No. 98-50405

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

CHARLES FREDERICK BYRNE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This action was instituted by the filing of an indictment in the United States District Court for the Southern District of California charging appellant Charles Frederick Byrne and other co-defendants with violations of federal criminal statutes (E.R. 184; R. 1).[1/] The district court had jurisdiction over this criminal case pursuant to 18 U.S.C. 3231.

Byrne is appealing the district court's decision, on June 30, 1998, to deny his motion for a judgment of acquittal, under Fed. R. Crim. P. 29, on the grounds that the denial violated the Double Jeopardy Clause of the Fifth Amendment (E.R. 174). Byrne filed his notice of appeal that same day (E.R. 174). This Court

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[1/] "R. __" refers to the number assigned to a document on the district court's docket sheet; "E.R. __" refers to the Excerpts of Record filed with Appellant's Brief; "Tr. __" refers to the trial transcript; "Br. __" refers to Appellant's Opening Brief.

has jurisdiction pursuant to the collateral order exception to 28 U.S.C. 1291. See Abney v. United States, 431 U.S. 651 (1977).

STATEMENT OF THE ISSUE

Whether the Double Jeopardy Clause barred the district court from reconsidering its decision to grant a motion for judgment of acquittal on Count V, when the court: (a) indicated it was withholding final decision on the motion pending its review of the transcript of a government witness; (b) did not inform the jury it had initially dismissed Count V; and (c) reconsidered its ruling before Byrne presented evidence on Count V.

STATEMENT OF THE CASE

On December 16, 1997, the United States filed a six-count indictment against six former Marine Corps Military Policemen, John Wolf, Shawn Simonet, Corey Gautreaux, Brian Gadway, Mark Burton, and Charles Byrne (E.R. 184; R. 1). Count I charged five of the co-defendants -- Wolf, Simonet, Gautreaux, Gadway, and Burton -- with violating 18 U.S.C. 241, by conspiring to deprive three inhabitants of California, Francisco Morales-Ramirez, Justino Mendez, and Evelia Mayo of their federally protected rights while acting under color of law (E.R. 4). Counts II, III and IV charged the same five defendants with violating 18 U.S.C. 242 by willfully assaulting these three inhabitants of California, thereby depriving them of their federally protected rights while acting under color of law (E.R. 6-8). Count V charged Byrne with violating 18 U.S.C. 3 by providing a false alibi, knowing that his co-defendants had committed offenses

against the United States (E.R. 8). Count VI charged all the defendants with violating 18 U.S.C. 1001, by conspiring to make false statements as to material facts in a federal investigation (E.R. 9). The United States also filed a criminal information against James Graham, another Marine, alleging that he coerced Burton to make a false statement (Tr. 757, 758).

Defendants Wolf, Simonet, and Gautreaux pled guilty to conspiracy to deprive persons of their federally protected rights and conspiracy to commit false statements (Tr. 582, 878-879; 217-218). Gadway pled guilty to conspiracy to deprive persons of federally protected rights, pursuant to Section 5K1.1 of the Sentencing Guidelines (Tr. 475, 549). Graham pled guilty by criminal information to coercing a witness (Tr. 757-758).

Defendants Burton and Byrne, however, contested the Counts against them, and their trial began on June 12, 1998 (E.R. 191). The other five co-defendants testified against Burton and Byrne (Tr. 229, 245-247). They detailed Burton's involvement in the conspiracy and the substantive deprivation of federally protected rights and explained Byrne's role as an accomplice after the fact in the conspiracy to make false statements. On June 19, 1998, at the close of the government’s case, Byrne filed a motion, under Fed. R. Crim. P. 29, for a judgment of acquittal as to Count V, which charged him as an accessory after the fact with providing a false alibi for the co-defendants (E.R. 192). On June 25, 1998, the district court initially indicated it would grant the motion (E.R. 77; Tr. 1386) but then reconsidered, and on June 30, 1998,

the district court denied the motion (E.R. 93; Tr. 1403). Trial resumed after that ruling, but later on June 30, 1998, the court severed Count V from the rest of the counts and stayed further proceedings pending the resolution of this appeal (E.R. 135; Tr. 1509).

