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FEDERAL RULE OF CRIMINAL PROCEDURE 29:
A NUTS AND BOLTS GUIDE
TO JUDGMENTS OF ACQUITTAL
FOR CRIMINAL DEFENSE ATTORNEYS

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A successful motion for judgment of acquittal under Federal Rule of Criminal Procedure 29 is the equivalent to winning a not guilty verdict and generally bars the government from retrying your client. But the rule has a few counter-intuitive traps that can snare a careless attorney. This paper is designed as a practical guide to making and successfully litigating Rule 29 motions and to avoiding common mistakes.

FED. R. CRIM. P. 29: A Nuts & Bolts Guide

I. The Test

The standard for evaluating a Rule 29 motion for judgment of acquittal is the same as the due process standard used in evaluating whether the evidence is sufficient to sustain the verdict: whether viewing all the evidence in the light most favorable to the government, any rational juror could find the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "Although *Jackson* requires the reviewing court initially to construe all evidence in favor of the government, the evidence so construed may still be so supportive of innocence that no rational juror could conclude that the government proved its case beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010) (en banc). "[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." *Id.* A judgment of acquittal is also required where the conduct alleged in the indictment is not made criminal by the statute. *United States v. Ermoian*, No. 11-10124, 2013 U.S. App. Lexis 17949 (9th Cir. Aug. 28, 2013).

On appeal, the court will uphold a conviction if the evidence, *including evidence that was erroneously admitted*, was sufficient to sustain the verdict. *Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988). But where the court instructs the jury that some evidence was admitted only for a limited purpose, in examining the sufficiency of the evidence, that evidence is restricted to its purpose. *United States v. Tran*, 568 F.3d 1156, 1166 (9th Cir. 2009); *United States v. Arteaga*, 117 F.3d 388, 397-99 (9th Cir. 1997). Also, the verdict cannot be sustained based on a legal theory on which the jury was not instructed. *United States v. Tarallo*, 380 F.3d 1174, 1183 (2004), *amended*, 413 F.3d 928 (9th Cir. 2005) (verdict cannot be sustained on securities fraud conviction based on theory of co-schemer's liability where jury was not instructed on theory).

On federal habeas review of a state court conviction, the federal court cannot grant relief unless the state court's denial of a *Jackson v. Virginia* insufficiency of the evidence claim is "an unreasonable application of . . . clearly established Federal law" under 28 U.S.C. § 2254(d)(1). *McDaniel v. Brown*, 558 U.S. 120 (2010).

II. In Which Cases Should A Rule 29 Motion Be Made?

In which cases should a defense attorney make a Rule 29 motion for judgment of acquittal at a jury trial? Answer: in ***every case***! Even if you don't see a legitimate ground for moving for an acquittal, the appellate attorney with more time to scrounge through the record might see one that you missed. And there are examples of cases where a district judge has said he or she would have granted a judgment of acquittal if only the defense attorney had moved for one. *United States v. McCormick*, 72 F.3d 1404, 1411 (9th Cir. 1995) (Court gives "some deference" to the trial judge's comments at sentencing that he would have granted a post-trial Rule 29 motion if one had been made). When faced with a case with overwhelming evidence of your client's guilt and where you can't think of any possible argument that any juror could possibly find your client not guilty, make a "general" motion anyway, saying: "I move for a judgment of acquittal on the ground that the prosecution has failed to present sufficient proof from which a rational juror could conclude beyond a reasonable doubt that my client is guilty on each and every count."

If you forget to make a motion before the verdict, you can still file a short, written motion after the verdict under Rule 29(c) saying the same thing. This "general" motion for acquittal should be enough to preserve the sufficiency of the evidence claim for appeal. *United States v. Viayra*, 365 F.3d 790, 793 (9th Cir. 2004) (agreeing with "[s]everal of our sister circuits [that] have held that *Rule 29* motions for acquittal do not need to state the grounds upon which they are based because 'the very nature of such motions is to question the sufficiency of the evidence to support a conviction"); *but see Gilbert v. United States*, 359 F.2d 285, (9th Cir. 1966) (at least when "specifically limited" to grounds other than venue, a motion for judgment of acquittal does not preserve a venue objection). In fact, in some cases it might be the better approach not to specify grounds for the motion as appellate courts sometime find insufficiency arguments other than those raised before the district court to be waived and reviewed only for plain error. *See, e.g.*, *United States v. Eriksen*, 639 F.3d 1138, 1148 (9th Cir. 2011); *United States v. Herrera*, 313 F.3d 882, 884-85 (5th Cir. 2002) ("Where, as here, a defendant asserts *specific grounds* for a specific element of a specific count for a Rule 29 motion, he waives all others for that specific count.").

