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ARIZONA SUPREME COURT

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

R-17-_____

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

15 The Maricopa County Attorney hereby renews last year's Petition to delete
16 Rule 20, Arizona Rules of Criminal Procedure and to move the post-verdict
17 provisions of that rule to Post-Verdict Proceedings. This request is made to enforce
18 the State's right to a jury trial and to protect victim's rights while retaining sufficient
19 protections for defendants who may be convicted in cases with insufficient evidence.

20 Respectfully submitted this 10th day of January, 2017.

21 WILLIAM G. MONTGOMERY
22 MARICOPA COUNTY ATTORNEY

23 By 
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MARK FAULL
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1 **I. Introduction**

2 Last year, the Maricopa County Attorney's Office (MCAO) filed a petition to
3 remove a criminal trial court's power to direct a pre-verdict acquittal under Rule 20,
4 Arizona Rules of Criminal Procedure. After receiving comments for and against this
5 request, this Court denied the petition. When requested rule changes are denied, this
6 Court does not issue any orders explaining the basis for the decision. Because the
7 Supreme Court has expanded to seven members, the MCAO renews its request from
8 last year to eliminate pre-verdict directed verdicts of acquittal. While this year's
9 petition rests on the same policy rationale, this petition also addresses some of the
10 comments filed against the change last year.
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12 **II. Argument**

13 **A TRIAL COURT'S PROCEDURAL POWER TO DIRECT AN ACQUITTAL**
14 **SHOULD ONLY ARISE AFTER CONVICTION.**
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16 **A. The trial court's procedural power to enter a mid-trial acquittal**
17 **removes the State's right to have a jury decide a criminal case.**
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19 The right to a jury trial in criminal cases in Arizona is held by both the accused
20 and the State. ARIZ. CONST. art. VI, § 17; A.R.S. § 13-3983; *Phoenix City*
21 *Prosecutor's Office v. Ybarra*, 218 Ariz. 232, 234, ¶ 10, 182 P.3d 1166, 1168 (2008);
22 *State v. Poehnelt*, 150 Ariz. 136, 147, 722 P.2d 304, 315 (App. 1985). The State's
23 right to a jury trial was recognized in *Ybarra* as noted in *Alejandro v. Harrison* when
24 that court wrote, "*Ybarra* merely applied [A.R.S.] § 13-3983 and explained that both
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1 the State and a defendant have the independent right to a jury trial in criminal
2 proceedings and a court could not grant a bench trial to a defendant if the State
3 insisted on its right to a jury trial on the charges.” 223 Ariz. 21, 26, ¶ 15, 219 P.3d
4 231(App. 2009) (emphasis added).

6 Despite this statutory right, Arizona’s Rules of Criminal Procedure allow a trial
7 judge, on his or her own motion, to direct a verdict of acquittal in a criminal case
8 after the State has rested if, in the court’s view, there is “no substantial evidence to
9 warrant a conviction.” ARIZ. R. CRIM. P. 20. Thus, Rule 20 permits a judge to
10 remove the case from the jury’s consideration effectively denying the State’s its right
11 to a have a jury decide the issue. The only protection for the State is the high
12 standard a judge must apply to grant a directed acquittal. “A directed verdict should
13 not be granted if the evidence is such that reasonable minds may differ on the
14 inferences to be drawn therefrom.” *State v. Mosley*, 119 Ariz. 393, 402, 581 P.2d
15 238, 247 (1978) (citing *State v. Latina*, 25 Ariz. App. 66, 540 P.2d 1285 (1975)).

19 The problem with Rule 20 is that a single judge is deciding whether reasonable
20 minds may differ. That type of decision is the entire point of a jury trial – the
21 collective wisdom of members of our community is better than the views of one
22 person. The jury should be drawing inferences from the evidence and reaching
23 reasonable conclusions from that evidence. The Rule permits a judge to take these
24 decisions away from 6, 8 or 12 members of our community and it effectively turns a
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1 jury trial into a bench trial rendering the right to a jury trial meaningless. The court
2 should not have the power to grant a mid-trial acquittal any more than it should have
3 the power to enter a mid-trial verdict of guilt if the evidence of guilt is overwhelming.
4 In Arizona, both the defendant and the State have a right to have a jury decide the
5 case and Rule 20 unnecessarily deprives one party of that right.
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8 **B. A mid-trial acquittal is a permanent and final verdict that prevents any**
9 **appellate review even when the court is clearly mistaken on the law or**
10 **facts.**