On July 7, 1998, the jury found Burton guilty of: Count I for conspiring to deprive persons of federally protected rights under color of law; Count II for assaulting Justino Mendez and thereby depriving him of his federally protected rights; and Count VI for conspiring to make false statements (E.R. 194; R. 80). The jury acquitted Byrne of Count VI (E.R. 194; R. 79).

Byrne is not appealing the merits of the denial of his motion for a judgment of acquittal as to Count V. Instead, he argues the district court was barred from reconsidering and then denying the motion (Br. 12).

STATEMENT OF FACTS

A. The Assaults

On August 1, 1994, defendants Wolf, Gautreaux, Simonet, Gadway, and Burton were on duty with the Marine Corps military police's Special Reaction Section 1 (SRS-1), based at Camp Pendleton, California (Tr. 218-219). Graham, who was also assigned to SRS-1, was not on duty that day (Tr. 223, 742). The Special Reaction Sections are the military equivalents of "SWAT" teams used by civilian police departments (Tr. 218, 416).

During the early evening hours of August 1, 1994, Wolf, Gautreaux, Simonet, Gadway, and Burton participated in a training

session on entering and clearing buildings (E.R. 24; Tr. 592). They conducted this training with defendant Byrne, who, as a dog handler, often trained with SRS-1 on clearing buildings (Tr. 586). After completing that training session, these five members of SRS-1, who were still on duty, decided to leave the base to search for undocumented immigrants (E.R. 26; Tr. 229, 238).

The assailants left their duty hut dressed in military fatigues (Tr. 232), and sometime between 10:00 and 11:00 p.m. that night, they arrived at the illegal immigrant camp just past the boundaries of Camp Pendleton (Tr. 967, 979). Once there, the defendants saw a very small shack and encountered Mr. Francisco Morales-Ramirez, a 61-year old, outside of the shack (Tr. 239). Three of the defendants, Gautreaux, Simonet, and Burton, detained Mr. Morales-Ramirez (Tr. 240). One of the defendants yelled "Migra," to indicate the defendants were immigration authorities and demanded his "papeles," or immigration papers (Tr. 239, 602). After Mr. Morales-Ramirez indicated he had no immigration papers, Gautreaux, Simonet, and Burton put flexicuffs on him and beat him until he was unconscious and severely bleeding from a laceration above his eyebrow (E.R. 34-35; Tr. 923, 981-987).

While the assault of Mr. Morales-Ramirez was taking place, Wolf and Gadway went to the shack, pushed Ms. Evelia Mayo to the side (Tr. 607), pulled Mr. Justino Mendez outside and kicked him (Tr. 429, 604). Mr. Mendez was able to escape his attackers without sustaining injury (Tr. 971). After Mr. Mendez fled, Wolf

led the other assailants back to Camp Pendleton (E.R. 28; Tr. 604).

Mr. Morales-Ramirez sustained serious injuries that required medical attention (E.R. 34-35; Tr. 985-987). On August 2, 1994, Mr. Mendez and Ms. Mayo brought Mr. Morales-Ramirez to Tri-City Hospital in Oceanside, California (Tr. 973-974). While at the hospital, the victims told Mr. Sean Bannan, a member of the Oceanside Police Department, that five or six men dressed in military uniforms had attacked them (E.R. 30-33; Tr. 922-924).