If no motion is made at the trial level, review on appeal is only to avoid a manifest miscarriage of justice under plain error review, a more difficult standard

to overcome, *see, e.g.*, *United States v. Stauffer*, 922 F.2d 508, 511 (9th Cir. 1990), though a savvy appellate attorney would rely on cases indicating that there is no real difference between the two standards when dealing with insufficiency claims. *United States v. Flyer*, 633 F.3d 911, 917 (9th Cir. 2011) (plain error review of a sufficiency claim "is only theoretically more stringent than the standard for a preserved claim"); *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1110 (9th Cir. 1995) (dicta).

In a bench trial, no motion for acquittal is necessary to preserve an insufficiency of the evidence claim because the district court must already enter a judgment of acquittal unless convinced beyond a reasonable doubt of your client's guilt. *United States v. Atkinson*, 990 F.2d 501 (9th Cir. 1993) (en banc). The same standard of appellate review for insufficiency of the evidence claims applies to both jury and bench trials. *United States v. Randolph*, 93 F.3d 656, 660 (9th Cir. 1996).

III. When Should A Rule 29 Motion Be Made?

In general, a Rule 29 motion may be made at three points in a criminal case: first, after the close of the government's case-in-chief; second, at the close of all the evidence and before the verdict; and, third, after the jury's verdict.

A. Before The Case Is Submitted To The Jury

Under its terms, a Rule 29(a) motion may be made at the close of the government's case or after the close of all the evidence.[1] But a motion made at the close of the government's case is generally *waived* and reviewed only for plain error unless renewed after the close of all the evidence. *United States v. Mora*, 876 F.2d 76, 77 (9th Cir. 1989). The converse, however, is not true. One can make a motion for judgment of acquittal at the close of *all* the evidence even if no motion was made when the government completed its case-in-chief. It is thus essential to

[1] There is some case law to support a motion for judgment of acquittal even before the government has finished its case. *See United States v. Capocci*, 433 F.2d 155, 158 (1st Cir. 1970) (after opening statements); *United States v. Ubl*, 472 F. Supp. 1236, 1237 (N.D. Ohio 1979) (whenever it appears inevitable that the prosecution's case must fail).

make a Rule 29 motion at the close of *all* the evidence, regardless whether any motion was made earlier. On appeal in a case where a Rule 29 motion after the government's case-in-chief was not renewed after all the evidence, it may be worth pointing out that, because the waiver rule is not required by statute or the text of Rule 29, the court has discretion to depart from the rule in appropriate circumstances. *See United States v. Esquivel-Ortega*, 484 F.3d 1221, 1225 (9th Cir. 2007) (Rule 29 motion at close of government's case was sufficient to preserve record where doing so a "few minutes later" after minimal additional evidence was introduced in the defense's case would have been an "empty ritual"); *United States v. Baxley*, 982 F.2d 1265, 1268 n.6 (9th Cir. 1992).

Where a motion is made after the government finishes its case-in-chief, the district court may reserve decision on the motion until after the jury reaches a verdict or a mistrial is declared. Fed. R. Crim. P. 29(b). Under federal law, if defense counsel decides to present evidence after the district judge has denied a Rule 29 motion at the close of government's case-in-chief, the defense waives its right to challenge the sufficiency of the evidence presented in the government's case-in-chief. Rather, the appellate court will review whether all the evidence presented in both the government's case and the defense case is sufficient to uphold the conviction. This is different from the law in California and some other states where the court of appeal would evaluate only the evidence presented before the close of the government's case, even if the defense presented evidence in its own case. *See, e.g., People v. Trevino*, 39 Cal.3d 667, 695, 217 Cal.Rptr. 652 (1985); *cf. LaMere v. Slaughter*, 458 F.3d 878 (9th Cir. 2006) (in a § 2254 action, federal court reviews the evidence in both the state and defense cases in ruling on a *Jackson v. Virginia* due process insufficiency claim).