11 Even more concerning than the court denying the State a jury trial, is the fact
12 that a mid-trial directed acquittal is final and completely immune from review. If a
13 judgment of acquittal is entered under Rule 20 before a jury reaches a verdict, double
14 jeopardy bars any appeal of that decision. *Evans v. Michigan*, 133 S. Ct 1069, 1081,
15 fn. 9, 185 L.Ed.2d 124 (2013); *State v. West*, 226 Ariz. 559, 562, 250 P.3d 1188,
16 1191 (2011). In fact, just last year, while MCAO's petition to eliminate mid-trial
17 directed acquittals was pending, the Court of Appeals reaffirmed that the rule
18 prevents not only appeals, but even a court's own reconsideration of a decision under
19 the rule. *See State v. Ruiz*, 239 Ariz. 379, 382-84, ¶¶ 11-15, 372 P.3d 323 (App.
20 2016). In *Ruiz*, the trial court stated, "I am going to dismiss Counts Two and Four"
21 but then, in the same conversation, the court decided that the attempted lesser
22 included offenses could go forward. The Court of Appeals reversed the subsequent
23 convictions because the minute entry said the court was reversing its dismissal of
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1 those counts. The Court of Appeals held that the prohibition against double jeopardy
2 prevented any reconsideration of a decision made under Rule 20 and reversed the
3 convictions. *Id.*

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5 The rule against reconsideration and appellate review is absolute regardless of
6 the egregiousness of any legal error. In *Evans*, it was undisputed that the trial court
7 erroneously directed a verdict of acquittal based on a misunderstanding of the
8 elements of the offense. *Evans*, 113 S. Ct. at 1073-74. Nevertheless, despite the
9 clear, uncontroverted fact that the judge erred as a matter of law, the United States
10 Supreme Court held that the prohibitions against double jeopardy barred any retrial of
11 the defendant because the trial court entered its ruling before any jury verdict. *Id.* at
12 1081.

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16 Similar errors have occurred here in Arizona as well. In *State v. Sabalos* the
17 trial court erroneously entered a post-verdict judgment of acquittal based on a
18 misunderstanding of DHS regulations and the breath test evidence in a DUI case.
19 178 Ariz. 420, 421-23, 874 P.2d 977, 978-80 (App. 1994). Because it was a post-
20 verdict judgment of acquittal the State had the ability to ask a court to review and
21 correct the error. Had the trial court granted the same motion based on same
22 incorrect legal grounds before the verdict was entered there would have been no way
23 to correct the error. Of course it is impossible to know how many times similar types
24 of errors have resulted in unreviewable mid-trial acquittals.

1 The law is clear: Under Rule 20, if a judge decides to direct a verdict of acquittal
2 after the State rests, but then a few moments later, the court realizes it was legally
3 mistaken about the necessary elements, nothing could be done to correct that
4 momentary mistake. No reconsideration by the trial court and no appeal to a higher
5 court. No matter the severity of the crime; no matter the impact on the victims or the
6 community; a momentary lapse in concentration or judgment would permanently end
7 the prosecution of that case. A reasonable justice system should not permit such a
8 blatant denial of justice for the victims or the State. The absolute, strict bar to review
9 and reconsideration described by the court in *Ruiz* coupled with the reality that the
10 court's decision may be based on clear legal error as in *Evans*, are sufficient
11 justifications for the proposed rule change. No victim should be denied justice and
12 no defendant should escape justice based purely on a judge's momentary legal error.