B. The Cover-Up

After the Oceanside Police Department completed its investigation, Naval Criminal Investigative Service (NIS) conducted its own. Anthony LaCosta was the Special Agent assigned to conduct the investigation for NIS (Tr. 992). The Federal Bureau of Investigation (FBI) monitored the investigation (Tr. 993). On August 17, 1994, Agent LaCosta began questioning the members of SRS-1, including Graham (Tr. 998). All of the assailants -- Wolf, Gautreaux, Simonet, Burton, Gadway -- initially told LaCosta they were not involved in the assaults and had no knowledge of the crimes (Tr. 443, 448, 1002-1003). They also told LaCosta that at the time of the assault, they were on duty and had been conducting building entry training and had been working with defendant Byrne (Tr. 1002-1003). Graham disclaimed knowledge of the crimes (Tr. 745).

On September 6, 1994, Agent LaCosta interviewed Byrne about the assaults. He told Byrne he "was investigating the attack on

a migrant worker outside the camp on August 1" (Tr. 1013). Agent LaCosta also told Byrne that the FBI was involved and "that the Justice Department was looking at it as a civil rights violation" (Tr. 1014). Byrne waived his rights against self-incrimination and signed a written statement which provided (Tr. 1021-1022) that:

> On August 1st, 1994, I used my night off to supervise SRS-1 Team's use of dogs to track building entries in the 16 area. We practiced from approximately 20:00 to 22:30. We returned to the 16 area directly to the device 5 duty hut next to the San Louis Rey gate. I made sure the dogs were put back in the kennel and then returned home for the evening. At no time, did I or any SRS team member leave the base perimeter. Agent LaCosta has informed me that a migrant worker was assaulted outside the gate that evening at approximately 22:30. Neither I nor any of the team members had anything to do with that assault.

LaCosta closed the investigation in October 1994 (Tr. 1023).

The investigation was reopened in June 1997. Defendant Gadway, while applying for a position with the Vermont State Police, was asked if there was anything of which he was particularly ashamed. Gadway responded affirmatively and confessed that he and other Marine military policemen had unlawfully assaulted illegal immigrants (Tr. 450-451). The Vermont State Police turned this information over to the FBI. Gadway cooperated with the FBI by identifying the other defendants and agreeing to being taped when he spoke to the defendants about the case (Tr. 453-455). Gadway's cooperation resulted in confessions from Wolf, Gautreaux, and Simonet (Tr. 454, 582, 217-218, 878-879). Graham also confessed that, in 1994, he coerced Burton to keep quiet about the assault (Tr.

757). Burton admitted punching Mr. Morales-Ramirez without justification (Tr. 1490-1491).

Byrne did not admit any involvement in the cover-up of the assaults. At trial, however, each of the co-defendants, who pled guilty, testified against Byrne. The assailants testified that they discussed their crimes and the investigation with Byrne and he volunteered to provide an alibi to cover-up the assailants' crimes (Tr. 244-245, 437, 613-615, 747). Gautreaux testified the defendants told Byrne that "NIS was running [the investigation] and the FBI was involved" (Tr. 245). Gautreaux also testified that, during those discussions with Byrne, the defendants agreed to "refer back to the logbook as to what [they] did" (Tr. 244). Wolf testified that the defendants told Byrne what they had put in their false statements to NIS (Tr. 625), and that Byrne was part of the discussions in which the defendants agreed to tell LaCosta that Byrne was with them and "everybody was training at the building" at the time of the incident (Tr. 725).

The government also presented a tape of the conversation between Gadway and Byrne in which Byrne stated "you made a statement when [NIS] came out to talk to us all. Okay. Just stick with that statement" (Tr. 456, 1826; U.S. Exh. 10-A at 3). Byrne also told Gadway, he believed that the FBI was reinvestigating the 1994 crime because of a recent incident in which the Riverside County Sheriffs' Office "beat up those Mexicans" (U.S. Exh. 10-A at 4). Wolf testified that Byrne

provided an alibi, because, in Byrne's words, "I'm a sergeant and it will give you a little bit of credibility" (Tr. 613).