An exception to this rule is where the judge reserves ruling on a motion for acquittal made after the government's case. In that case, a defendant may challenge on appeal whether the government presented sufficient evidence in its case-in-chief to sustain the conviction--without reference to any of the evidence presented in the defense case or the government's rebuttal. *See* Fed. R. Crim. P. 29(b) ("If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved."); *United States v. Boria*, 592 F.3d 476, 480 n.7 (3d Cir. 2010); *United States v. Hebshie*, 549 F.3d 30, 35 (1st Cir. 2008); *see also* Notes of Advisory Committee on 1994 Amendment to Fed. R. Crim. P. 29. Moreover, if a defendant refrains from presenting evidence on a particular count, there is a good argument that he reserves the right to review of the

evidence at the end of the government's case on that count, even if he or she submits evidence on other counts. *United States v. Thomas*, 987 F.2d 697, 702-03 (11th Cir. 1993).

The federal rule forces defense counsel to make a tactical choice where the trial judge denies a potentially meritorious Rule 29(a) motion at the close of government's case-in-chief and the defense case may strengthen the evidence on a weak element. Option one is to rest without presenting any evidence, thus preserving the Rule 29 motion. Option two is to present evidence in the defense case to increase the chances of obtaining a not guilty verdict from the jury, but waiving a challenge on appeal to the state of the evidence at the close of the government's case. Under this second approach, the appellate court would consider *all* of the evidence at trial in deciding whether the evidence was sufficient to sustain the verdict.

What should an alert defense attorney do when he or she believes the prosecution has completely failed to prove one element of an offense, but that it could easily correct the error if the lack of evidence is brought to its attention? Tough call. If you move for an acquittal during trial on that ground, the district court would likely have discretion to permit the prosecution to reopen its case to supply evidence on the missing element. *See United States v. Suarez-Rosario*, 237 F.3d 1164, 1167 (9th Cir. 2001) (district court did not abuse its discretion in allowing government to reopen). If the judge is likely to do so, the better option may be to wait to move for a judgment of acquittal until after the jury returns a verdict, when it is too late for additional evidence.

B. Motions For Acquittal After Trial

Under Rules 29(c) and 45(b), a post-trial motion for acquittal must be made or an extension requested within 14 days after the jury's verdict or the discharge of a jury that failed to reach a verdict. Under Rule 45(b)(1)(B), if the defendant fails to file the Rule 29 motion within the specified time, the Court may nonetheless consider an untimely motion if the failure to file the motion resulted from "excusable neglect." Otherwise, a district court cannot grant a motion for judgment of acquittal filed even one day late. *Carlisle v. United States*, 517 U.S. 416 (1996). Rule 29(c)(3) specifically states that "[a] defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a

prerequisite for making such a motion after jury discharge." *See also United States v. Miranda-Lopez*, 532 F.3d 1034, 1041 (9th Cir. 2008).

As a general rule, a post-trial motion for judgment of acquittal should also be accompanied by a motion for new trial under Federal Rule of Criminal Procedure 33 on the ground that, even if the evidence is found sufficient to sustain the verdict, it "preponderates heavily against the verdict." *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981) (quoting 2 Wright, Federal Practice and Procedure, Criminal § 553 at 487 (1969)). The Ninth Circuit has held that a Rule 29(c) motion for judgment of acquittal by itself does not give the district court authority to grant a motion for new trial, absent a separate Rule 33 motion. *United States v. Viayra*, 365 F.3d 790 (9th Cir. 2004).

Unlike a successful motion for new trial before the jury's verdict, however, the Double Jeopardy Clause of the Fifth Amendment does not bar the government from appealing the district court's grant of a *post-trial* motion for judgment of acquittal. *United States v. Jenkins*, 420 U.S. 358 (1975).

IV. Some Helpful Cases For Insufficiency Of The Evidence Claims

A. Types of Evidence

1. Identification Evidence

"The cases teach that in the absence of connecting or corroborating facts or circumstances, resemblance identification *alone* will not sustain the beyond a reasonable doubt standard essential for conviction." *United States v. Ezzell*, 644 F.2d 1304, 1306 (9th Cir. 1981).

