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**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

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| In the Matter of: | ) | No. R-19-____ |
| | ) | |
| | ) | **PETITION TO AMEND ARIZONA** |
| Petition to Amend Arizona Rule of | ) | **RULE OF CRIMINAL** |
| Criminal Procedure 20(b)(1) | ) | **PROCEDURE 20(B)** |
| | ) | |

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") hereby submits the following petition to amend Arizona Rule of Criminal Procedure 20(b), subsections (1) and (2), to address the anomalous and absurd result of permitting a trial court to entertain a motion for judgment of acquittal only in cases where the jury returns a guilty verdict but not when the jury fails to reach a unanimous verdict.

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.

## Background

In *State v. Diaz*, 221 Ariz. 209, 211 ¶ 4 (App. 2009), *vacated on other grounds*, 223 Ariz. 358 (2010), the defendant challenged his conviction on one count of aggravated assault against R. on the ground that he had previously been tried and the State presented insufficient evidence to convict at that first trial. The court of appeals refused to address the issue because the first jury did not reach a verdict:

> During his first trial, Diaz moved for a judgment of acquittal on the count charging him with the aggravated assault of R. and now asserts the court erred in denying his motion. But, because the jury was unable to reach a verdict regarding his alleged aggravated assault of R., Diaz's first trial ended in a mistrial on that charge. *See* Ariz. R. Crim. P. 22.4. "Where the jur[ors] disagree and are discharged by the court, then the status of the case is the same as though there had been no trial at all" on the charges as to which the jurors could not agree. *State v. Woodring*, 95 Ariz. 84, 86, 386 P.2d 851, 852 (1963); *cf. State ex rel. Sullivan v. Patterson*, 64 Ariz. 40, 45, 165 P.2d 309, 312 (1946) (mistrial renders "entire proceedings ... a nullity"). Because the declaration of a mistrial had the effect of nullifying all trial proceedings related to the alleged

> aggravated assault of R., including those pertaining to Diaz's motion for a judgment of acquittal, it is as if they had never happened, and there is nothing for us to review. *See Woodring*, 95 Ariz. at 86, 386 P.2d at 852. We, therefore, do not address the issue further.

While both cases upon which *Diaz* relied involved juries that were discharged after being unable to return unanimous verdicts, neither case involved the question whether the evidence in the first trial was sufficient to convict.

The court of appeals did not have another opportunity to address this question until *State v. Godoy (Whitney)*, 244 Ariz. 327 (App. 2017). In that case, defendant Whitney was charged with five counts of child abuse. The trial court granted a motion pursuant to Rule 20(a) as to one count and allowed the remaining counts to go to the jury. *Id*. at 328 ¶ 2. The judge discovered juror misconduct during deliberations and granted Whitney's motion for mistrial. *Id*. ¶ 3. Eight days after the jury was discharged, Whitney filed a "Motion for Reconsideration of the Rule 20(a) Judgement [sic] of Acquittal." *Id*. ¶ 4. In her reply, Whitney argued that the motion alternatively should be considered under Rule 20(b), while affirming her belief that "Rule 20(a) is the more appropriate mechanism under the circumstances." *Id*. The trial court determined that it should be treated as a motion to reconsider the denial of the Rule 20(a) motion, and it granted the motion as to three of the remaining four counts. *Id*. ¶ 5.

The court of appeals held that the trial court erred because the procedure for requesting reconsideration of a denial of a Rule 20 motion is delineated within Rule

20(b), and that under the Rule's plain language, the trial court "lacked authority to consider Whitney's renewed Rule 20 motion." *Id.* at 329 ¶¶ 8-9. In particular, the court of appeals noted that the "types of verdict" are limited; "except for specialized verdicts, such as guilty except insane or capital verdicts, 'the jury shall in all cases render a verdict finding the defendant guilty or not guilty.'" *Id.* ¶ 8 (quoting Rule 23.2). "Had our supreme court intended to allow a motion for judgment of acquittal to be renewed after a mistrial had been declared or the jury was otherwise discharged without reaching a verdict, it could have done so expressly." *Id.* ¶ 9. The court of appeals also relied on the fact that in those jurisdictions that allow the practice of renewing a motion for judgment of acquittal after a mistrial, including the federal system, the rule or statute governing the procedure contains express language permitting it. *Id.* ¶ 10.

Although the court of appeals was technically correct with regard to the plain language of Rule 20(b), its result was absurd. *Cf. State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 345 ¶ 13 (2014) ("Statutes should be construed sensibly to avoid reaching an absurd conclusion."). At the moment the case is presented to the jury and deliberations begin, it is unknown what the jury will do with the case. Possibly it will convict or acquit; possibly it will be unable to reach a unanimous verdict on some or all counts; and as in Whitney's case, its members might commit misconduct. What is known with absolute certainty, however, is the evidence that was presented

in the case is complete. It is almost axiomatic that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). As this Court and the U.S. Supreme Court have recognized, "[w]hen a case is reversed for any reason but insufficient evidence, 'the original conviction has been nullified and "the slate wiped clean."'" *State v. Moody*, 208 Ariz. 424, 439 ¶ 26 (2004) (quoting *Bullington v. Missouri*, 451 U.S. 430, 442 (1981), *quoting in turn North Carolina v. Pearce*, 395 U.S. 711, 721 (1969)). While Diaz and Whitney may have avoided conviction in their first trials, the State was still allowed to retry them in spite of the fact that insufficient evidence had been produced at the first trial. The court of appeals' reading of Rule 20(b) allows a defendant to obtain relief from a guilty verdict where the jury unanimously voted guilty after 10 minutes of deliberation, but does not allow a similarly situated defendant to seek relief if any jurors voted for acquittal.