C. Byrne's Motion For A Judgment Of Acquittal

On June 19, 1998, the United States rested its case (Tr. 1125). That same day, Byrne filed his motion, under Fed. R. Crim. P. 29, for a judgment of acquittal as to Count V (E.R. 41; Tr. 1130). The district court did not immediately resolve the motion (E.R. 49; Tr. 1138). It permitted Byrne's co-defendant, Burton, to begin his case that day (Tr. 1142). On the next trial date, June 25, 1998, the district court addressed Byrne's Rule 29 motion. Byrne argued the government had failed to present any evidence that he knew that the offenses had been committed while the defendants were acting under color of law (E.R. 54; Tr. 1363). After hearing the parties' arguments, the district court made a tentative ruling granting Byrne's motion for a judgment of acquittal as to Count V (E.R. 77; Tr. 1386). The Assistant United States Attorney immediately asked the "court to reconsider after obtaining the transcript of Mr. LaCosta" (E.R. 77; Tr. 1386). The Assistant United States Attorney and the court discussed the significance of Mr. LaCosta's testimony, and the government repeated its request that the court allow it to "submit transcripts of the testimony because [it] believe[d] that there is sufficient evidence to let it go to the jury" (E.R. 79; Tr. 1388). The court stated "I will let you do that, but I have made up my mind, unless I can be convinced otherwise" (E.R. 79; Tr. 1388). The district court later reiterated that it would

"certainly allow [the government] to get the transcripts" (E.R. 79; Tr. 1388).

On June 30, 1998, the next scheduled trial date (E.R. 192), the first matter the court addressed was Byrne's motion for a judgment of acquittal (E.R. 89; Tr. 1399). The district court explained that, based on the government's evidence, it planned to reconsider its initial decision to grant the Rule 29 motion, unless it was without jurisdiction to do so (E.R. 90; Tr. 1400). Byrne contended (E.R. 91; Tr. 1401) that the district court could not reconsider its decision and relied upon this Court's decision in United States v. Blount, 34 F.3d 865 (1994). The United States argued that this is not an instance of a subsequent prosecution because: the court made its ruling at the end of the last trial session; Byrne had not presented his case; and the jury was not told Count V was dismissed (E.R. 92; Tr. 1402).

The district court reasoned that its reconsideration of the Rule 29 motion was permissible since it had not "told the jury that count [V] is no longer going forward" (E.R. 92; Tr. 1402). It found that Blount was distinguishable and held that Rule 29 did not preclude it from reconsidering its initial decision (E.R. 92; Tr. 1402). The court found that the parties knew, at the June 25, 1998, hearing, that the court would review Agent LaCosta's testimony and then reconsider its ruling (E.R. 93-94; Tr. 1403-1404) (emphasis added):

> The Court: When we left here on Friday, it was with the understanding that the government could get the transcript of LaCosta and file a brief and revisit the Rule 29 issue because, admittedly, I didn't have

> LaCosta's testimony. They were relying on LaCosta, and they wanted to make some more arguments under Rule 29.
>
> I granted the motion, but I also said I would reconsider it in light of the government's presentation. So I am going to do that, unless, like I say, there is a case to the contrary. You were fully aware, Mr. Warren, that I would reconsider it. I even mentioned it during our jury instruction conference.[2/]
>
> Mr. Warren: There is no question you did, your Honor. I was out of town, as you know, over the weekend. It was Mr. Hubachek that explained it to me this morning that I might have missed that.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause prevents the government from "mak[ing] repeated attempts to convict an individual for an alleged offense." United States v. Scott, 437 U.S. 82, 87 (1978). It does that by protecting "the integrity of a final judgment." Id. at 92. The district court's initial ruling of Byrne's Rule 29 motion for acquittal was not a final judgment. During the June 25, 1998, hearing on the Rule 29 motion, the district court indicated it would grant the motion but reserved final decision until the United States presented Agent LaCosta's transcript (E.R. 79-80; Tr. 1388-89). The trial was adjourned from the June 25 hearing until June 30, 1998 (E.R. 192). That morning, the court decided to deny Byrne's motion for a judgment of acquittal. Between its initial, tentative ruling on June 25, 1998, and its final decision on June 30, 1998, nothing happened

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2/ The jury instruction conference to which the court is referring was held in-chambers and immediately after the court told the parties it would review Agent LaCosta's transcript. In that conference, the court again made Byrne's counsel aware that it would reconsider its ruling.

in the trial -- the court did not inform the jury that Count V had been dismissed, and no evidence was presented to the jury.