2. Fingerprint Evidence

Although "fingerprint evidence alone may under certain circumstances support a conviction, . . . in fingerprint only cases in which the prosecution's theory is based on the premises that the defendant handled certain objects *while committing the crime in question*, the record must contain sufficient evidence from which the trier of fact could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date." *Mikes v. Borg*, 947 F.2d 353, 356-57 (9th Cir. 1991) (emphasis in original).

3. Confessions

A confession alone is insufficient to establish a conviction unless the government introduces sufficient corroboration (1) to establish criminal conduct at the core of the offense and (2) "independent evidence tending to establish the trustworthiness of the admissions, unless the confession itself is, by virtue or special circumstances, inherently reliable." *United States v. Norris*, 428 F.3d 907, 914 (9th Cir. 2005).

B. Specific Offenses

1. Conspiracy

"Once the existence of a conspiracy is established, only a slight connection [to the conspiracy] is necessary to support a conviction of knowing participation in that conspiracy. . . . However, that connection must be proved beyond a reasonable doubt." *Ramos-Rascon*, 8 F.3d 704, 707 (9th Cir. 1993) (citation omitted); *see also United States v. Esperaza*, 876 F.2d 1390, 1392 (9th Cir. 1989) ("the word 'slight' properly modifies 'connection' and not 'evidence'. It is tied to that which is proved, not to the type of evidence or the burden of proof."); *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1228 (9th Cir. 2007) ("the term slight connection in this context does not mean that the government's burden of proving a connection is slight"). "It is not a crime to be acquainted with criminals or to be physically present when they are committing crimes." *United States v. Herrera-Gonzalez*, 263 F.3d 1092, 1095 (9th Cir. 2001). A defendant's proximity to duffel bags containing drugs near border was found insufficient to establish guilt of conspiracy to possess marijuana, even with evidence that defendant traveled with other conspirators and brandished a handgun just prior to his arrest. *United States v. Corral-Gastelum*, 240 F.3d 1181 (9th Cir. 2001).

2. Sexual Assault

Proof of sexual assault has been held to be insufficient to show that the defendant committed a charged crime on any date within or reasonably near the period in the indictment, where complainant did not remember *when* crime occurred. *United States v. Tsinhnahijinnie*, 112 F.3d 988 (9th Cir. 1997).

3. Mail/Wire Fraud

In mail fraud cases, "[t]he government may not prevail without demonstrating that the mailings were incident to the execution of the scheme, rather than part of an after-the-fact transaction that, although foreseeable, was not

in furtherance of the scheme." *United States v. Lo*, 231 F.3d 471, 478 (9th Cir. 2000); *see also United States v. Manarite*, 44 F.3d 1407 (9th Cir. 1995). In reversing wire fraud convictions, the Court stated that "Concealing the source and ownership of fraudulently-obtained property in downstream transactions is better understood as money laundering absent evidence that the wire transfer is 'incident to an essential part of the scheme.'" *United States v. Lazarenko*, 564 F.3d 1026, 1037 (9th Cir. 2009).

4. Drugs/Contraband

Mere knowledge of contraband without evidence showing dominion or control is insufficient to prove possession of the contraband. *United States v. Ramirez*, 176 F.3d 1179, 1181 (9th Cir. 1999). Although a "jury can infer knowledge when an individual is the driver and sole occupant of the vehicle," *United States v. Diaz-Cardenas*, 351 F.3d 404, 407 (9th Cir. 2003), "it is 'well established that a passenger may not be convicted unless there is evidence connecting him with the contraband, other than his presence in the vehicle.'" *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1225 (9th Cir. 2007).

C. Entrapment

Cases where courts have found evidence insufficient as a matter of law on the ground that the government failed to disprove entrapment beyond a reasonable doubt: *Jacobson v. United States*, 503 U.S. 540, 548 (1992); *United States v. Poehlman*, 217 F.3d 692 (9th Cir. 2000); *United States v. Skarie*, 971 F.2d 317 (9th Cir. 1992).

D. *Pinkerton* Liability

Pinkerton liability does not necessarily support a gun conviction in a drug conspiracy because "there is no presumption of foreseeability" of a gun. *United States v. Casteneda*, 9 F.3d 761, 763 (9th Cir. 1993). "Where a defendant has little or no connection to the predicate drug offense, another conspirator's use of a firearm may, in some fact situations, be unforeseeable. In those cases, it would violate due process to find that defendant vicariously liable for the firearm's use under [18 U.S.C.] § 924(c)." *Id.* at 767.