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14 In addition to legal error, courts can make mistakes about the strength of the
15 evidence in a case. Reasonable minds can differ on when the evidence requires a
16 directed verdict of acquittal. Some of the comments filed last year, noted that some
17 of the cases mentioned here are not even Rule 20 cases. That is, of course, true and
18 one main reason is precisely because appeals are not possible when a court grants a
19 pre-verdict Rule 20 motion. Regardless of the procedural posture, these cases help
20 illustrate the fact that sometimes judges make judgments about the strength of
21 evidence in cases that are later reversed on appeal. Thus, although one court may
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1 conclude that no reasonable minds can differ on inferences to be drawn from the
2 evidence, other judges may disagree. This fact emphasizes the importance of having
3 the ability to have a higher court review a lower court's decision.
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5 In *State v. Miramon*, for example, the Court of Appeals reversed a conviction
6 and directed that a judgment of acquittal be entered on the extremely fact intensive
7 question of whether the defendant "exercised dominion and control" over drugs. 27
8 Ariz. App. 451, 452-53, 555 P.2d 1139, 1140-41 (1976). In that case, the trial judge,
9 the jurors, and even one dissenting judge on the Court of Appeals all believed that the
10 evidence was sufficient to sustain the conviction. This case shows that of the four
11 judges who assessed the evidence, half of them believed the evidence was sufficient
12 and the other half disagreed. The point isn't whether the ultimate result was a
13 conviction or an acquittal; the point is that determining whether reasonable minds can
14 differ on inferences from the evidence is difficult to apply in practice and it is a
15 decision that should be subject to review. Numerous other Arizona cases also
16 highlight the difficulty in applying the Rule 20 standard in practice and the
17 importance of additional review of that decision. See e.g. *State v. Alvarado*, 219
18 Ariz. 540, 200 P.3d. 1037 (App. 2008) (trial court granted a post-verdict Rule 20
19 motion finding that the State did not prove the defendant committed a voluntary act in
20 on a prison contraband case and the Court of Appeals reversed and reinstated the
21 verdict); *State v. Just*, 138 Ariz. 534, 545-46, 675 P.2d 1252, 1364-65 (App. 1983)
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1 (three appellate judges disagreed with the trial judge regarding evidence supporting
2 premeditation); *State v. Paoletto*, 133 Ariz. 412, 416, 652 P.2d 151, 155 (App. 1982)
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4 (three judges reversed a post-verdict judgment of acquittal finding that “the trial court
5 erred in invading the province of the jury by granting the defendant’s motion for
6 acquittal based on his belief that the victim’s testimony was not credible.”).¹
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8 One comment filed last year argued that the State has sufficient appellate
9 remedies because the State could file a special action during trial to seek review of
10 incorrect legal rulings. While this fact is, of course, true, it does little to address the
11 problem of pre-verdict Rule 20 motions. First, to file a special action, the State must
12 be able to anticipate where the court may err. While it may be possible in some cases
13 to correctly anticipate such issues and seek early rulings to address them, in the vast
14 majority of criminal cases such prescience is not possible. For example, the parties in
15 the *Evans* case could not have anticipated that the court would misunderstand the
16 very elements of the offense. Second, to seek a special action, the court has to
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20 ¹ *Paoletto* also involved legal error because the trial court believed that because it had
21 to determine the probation violation matter, it was a fact finder and was obligated to
22 supplant the jury’s credibility findings with its own. 133 Ariz. at 415, 652 P.2d at
23 154. The Court of Appeal rejected that notion, “We know of no authority, nor has
24 any been cited, which would suggest that by consolidating a probation violation
25 hearing with a jury trial on the substantive charges, the jury’s verdict is in some way
26 rendered advisory.” *Id.* at 416, 652 P.2d at 155. Of course if the trial judge had
27 directed this verdict when the State rested or after the defendant rested – as the
28 defense requested – this clear legal error would have avoided any review and this
victim would have been denied justice in this serious case involving kidnapping,
armed robbery and sexual assault based on a clear mistake by the trial court. No less
important, the defendant would have faced no consequences for his horrible crimes.

1 actually make a ruling and by the time a court has potentially erred by granting a pre-
2 verdict Rule 20 motion, it is too late to seek special action review because, as
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4 discussed above, any appeal or reconsideration of that decision would violate the
5 defendant's double jeopardy protections. Third, special actions are discretionary and
6 are extremely inefficient for the parties, the jury, the trial court, and the Court of
7 Appeals. Special actions do not give the State any meaningful appellate review in the
8 context of Rule 20.
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10 One comment filed last year suggested that somehow this rule change would
11 hold wrongfully convicted defendants in jail until the matter was addressed on
12 appeal. Of course this is completely inaccurate. The proposed rule change would not
13 alter a court's power to direct a verdict of acquittal; it would only impact the timing
14 of that directed verdict. To the extent a wrongfully accused defendant would be
15 vindicated by a Rule 20 motion, the same would be true under this proposed change –
16 the court would just grant the motion after the verdict. In that scenario, the defendant
17 would be acquitted of the crime for all purposes until and unless the State appealed
18 and a higher court reinstated the jury's verdict. Thus, this proposed rule change
19 permits the State to seek higher review of a court's directed verdict of acquittal while
20 retaining due process protections for defendants if a judge believes the defendant was
21 convicted with insufficient evidence.
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1 **C. The trial court’s procedural power to enter a mid-trial acquittal**
2 **infringes on a victim’s constitutional rights.**