No case or statute cited by Byrne stands for the proposition that a judge does not have the inherent power to reconsider the granting of a Rule 29 motion when a defendant has been warned the decision might be reconsidered and the jury has not learned of the tentative ruling. United States v. Blount, 34 F.3d 865 (9th Cir. 1994), does not support his claim; indeed the Court's rationale there supports the district court's action in this case. In Blount, the Court found a double jeopardy violation because the trial court granted the motion for judgment of acquittal, told the jury of its first decision, and did not reconsider that decision until after the defense presented its case.

Byrne's reliance on the 1994 amendment to Fed. R. Crim. P. 29(b) is also misplaced. Neither the text nor the legislative history of that statute suggests Congress intended to prevent judges from employing their inherent authority to reconsider rulings with regard to motions for judgments of acquittal.

STANDARD OF REVIEW

Whether the Double Jeopardy Clause of the Fifth Amendment has been violated is a question of law, which this Court reviews de novo. United States v. McClain, 133 F.3d 1191, 1193 (9th Cir.), cert. denied, 118 S. Ct. 2386 (1998).

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DID NOT BAR THE DISTRICT COURT FROM RECONSIDERING BYRNE'S RULE 29 MOTION

A. The Double Jeopardy Clause Protects The Integrity Of Final Judgments Of Acquittal; The District Court's Initial Decision Was Not A Final Judgment

1. The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. V. The Clause places a limit on prosecution of criminal actions so that "the State with all its resources and power [will] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-188 (1957). By preventing repeated prosecutions, the Double Jeopardy Clause "protect[s] the integrity of a final judgment." United States v. Scott, 437 U.S. 82, 92 (1978); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (trial "terminated with the entry of a final judgment of acquittal"); United States v. Govro, 833 F.2d 135, 137 (9th Cir. 1987). As the Supreme Court has often instructed when there is "'no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended.'" Schiro v. Farley, 510 U.S. 222, 230 (1994), quoting, United States v. Wilson, 420 U.S. 332, 344 (1975).

2. In determining whether a district court's order is final, this Court examines the record to discern what effect the district court intended it to have. Montes v. United States, 37 F.3d 1347, 1350 (9th Cir. 1994). To prevail here, Byrne must establish that the district court's initial statement that it would grant his Rule 29 motion for acquittal was intended to be a final judgment. The record does not support that claim.

On June 25, 1998, during the first hearing on the Rule 29 motion, the district court ruled in Byrne's favor (E.R. 77; Tr. 1386). But, during its discussion about the motion, the court expressly reserved a final decision on the motion. The prosecutor requested that the court reserve final ruling on the motion "to allow us to submit transcripts of [Special Agent LaCosta's] testimony because I believe that there is sufficient evidence to let it go to the jury" (E.R. 78; Tr. 1387). The district court immediately granted that request and indicated that it could be "convinced otherwise," depending upon its review of the transcript (E.R. 79; Tr. 1388).

The trial had been adjourned before the end of the June 25, 1998, hearing, and the district court scheduled the trial to resume on June 30, 1998 (E.R. 192). Prior to resuming trial, the court addressed Byrne's Rule 29 motion (E.R. 89; Tr. 1399). After reviewing the transcript of Agent LaCosta's testimony, the court denied Byrne's motion for a judgment of acquittal (E.R. 101; Tr. 1411). Thus, between its initial, tentative ruling on June 25 and its final decision on June 30, the trial had been

adjourned, the jury was not told that Count V had been tentatively dismissed. Nor was any evidence presented. Under these circumstances, Byrne's contention that the government has twice prosecuted him on Count V is meritless.

