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In the Matter of: 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,	No. R-17-0028 COMMENT OF THE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN 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

Arizona Attorneys for Criminal Justice ("AACJ") respectfully submits this comment opposing the Petition of the Maricopa County Attorney's Office ("MCAO") to delete Rule 20, Arizona Rules of Criminal Procedure, and renewing the objections AACJ expressed in its comment to this same rule change petition in 2016.

INTRODUCTION

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 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.

ARGUMENT

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 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 fails to note in its petition even a single instance of an improper grant.[1] 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, although this all-too-unlikely and clearly avoidable harm might result in some guilty persons going free, 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.

[1] Contrary to MCAO argument that "it is impossible to know how many times . . . errors have resulted in unreviewable mid-trial acquittals," Petition at 5, it seems self-evident that MCAO, the one entity that conducts more criminal prosecutions than any other in this State, is well-positioned to identify the number of pre-judgment acquittals. MCAO's failure to identify even one suggests it does not deem this information important enough to track, or that such instances simply don't occur.

I. Rule 20 Holds the State to Its Burden of Proof Beyond a Reasonable Doubt 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. "[T]he 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, 133, 137 P. 550, 553 (1913). After close of the state's evidence, defendant moved for a directed verdict of acquittal. When the motion was denied, defendant provided his own evidence, after which he was convicted of burglary. On appeal, this 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.

Id. 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). Arizona courts have 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). This concern ultimately resulted in an amendment to the rule *specifically prohibiting* a trial court from reserving its ruling. *See* Ariz. R. Crim. P. 20(a) ("The court's decision on a defendant's motion shall not be reserved, but shall be made with all possible speed.").

MCAO argues that the ability to seek a mid-trial acquittal is an "advantage" that is not constitutionally mandated. But whether the constitution *requires* a pre-verdict motion for acquittal is beside the point. Indeed, if that were the case, then Rule 20 would be irrelevant. Rather, the inquiry should be whether the rule "provide[s] for the just, speedy determination of every criminal proceeding" and "protect[s] the fundamental rights of the individual while preserving the public welfare." *See* Ariz. R. Crim. P. 1.2. Since before statehood, Arizona has recognized that the pre-verdict motion for acquittal serves these goals. MCAO provides no reason to deviate from over a century of inherited wisdom—other than its wish to make it easier to secure convictions.

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.

II. The State's Interest in a Jury Trial Is Limited and Is Unimpeded by Rule 20

A. 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, 277 (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, 35-37 (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 Arizona Rule of Criminal Procedure 18.1(b) and A.R.S. § 13-3983 provide 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.

B. The State's Interest in a Jury Trial Is Limited

The cases cited by MCAO to support its claim that the State has a right to a jury trial do not so hold. They merely point out that, by statute, the prosecution must consent to the waiver of the right to a jury trial. *See Phoenix City Prosecutor's Office v. Ybarra*, 218 Ariz. 232, 235 ¶ 14, 182 P.3d 1166, 1169

(2008) ("[The] statute requires the prosecution's agreement before the court may grant a defendant's request for a bench trial."); *State v. Poehnelt*, 150 Ariz. 136, 147, 722 P.2d 304, 315 (App. 1985) ("[T]he statute and the criminal rule require the consent of the parties in order for the jury to be waived in criminal proceeding."). However, the "right" is strictly limited. "[T]he State's right to a jury trial [is] relevant *only* to a defense request for a bench trial." *Alejandro v. Harrison*, 223 Ariz. 21, 26 ¶ 14, 219 P.3d 231, 236 (App. 2009) (holding that state's right to a jury trial does not foreclose defendant's right to unilaterally enter a guilty plea).

The State's "right" to a jury trial is thus nothing more than a procedural right to object if the defendant requests a bench trial. Arizona courts have not extended this "right" any further. The Constitutional right to a jury trial, however, is a robust protection of the individual against encroachment by the State. *Apprendi*, 530 U.S. at 477. This right is "a substantial rather than a mere procedural or technical right." *State v. Thompson*, 68 Ariz. 386, 390, 206 P.2d 1037, 1039 (1949). Thus, although Arizona's Rules of Criminal Procedure provide 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 to a jury trial.

C. The State's Interest in a Jury Trial is Unaffected by Pre-Verdict Acquittal

Furthermore, whatever interest the State has in a jury trial is unaffected by a judgment of acquittal before the jury reaches a verdict. The pre-verdict acquittal does not impact that interest because juries still retain the exclusive right to "weigh evidence and determine contested issues of fact." *Berry v. United States*, 312 U.S. 450, 453 (1941). MCAO's petition appears to argue that a pre-trial motion for acquittal would allow a judge to take away the jury's ability to "draw[] inferences from the evidence and reach[] reasonable conclusions from that evidence." Petition at 3. But this greatly overstates the judge's role in ruling on a Rule 20 motion. When ruling on such a motion, "the trial judge must review the evidence in the light most favorable to the state, and all reasonable inferences are to be resolved against the defendant to decide if a reasonable person could fairly conclude the defendant is guilty beyond a reasonable doubt." *State v. Fischer*, 242 Ariz. 44 at -- ¶ 17, 392 P.3d 488, 493 (2017). The judge does not make inferences or weigh evidence. *State v. West*, 226 Ariz. 559, 563 ¶ 18, 250 P.3d 1188, 1192 (2011). He merely looks at the totality of the evidence presented by the prosecution and decides whether, if every iota of evidence were true, that evidence would, as a matter of law, prove that a defendant has committed every element of a criminal act.