3 In Arizona, the victim of a crime has constitutional rights that were enacted “[t]o
4 preserve and protect victims’ rights to justice and due process. . .” Ariz. Const. art
5 II, § 2.1(A). The concepts of justice and due process have evolved over time, but in
6 2017, any reasonable concept of justice and due process in a criminal case should
7 include the right to have final, case-ending judicial decisions reviewed by a higher
8 court. Contrary to some comments submitted last year, no one would suggest that a
9 victim has the right to a conviction in a particular case. The rights to justice and due
10 process, however, should prevent a single judge presiding over a jury trial from
11 permanently ending a prosecution in a completely unreviewable manner. When a
12 Rule 20 directed verdict is granted in a jury trial for a crime involving a victim, that
13 verdict has denied the victim the right to due process – not because the case ended in
14 an acquittal – but because it ended based on a single judge’s opinion of the evidence,
15 not the jury’s, and no higher court can review that decision. Even worse, as discussed
16 above, the court’s decision could be based on issues that have nothing to do with the
17 facts but are rather a clear misunderstanding of the law. But even in the case of clear
18 legal error, the victim, erroneously denied justice, has no legal remedies. Such a
19 system completely undermines a victim’s right to justice and due process.
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26 Some comments last year noted that a sovereign’s right to appeal is a relatively
27 modern concept. While that may be true, it only proves that the concept of due
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1 process has evolved to include more opportunities for review because people – even
2 judges – make mistakes and the State and victims should be no more deprived of their
3 rights to justice and due process based on a judge’s error than a defendant should be.
4 Indeed to the extent that eliminating Rule 20 would put Arizona at the forefront of
5 protecting a victim’s right to due process that would be entirely appropriate and in
6 keeping with Arizona’s proud tradition of being a leader in protecting crime victims.
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9 **D. The power to grant a mid-trial acquittal is not necessary to secure a**
10 **defendant’s constitutional rights.**

11 According to the comments received last year from the defense bar, the potential
12 for an unreviewable, erroneous judicial acquittal is an acceptable price to pay because
13 the current rule secures a defendant’s right against self-incrimination. The comments
14 noted that the purpose of permitting a directed verdict immediately upon the
15 conclusion of the State’s case was to prevent a defendant from presenting evidence,
16 including the defendant’s own testimony, that ultimately filled in the gaps in the
17 State’s case. No doubt it is an advantage for a defendant to see if a judge will enter
18 an acquittal mid-trial, but having that advantage is not a constitutional necessity. As
19 the United States Supreme Court noted in *Evans*:
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23 Nothing obligates a jurisdiction to afford its trial courts the power to
24 grant a midtrial acquittal, and at least two States disallow the practice.
25 See Nev.Rev.Stat. § 175.381(1) (2011); *State v. Parfait*, 96,1814
26 (La.App. 1 Cir. 05/09/97), 693 So.2d 1232, 1242. Many jurisdictions,
27 including the federal system, allow or encourage their courts to defer
28 consideration of a motion to acquit until after the jury returns a verdict,
which mitigates double jeopardy concerns. See Fed. Rule Crim. Proc.

1 29(b). And for cases such as this, in which a trial court's interpretation of
2 the relevant criminal statute is likely to prove dispositive, we see no
3 reason why jurisdictions could not provide for mandatory continuances
4 or expedited interlocutory appeals if they wished to prevent misguided
5 acquittals from being entered. But having chosen to vest its courts with
6 the power to grant midtrial acquittals, the State must bear the
7 corresponding risk that some acquittals will be granted in error.