Nor can Byrne persuasively argue that, under the circumstances of this case, the United States subjected him to the harms the Double Jeopardy Clause was intended to forestall -- added embarrassment, unnecessary expense, or a continuing state of anxiety over the possibility of retrial. No proceedings occurred between the district court's initial ruling on June 25, 1998 (Tr. 1389), and its reconsideration prior to the resumption of trial on June 30, 1998 (E.R. 89; 1399). Byrne was well-aware that the district court's ruling on June 25 was a tentative ruling. On June 25, the district court stated, at least three times, that it would reconsider after reviewing LaCosta's testimony (E.R. 79, 80; Tr. 1388-1389). At the jury instruction conference in the court's chambers, which immediately followed the June 25, hearing, the court again made Byrne's counsel aware that it would reconsider the motion. Removing all doubt at the reconsideration hearing, Byrne's counsel acknowledged that the court had made clear that the ruling was tentative (E.R. 93; Tr. 1403).

B. Byrne's Double Jeopardy Argument Lacks Authority And Merit

1. United States v. Blount, 34 F.3d 865 (9th Cir. 1994), does not support Byrne's argument. In Blount, 34 F.3d at 866, a multi-count indictment alleged that Blount had violated

several federal criminal statutes, including two counts of "tree-spiking" in violation of 18 U.S.C. 1864. "Tree-spiking" requires proof of damage in excess of $10,000. Ibid. At the close of the government's case, Blount moved, pro se, for a judgment of acquittal on the "tree-spiking" counts, arguing there was no evidence the damage was more than $10,000. Ibid. The court gave the government the opportunity to modify its charge to the lesser-included misdemeanor charge of 18 U.S.C. 1864. Id. at 867. When the government declined, the district court granted Blount's motion. Ibid. The district court announced to the jury that the tree spiking counts "were no longer in this case." Ibid. Blount and a co-defendant then presented their defenses on the remaining counts. After the defense had rested, the court announced that it would reconsider its earlier ruling because of its view that "the acquittal on the felony charges did not preclude reinitiation of the lesser-included offense." Id. at 367.

On appeal, this Court concluded that, under these circumstances, the lower court had erred in reconsidering its motion for a judgment of acquittal. It explained that the fact that the jury had been informed of the dismissal of the count and the defense has presented its case on the remaining counts, were factors that prejudiced the defendant. Id. at 868-869. But that is not the situation present here. Indeed, the Blount Court's rationale supports the ruling in this case.

In Blount, the government asked the Court to apply the Second Circuit's holding in United States v. LoRusso, 695 F.2d 45, 53 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983). In LoRusso, the district court stated it would grant defendant's Rule 29 motion for acquittal on the charged offense. 695 F.2d at 53-54. Immediately thereafter, the government asked for submission of the lesser-included offense, which the district court granted. Ibid. The LoRusso Court held that, under the circumstances in that case, the district court had entered an interlocutory order, which was subject to the trial court's inherent authority to reconsider such orders. 695 F.2d at 54. The Blount Court refused to apply LoRusso because it concluded that the facts in LoRusso were not present in Blount. 34 F.3d at 868.

But Byrne is incorrect when he states that the Blount Court rejected the result in LoRusso (Br. 26). To the contrary, the Blount Court expressed its agreement with the holding in LoRusso. As the Blount Court explained: "The defendant [in LoRusso] was not subject to double jeopardy because the motion for modification followed the court's decision 'promptly,' and the court did not give any indication to the jury of its ruling." 34 F.3d at 869, quoting LoRusso, 695 F.2d at 54 (emphasis added).