The pre-verdict acquittal also complies with Arizona's constitutional requirement that the right to a jury trial "shall remain inviolate." Ariz. Const. art. 2, § 23. This Court has consistently held that this clause "preserves the right to jury trial as it existed at the time Arizona adopted its constitution." *Derendal v. Griffith*, 209 Ariz. 416, 419 ¶ 9, 104 P.3d 147, 150 (2005). As previously noted, the pre-verdict motion for acquittal pre-dates Arizona statehood. *See* Ariz. Penal Code § 946 (1901). And Arizona courts have also held that even the constitutional right to a jury trial "has never been construed to prohibit reasonable conditions upon its exercise . . . [a]s long as laws affecting the right to trial by jury do not significantly burden or impair the right to ultimately have a jury determine the issues of fact." *Fisher v. Edgerton*, 236 Ariz. 71, 82 ¶ 35, 336 P.3d 167, 178 (App. 2014).

III. Rule 20 Does Not Unreasonably Impede Appellate Review

MCAO's petition is a solution in search of a problem. There is no coherent policy rationale (other than the desire to secure more convictions) to do away with pre-verdict Rule 20 motions, nor has MCAO shown why there is a practical need to do so. As AACJ's opposition to MCAO's 2016 petition to delete Rule 20 argued, the pre-verdict motion for acquittal has existed in Arizona since before statehood, Ariz. Penal Code § 946 (1901), while the State's right to appeal a post-verdict grant of acquittal has only existed in Arizona since 1980, 1980 Ariz. Sess.

Laws, Ch. 50, § 6 (34th Leg., 2d Reg. Sess.). The pre-verdict judgment of acquittal is a mainstay of the criminal landscape in Arizona, while the ability of the State to appeal *any* judgment of acquittal is a relatively recent legislative innovation. Furthermore, to the extent that pre-verdict judgments of acquittal make it slightly more difficult for MCAO to secure convictions, this "harm" is more than outweighed by the important role that such acquittals have in safeguarding a defendant's constitutional rights by holding the State to its burden of proof.

In *Evans v. Michigan*, 133 S.Ct. 1069 (2013), the Supreme Court addressed some of the arguments raised by MCAO in its petition. In response to the State's concern that a trial court could issue an unreviewable acquittal "for any reason at all," the Court said:

> If the concern is that there is no limit to the magnitude of the error that could yield an acquittal, the response is that we have long held as much. If the concern is instead that our holding will make it easier for courts to insulate from review acquittals that are granted as a form of nullification, we reject the premise. We presume here, as in other contexts, that courts exercise their duties in good faith.

Id. at 1078-79. MCAO has offered no evidence that trial courts are granting mid-trial acquittals in error or in bad faith.

Evans also specifically contemplated a remedy for this theoretical problem. "[F]or cases . . . in which a trial court's interpretation of the relevant criminal statute is likely to prove dispositive, we see no reason why jurisdictions could not

provide for mandatory continuances or expedited interlocutory appeals if they wished to prevent misguided acquittals from being entered." 133 S.Ct. at 1081. Arizona has done just that by providing the Special Action as a remedy. The Special Action is specifically available as a remedy when "the defendant has proceeded *or is threatening to proceed* without or in excess of jurisdiction or legal authority." Ariz. R. P. Spec. Act. 3(b) (emphasis added).[2]

Furthermore, it is unlikely that directed verdicts resulting from a trial judge's legal error are increasing the number of unappealable errors. If, instead of directing a verdict for the defendant based on a legal error, a judge instead instructs the jury by means of an instruction propounding the error, and the jury acquits based on that error, the verdict is still not appealable. In other words, if the concern is that judges are making legal errors in granting directed verdicts, eliminating their ability to direct verdicts is unlikely to provide a remedy (though, again, MCAO has been unable to show that this concern has any merit whatsoever).

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[2] Though MCAO complains that Special Actions are "discretionary and extremely inefficient for the parties," Petition at 9, it should know better than most that the likelihood that a remedy will be granted is irrelevant to the question of whether that remedy is *available*. *See, e.g., State v. Cota*, 229 Ariz. 136, 151 ¶ 76, 272 P.3d 1027, 1042 (2012); *see also* State's Brief in Opposition to Petition for Writ of Certiorari at 12–13, *Lynch v. Arizona*, 136 S.Ct. 1818 (2016) ("Whether, as a practical matter, he would ever be [granted relief], is irrelevant to the inquiry.").

IV. Rule 20 Does Not Infringe on Victim's Constitutional Rights

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 2, § 2.1. But 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)(4). 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. A victim also has no right to a lengthy appeals process. If anything, the pre-verdict judgment of acquittal serves the victim's right to "a speedy trial or disposition and prompt and final conclusion of the case." Ariz. Const. art. 2, § 2.1(A)(10).

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.

V. 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 also 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. Ct. App. 1997).[3] 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.

[3] 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.

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 voices its 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.

RESPECTFULLY SUBMITTED this 22nd day of May, 2017.

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