut and Illinois are among those states). Although Ariz. R. Crim. P. 18.1(b) provides that the State must approve a defendant's waiver of his right to a trial by jury, that rule only reflects Arizona's preference for a trial by jury; it

does not emanate from any right, constitutional or otherwise, that the State holds in trial by jury.

III. A Crime Victim's Rights Do not Override a Defendant's Right to Due Process

MCAO argues that a mid-trial acquittal denies a crime victim his constitutional right to "justice and due process" under the Victim's Bill of Rights ("VBR"). Ariz. Const. art II, § 2.1. The Arizona Coalition to End Sexual and Domestic Violence ("ACESDV") and Arizona Voice for Crime Victims ("AVCV") additionally claim that such an acquittal denies a victim the "right to notice, to be heard, and to participate in a conference prior to counts being dismissed." (Comment of ACESDV at 2.)

A victim has no right to notice of a defendant's acquittal. The Rules of Criminal Procedure grant a victim the right "to be given reasonable notice of the date, time and place of any criminal proceeding." Ariz. R. Crim. P. 39(b)(3). This right is to facilitate the victim's right "to be present at all criminal proceedings." Ariz. R. Crim. P. 39(b)(2). The right to notice does not give the victim a right to notice that a defendant will be acquitted, whether that be by the court or the jury. Rule 20 does not impede a victim's ability to be present at court proceedings.

Further, when the rights of victims conflict with the constitutional rights of a defendant to due process, the defendant's right is superior. *State ex rel. Romley v. Super. Ct.*, 172 Ariz. 232, 236, 836 P.2d 445, 449 (App. 1992). The rights accorded under the VBR "should not be a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense." *Id.* at 241, 836 P.2d at 454. As has already been discussed, the pre-verdict motion for acquittal preserves the burden of proof and protects a defendant's right against having to give evidence against himself. A victim may not burden a defendant's enjoyment of those constitutional rights by strategically employing what is effectively a procedural right.

IV. The Vast Majority of Jurisdictions Retain the Pre-Verdict Motion for Acquittal

Deleting Rule 20 would not only significantly undermine the burden of proof and impair the privilege against self-incrimination; it would place Arizona in a distinct minority of states that have eliminated the pre-verdict motion for acquittal. Only two states, Nevada and Louisiana, have eliminated a defendant's ability to seek a motion for acquittal before the jury renders a verdict. Nev. Rev. Stat. § 175.381(1); *State v. Parfait*, 693 So.2d 1232, 1242 (La. App. 1997).[1] The remaining forty-seven states, the District of Columbia, and the Federal Rules of Criminal Procedure all provide mechanisms for a pre-verdict motion for acquittal. *See, e.g.*, Fed. R. Crim. P. 29(a); D.C. Super. Ct. R. Crim. P. 29(a); Colo. R. Crim. P. 29(a); Cal. Penal Code § 1118.1; Fla. R. Crim. P. 3.380.

CONCLUSION

MCAO's request to delete Rule 20 is a solution in search of a problem. The removal of the opportunity for a pre-verdict judgment of acquittal would severely burden a defendant's constitutional rights and provide little benefit. Based on the foregoing, AACJ and MCPD voice their strong opposition to the Petition to Delete Rule 20, to Add Rule 24.1 and to Renumber Rules 24.1, 24.2, 24.3, and 24.4, Arizona Rules of Criminal Procedure.

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[1] Although Nevada has statutorily eliminated the pre-verdict motion for acquittal, its Supreme Court has refused to reverse such pre-verdict acquittals where they are nonetheless granted. *State v. Combs*, 14 P.3d 520 (Nev. 2000). Thus Nevada still retains a *de facto*, if not a *de jure*, pre-verdict motion for acquittal.

DATED this 20th day of May, 2016.

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THE FOREGOING has been electronically filed this 20th day of May, 2016.