The same circumstances that distinguished LoRusso from Blount are present here. Here, as in LoRusso, the trial court reconsidered its ruling and did not inform the jury of its initial decision to dismiss Count V, and Byrne did not present

any evidence that might have prejudiced him during a jury trial on that count (E.R. 93; Tr. 1403). Moreover, this is an even stronger case factually than LoRusso because the trial court in this case indicated that its initial ruling on the Rule 29 motion was tentative (E.R. 77-79; Tr. 1386-88).[3/] Thus, Blount supports the United States' position in this case.

This Court should reject Byrne's other attempts to misconstrue Blount. Contrary to Byrne's arguments (Br. 11, 16, 20), the Blount Court did not rule that a district court may never reconsider an order granting a Rule 29 motion. Facts presenting that precise issue were not before that Court. The Blount Court disagreed with the argument presented there that "a grant of a judgment of acquittal on one count is not final until a final judgment has been entered on all counts." 34 F.3d at 869. But that is not the United States' position in this case; moreover, that issue is not present in this case. Here, the

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[3/] There is no merit to Byrne's contention (Br. 26 n.13) that the Second Circuit's holding in LoRusso is limited to situations in which a district court grants a Rule 29 motion but then permits the government to proceed on a lesser-included offense. As he must, Byrne concedes (Br. 28-29) that the Second Circuit subsequently applied LoRusso to a case which did not involve a proceeding on a lesser-included offense after a grant of a judgment of acquittal on the greater offense. See United States v. Washington, 48 F.3d 73, cert. denied, 515 U.S. 1151 (1995). As in this case, Washington involved a district court granting defendant's Rule 29 motion and then reconsidering that decision prior to informing the jury and prior to the defense presenting its case. Id. at 73. Nor did this Court, in Blount, suggest that LoRusso should be limited to situations involving the district court permitting the government to proceed on lesser-included offenses. 34 F.3d at 868.

district court reconsidered its initial decision about the Rule 29 motion well-before final judgment on the remaining counts.

Byrne contends that the Blount Court was concerned with "creating rules that would unfairly distinguish between defendants facing one-count indictments and defendants facing multi-count indictments" (Br. 17). To be sure, the Blount Court stated that "[i]f jeopardy does not end with regard to the dismissed count and the acquittal on the dismissed count can be reconsidered at any time during the prosecution of the remaining counts, the meaning and effect of a judgment of acquittal during trial is different for the defendant faced with multiple counts in the indictment." 34 F.3d at 869. But, the concerns the Blount Court discussed are not present in this case.[4/]

As noted, the district court did not reconsider Byrne's Rule 29 motion during continued prosecution of Byrne's remaining counts (E.R. 78-93; Tr. 1388-1403). Furthermore, unlike in Blount, the district court here indicated that its initial ruling was tentative (E.R. 79; Tr. 1388). A holding that a district court may issue a tentative ruling pending its review of the transcript of a key government witness would not lead to inconsistent or unfair results whether a defendant faced a

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[4/] In Blount, the Court raised this concern, in particular, because once the district court initially granted the motion for judgment of acquittal, the court then dismissed the indictment against Blount's co-defendant LaCrosse because he faced only one count of tree-spiking. 34 F.3d at 869. To reinstate the indictment against LaCrosse would have subjected him to Double Jeopardy. Ibid. This case raises no such problem because Byrne is the only co-defendant alleged to have violated Count V (E.R. 8-9).

single-count indictment or a multi-count indictment. In either situation, the district court's procedure would be the same. As in this case, the court would issue its tentative ruling and not inform the jury that it was dismissing the count until after it had reviewed the transcript and made a final judgment.

The "primary evil" that the Double Jeopardy Clause protects against is "successive prosecutions." Schiro v. Farley, 510 U.S. 222, 230 (1994). Not even a threat of repeated prosecutions occurs when a trial court makes clear, as it rules on a Rule 29 motion, that the initial ruling will not be final until it reviews the trial transcript; the court does not inform the jury of the initial ruling; and the court changes its ruling prior to the presentation of additional evidence.