The court of appeals' restrictive interpretation of Rule 20(b) is also bad public policy. This Court explained the benefits of a more expansive reading of Rule 20(b):

> Fourth, *Hyder's* limitation makes little sense from a policy and systemic standpoint. Because *Hyder* sharply limits the ability to grant a post-verdict motion under Rule 20(b), judges in close cases might err on the side of granting the defendant's pre-verdict motion under Rule 20(a), and if so, double jeopardy principles would preclude the state from challenging that ruling on appeal. *See Smalis v. Pennsylvania*, 476 U.S. 140, 145–46, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). Conversely, if judges are able to reassess the quantum of evidence after a verdict,

> there will be less incentive to grant pre-verdict motions under Rule 20(a).

*State v. West*, 226 Ariz. 559, 562 ¶ 12 (2011). Now that the law in Arizona is that Rule 20(b) motions are unavailable in cases where the jury fails to return a verdict, trial judges are incentivized to grant Rule 20(a) motions, in spite of the concerns expressed in *West*. Furthermore, some trial judges might become more likely to ignore jurors' claims that they are hopelessly deadlocked and give an *Allen*[1] charge. *See State v. McCrimmon*, 187 Ariz. 169, 172-73 (1996). Still, other judges might become more inclined to suggest to jurors that they may be hopelessly deadlocked when they are not, which would have the effect of engendering litigation that the jury was not discharged for manifest necessity. *See State v. Fenton*, 19 Ariz. App. 274, 276-77 (1973) (where record reflected "merely a weary group of jurors," trial court's discharge of jury violated defendant's right to be tried by a single tribunal).

**Proposed Rule**

Rule 20(b)(1) currently allows the defendant to file a motion "no later than 10 days after any verdict is returned." Rule 20(b)(2) states, "After the verdict, if the court determines that there is no substantial evidence to support the verdict, the court

[1] Named for *Allen v. United States*, 164 U.S. 492 (1896), this Court has described it as a "'dynamite' charge" and defined it as "a supplemental instruction the court gives to encourage a jury to reach a verdict after that jury has been unable to agree after some period of deliberation." *State v. Dunlap*, 187 Ariz. 441, 464 n.5 (1996) (citing *United States v. Nickell*, 883 F.2d 824, 828 (9th Cir. 1989)).

on its own must order a judgment of acquittal or find an aggravator or other sentence enhancement not proven." AACJ proposes adding the phrase "or after the court discharges the jury, whichever is later" to the end of Rule 20(b)(1), and modifying Rule 20(b)(2) to begin: "After the verdict or after the court discharges the jury." *See* Appendix A. This would track the federal rule, which says: "A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later." Fed. R. Crim. P. 29(c)(1).

This change would not have any kind of deleterious effect on the State's ability to prosecute or a victim's right to justice, because neither the State nor victims have a right to obtain a conviction that is devoid of substantial evidence. On the other hand, this change would only fix an anomaly in the law. As the court of appeals recognized in *Godoy*, in addition to the federal system, thirteen other states have such a rule. 244 Ariz. at 329 ¶ 10 (citing state rules).

This Court's Criminal Rules Task Force offered substantive as well as stylistic amendments to Rule 20(b), such as the addition of the opportunity to make a post-verdict motion even if the defendant failed to make a pre-verdict motion under Rule 20(a). That Task Force recognized the absurdity of denying a defendant this opportunity to obtain a judgment of acquittal from the trial court even though that same defendant would have an opportunity to raise sufficiency of the evidence as an

appellate issue. "If those qualifications, strictly applied, are not met, a trial court must let a conviction stand even if it finds post-verdict no substantial evidence to warrant the conviction. But that potentiality is illogical and, more importantly, would conflict with well-settled law." *West*, 226 Ariz. at 561-62 ¶ 11. *Godoy* was decided on September 26, 2017, well after the Criminal Rules Task Force completed its work, and thus it had no opportunity to consider this issue.

## Conclusion

For these reasons, AACJ requests this Court grant the petition to amend Rules 20(b)(1) and 20(b)(2).

DATED (electronically filed): January 11, 2019.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/ David J. Euchner
David J. Euchner & Nathan S. Benedict

Electronically filed with the Court
on January 10, 2019

/s/ David J. Euchner

# APPENDIX A

**Rule 20. Judgment of Acquittal or Unproven Aggravator**

**(a) Before Verdict.**

(1) Acquittal. After the close of evidence on either side, and on motion or on its own, the court must enter a judgment of acquittal on any offense charged in an indictment, information, or complaint if there is no substantial evidence to support a conviction.

(2) Aggravation. After the close of evidence on either side in an aggravation phase, and on motion or on its own, the court must enter a judgment that an aggravating circumstance or other sentence enhancement was not proven if there is no substantial evidence to support the allegation.

(3) Timing. The court must rule on a defendant's motion with all possible speed. Until the motion is decided, the defendant is not required to proceed.

**(b) After Verdict.**

(1) On Motion. A defendant may make or renew a motion for judgment of acquittal or unproven aggravator or other sentence enhancement on any conviction or allegation no later than 10 days after any verdict is returned **or after the court discharges the jury, whichever is later**.

(2) On Court's Own Initiative. After the verdict **or after the court discharges the jury**, if the court determines that there is no substantial evidence to support the verdict, the court on its own must order a judgment of acquittal or find an aggravator or other sentence enhancement not proven.