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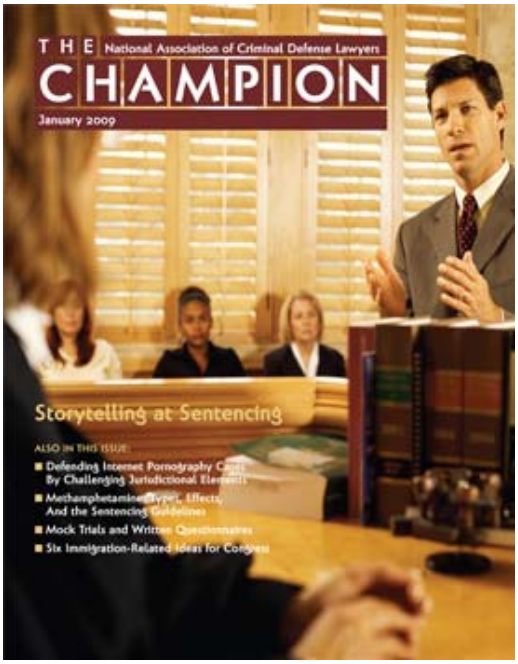

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By John Balazs

Rule 29: A Nuts and Bolts Guide to Judgments of Acquittal

A successful motion under Fed. R. Crim. P. 29 for judgment of acquittal is the equivalent to winning a not guilty verdict and bars the government from retrying your client. But the rule has a few counterintuitive traps that can snare a careless attorney, especially one used to state court practice where the rules can be quite different. This article is designed as a practical guide to making and successfully litigating Rule 29 motions and to avoiding potential land mines.

The Test

The standard for evaluating a Rule 29 motion is the same as the 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 jury could find the defendant guilty beyond a reasonable doubt.1 On appeal, the court will uphold a conviction if the evidence, including evidence that was erroneously admitted, was sufficient to sustain the verdict.2 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.3 Also, the verdict cannot be sustained based on a theory of liability on which the jury was not instructed.4

In Which Cases Should the Rule 29 Motion Be Made?

In which cases should you make a Rule 29 motion for judgment of acquittal at a jury trial? The answer: in every case! Even if you do not 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.5 When faced with a case with overwhelming evidence of your client's guilt and where you cannot think of any possible argument that any juror could possibly find your client not guilty, make the motion anyway, saying: "I move for a judgment of acquittal on the ground that the prosecution has failed to present sufficient proof on each and every element of every count from which a rational juror could conclude beyond a reasonable doubt that my client is guilty."

If you cannot say this to your judge with a straight face or you forget to make a motion before the verdict, you can 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.6 In fact, in some cases it might be the better approach not to specify grounds for the motion, as courts of appeal sometime find insufficiency arguments other than those raised before the district court to be waived and thus subject to review only for plain error.7

If no motion is made at the trial level, review on appeal is only to avoid a manifest miscarriage of justice or for plain error, a much more difficult standard to overcome.8 A savvy appellate attorney, however, would rely on cases that argue that there is no real difference in application between the two standards when dealing with insufficiency claims.9

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.10 The same standard of appellate review for insufficiency of the evidence claims applies to both jury and bench trials.11

When Should You Make a Rule 29 Motion?
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 Case Submitted To 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.12 But a motion made at the close of the government's case is waived unless renewed after the close of all the evidence so that review is only for plain error.13 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 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 United States v. Baxley14 held 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.

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.15 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 motion to challenge the sufficiency of the evidence presented in the government's case-in-chief. Rather, the appellate court will review whether the total evidence presented in both the government's case and the defense case is sufficient to uphold the conviction.16 This is different from the law in California and many 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 on its own behalf.17

An exception to this rule exists where the judge defers decision until after the verdict 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.18 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.19

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 the government's case-in-chief and the defense's case could serve to strengthen the evidence on a weak count. Option one is to rest without presenting any evidence, thus preserving the Rule 29 motion.20 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 realizes the government has completely failed to put on any evidence on one element of an offense that it could easily correct if the absence of evidence was brought to its attention? This is a 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.21 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 the judge to allow additional evidence.

B. Motions for Acquittal After Trial

Under Fed. R. Crim. P. 29(c) and 45(b), a post-trial motion for acquittal must be made or an extension requested within seven days after the jury's verdict or from discharge of a jury that failed to reach a verdict.22 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.23 Rule 29(c)(3) specifically states: "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."