8 *Evans*, 133 S. Ct. at 1081, 185 L. Ed. 2d 124 (2013) (footnotes omitted). If the right
9 against self-incrimination required a chance at a midtrial acquittal, the Supreme Court
10 certainly would not have made these comments. Additionally, whether a defendant
11 chooses to present a defense and whether that presentation includes his or her
12 testimony is a choice the defendant gets to make – it is not compelled simply because
13 the criminal rules do not provide for a mid-trial acquittal option. If a trial is the
14 search for the truth we should be less concerned about a defendant's freely made
15 decision to present evidence than we are about a court erroneously granting an
16 acquittal. Nevertheless, to the extent there is a valid concern about a defendant's case
17 actually producing evidence of guilt, the rule could simply require the court to
18 consider only the evidence presented by the State in determining whether to grant a
19 post-verdict judgment of acquittal which is exactly what the Federal Rules and
20 several states have done. *See* FED. R. CRIM. P. 29(b) ("If the court reserves
21 decision, it must decide the motion on the basis of the evidence at the time the ruling
22 was reserved"); MICH. R. MCR 6.419 (modified following the decision in *Evans* to
23 match the Federal rule to permit a court to defer the decision and requiring the court
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1 to only consider the evidence from the time the ruling was reserved); N.Y. CRIM. P.
2 LAW § 290.10(1); N.D. R. CRIM. P. 29; W. VA. R. CRIM. P. 29.

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4 **E. Judicial efficiency does not justify the power to enter an unreviewable,**
5 **pre-verdict acquittal.**

6 Some comments filed against the change last year noted judicial efficiency as a
7 basis to retain this rule. Because everyone agrees that Rule 20 motions are not
8 regularly granted, it is difficult to understand how the power to grant pre-verdict
9 judgments of acquittal is a case management tool. Rule 20 is an exceptionally poor
10 tool for calendar management because the number of mid-trial Rule 20 motions
11 would never be based on the size of a court's docket. Additionally, in the vast
12 majority of criminal trials, by the time the State rests, the majority of the case is over
13 and even if it continues a few days longer to verdict, that amount of extra time is a
14 small price to pay to gain the ability to appeal erroneous directed verdicts.
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18 **IV. Conclusion**

19 Contrary to the assertions in one comment last year that repeatedly suggested
20 that the MCAO's goal with this change was to secure more convictions, the clear goal
21 is to achieve a just result in every case. If a court erroneously grants a pre-verdict
22 Rule 20 motion, justice is denied in that case. Commenters last year frequently stated
23 that this rule change was unnecessary and "in search of a problem," but even the
24 possibility of denying the State and victims justice in a criminal case *is* a problem that
25 should be corrected.
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1 This proposed change does not ask this Court to eliminate a trial court's ability
2 to enter an acquittal when a conviction is based on insufficient evidence; the change
3 would simply require the trial court to defer a decision until the jury has rendered a
4 verdict. The societal cost for the wrongful entry of a pre-verdict judicial acquittal is
5 unusually high because it completely and permanently deprives the State and any
6 victim of the right to seek justice for the crime. To provide for appellate review of a
7 trial court's decision to direct an acquittal, this Court should modify the Rules of
8 Criminal Procedure to require that directed verdicts of acquittal be permitted only
9 after a jury has returned a verdict of guilt. This modified procedure will still permit a
10 trial judge to direct a judgment of acquittal but it will also afford the State the
11 opportunity to seek appellate review of that critical decision.
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16 Respectfully submitted this 10th day of January, 2017.

17 WILLIAM G. MONTGOMERY
18 MARICOPA COUNTY ATTORNEY

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20 By 
21 MARK FAULL
22 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, must enter a
20 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) *Aggravation Hearings.* In a non-capital case, after the jurors have
23 found an aggravating circumstance, or in a capital case after the close of
24 evidence on either side in the aggravation phase of the sentencing
25 proceeding, on motion of the defendant, or on its own, the court must
26 enter a judgment that the aggravating circumstance was not proven if it
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1 determines that there is no substantial evidence to support the finding of
2 the aggravating circumstance.
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4 b. Timeliness. A motion for judgment of acquittal shall be made no later than
5 10 days after the verdict of conviction has been rendered. A motion for
6 judgment of acquittal for an aggravating factor shall be made no later than 10
7 days after the aggravation finding has been rendered.
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10 Renumber remaining rules in Rule 24, so that current 24.1 becomes 24.2, 24.2
11 becomes 24.3, 24.3 becomes 24.4, 24.4 becomes 24.5.
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