As a general rule, every post-trial motion for judgment of acquittal should also be accompanied by a motion for new trial under Fed. R. Crim. P. 33 on the ground that, even if the evidence is found sufficient to sustain the verdict, it "preponderates heavily against the verdict."24 At least two circuits have 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.25

Unlike a successful motion for new trial before the jury's verdict, however, the Double Jeopardy Clause does not bar the government from appealing the district court's grant of a post-trial motion for judgment of acquittal.26

Notes

1. Jackson v. Virginia, 443 U.S. 307, 319 (1979).
2. Lockhart v. Nelson, 488 U.S. 33, 40-42 (1988).
3. United States v. Arteaga, 117 F.3d 388, 397-99 (9th Cir. 1997).
4. United States v. Tarallo, 380 F.3d 1174, 1183 (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); see also McCormick v. United States, 500 U.S. 257, 270 n.8 (1991).
5. 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).
6. United States v. Navarro 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"); United States v. Gjurashaj, 706 F.2d 395, 399 (2d Cir. 1983); but see United States v. Dabbs, 134 F.3d 1071, 1078 (11th Cir. 1998) (general Rule 29 motion does not preserve challenge for improper venue).
7. See, e.g., United States v. Dandy, 998 F.2d 1344, 1356 (6th Cir. 1993); 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.").
8. See, e.g., United States v. Stauffer, 922 F.2d 508, 511 (9th Cir. 1990).
9. United States v. Vizcarra-Martinez, 66 F.3d 1006, 1110 (9th Cir. 1995) (dicta); United States v. Cox, 929 F.2d 1511, 1514 (10th Cir. 1991).
10. United States v. Atkinson, 990 F.2d 501 (9th Cir. 1993) (en banc); United States v. Rosa-Fuentes, 970 F.2d 1379, 1381 (5th Cir. 1992).
11. United States v. Randolph, 93 F.3d 656, 660 (9th Cir. 1996).
12. 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. Capocii, 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); see also Fong Foo v. United States, 369 U.S. 141, 142 (1962) (affirming entry of acquittal after only three witnesses in a long and complicated trial).
13. United States v. Alvarado, 982 F.2d 659, 662 (1st Cir. 1992); United States v. Allen, 127 F.3d 260, 264 (2d Cir. 1997); United States v. Pennyman, 889 F.2d 104, 105 n.1 (6th Cir. 1989); United States v. Brinley, 148 F.3d 819, 821 (7th Cir. 1992); United States v. Sherod, 960 F.2d 1075, 1076 (D.C. Cir. 1992); United States v. Mora, 876 F.2d 76, 77 (9th Cir. 1989).
14. United States v. Baxley, 982 F.2d 1265, 1268 n.6 (9th Cir. 1992).
15. Fed. R. Crim. P. 29(b).
16. United States v. Byfield, 928 F.2d 1163, 1166 (D.C. Cir. 1991); United States v. Bowie, 892 F.2d 1494, 1497 (10th Cir. 1990).
17. See, e.g., People v. Trevino, 39 Cal.3d 667, 695, 217 Cal.Rptr. 652 (1985).
18. 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."); see also Notes of Advisory Committee on 1994 Amendment to Fed. R. Crim. P. 29.
19. United States v. Thomas, 987 F.2d 697, 702-03 (11th Cir. 1993).
20. Even if a co-defendant testifies, a defendant who presented no evidence after the government rests preserves his or her right to a review of the sufficiency of the evidence in

the government's case-in-chief. United States v. Thomas, 987 F.2d 697, 702-03 (11th Cir. 1993).
21. See United States v. Suarez-Rosario, 237 F.3d 1164, 1167 (9th Cir. 2001); United States v. Hinderman, 625 F.2d 994, 996 (10th Cir. 1980).
22. Before a 2005 amendment, a post-trial motion for acquittal had to be made within seven days of the jury's verdict or discharge or within a longer period only if the extended period was set by the district court within that seven-day period. Fed. R. Crim. P. 29, Notes of Advisory Committee on 2005 amendments.
23. Carlisle v. United States, 517 U.S. 416 (1996).
24. United States v. Pimental, 654 F.2d 538, 545 (9th Cir. 1981) (quoting 2 Wright, Federal Practice and Procedure, Criminal § 553 at 487 (1969)).
25. United States v. Navarro Viayra, 365 F.3d 790 (9th Cir. 2004); United States v. Moran, 393 F.3d 1, 9 (1st Cir. 2004).
26. United States v. Jenkins, 420 U.S. 358 (1975).

National Association of Criminal Defense Lawyers (NACDL)
1660 L St., NW, 12th Floor, Washington, DC 20036
(202) 872-8600 • Fax (202) 872-8690 • assist@nacdl.org