2. Equally unavailing is Byrne's reliance (Br. 19-20) upon the 1994 amendment to Fed. R. Crim. P. 29(b). Byrne acknowledges that there is an established principle that judges have inherent authority to reconsider their rulings (Br. 30). Accordingly, Byrne is arguing that the 1994 amendment to Rule 29 strips a district court of that authority with regard to motions for judgments of acquittals (Br. 18-21, 30).[5/] But, to accept

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[5/] Byrne concedes (Br. 30) that district courts have discretion to control proceedings and to modify and reconsider rulings. Citing Fed. R. Crim. P. 57(b) (judges may "regulate practice in any manner consistent with federal law"). This Court has consistently reaffirmed the general principle that district courts have the "inherent authority" to reconsider orders during criminal proceedings. See, e.g., United States v. Barragan-Mendoza, No. 97-30264, 1999 WL 221857, at *4 (Apr. 19, 1999); United States v. Foumai, 910 F.2d 617, 620 (1988) (district court has inherent jurisdiction within the time allowed for appeal to

(continued...)

Byrne's argument would violate established principles of statutory construction. Both the Supreme Court and this Court have instructed that courts are to "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-185 (1988); Chappell v. Robbins, 73 F.3d 918 (9th Cir. 1996). Thus, where a common-law principle is well established the "courts may take it as given that Congress has legislated with an expectation that the principle * * * will apply except when a statutory purpose to the contrary is evident." United States v. Texas, 507 U.S. 529, 534 (1993) (emphasis added) (citations and quotations omitted).

There is no textual or legislative history to support Byrne's claim (Br. 19) that, when it amended Rule 29(b) in 1994, Congress intended to prevent judges from employing their established authority to reconsider orders in the context of Rule 29 motions. In 1993, subsection (b) of Rule 29 suggested that a district court could reserve its ruling on a motion for a judgment of acquittal only if the motion had been made at the end of the presentation of all the evidence. The 1993 version of the statute stated: "If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a

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[5/] (...continued)
"modify its judgment for errors of fact or law or even to revoke a judgment") (citation omitted).

verdict of guilty, or is discharged without having returned a verdict."

The 1994 amendment to Rule 29(b) more clearly instructs that a judge may defer ruling on a motion for judgment of acquittal regardless of whether the motion was made at the close of the government's case or at the end of the defense's case. See Fed. R. Crim. P. 29, Advisory Committee Notes. Subsection (b) now states that a "court may reserve decision on a motion for judgment of acquittal, proceed with the trial * * * and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict."

In amending the Rule, Congress recognized the public interest in protecting defendants from double jeopardy when it amended the statute. See Fed. R. Crim. P. 29(b), Advisory Committee Notes. But there is no evidence that, to accommodate that interest, Congress intended the amendment to Rule 29(b) to strip district courts of their inherent authority to reconsider judgments of acquittal. Indeed, a holding that judges are permitted to make careful review of trial transcripts before rendering their final judgments on motions for judgments of acquittals is fully consistent with the purposes behind the 1994 amendment to subsection (b) of Rule 29. The Advisory Committee Notes for the 1994 amendment to subsection (b) explained that one of the purposes was to "remove the dilemma in those close cases in which the court would feel pressured into making an immediate,

and possibly erroneous, decision." Surely when a district court, such as the one in this case, withholds its final resolution of the motion for a judgment of acquittal until it has had a chance to review the transcript of a key government witness (E.R. 77-79; Tr. 1386-88), such a decision furthers that purpose.

3. Byrne relies upon cases, such as United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), and United States v. Ball, 163 U.S. 662, 671 (1896), to argue that, in determining finality of a judgment, it does not matter what label the district court order has, as long as the order has the effect of resolving facts that acquit the defendant (Br. 14, 22 n.12). That argument is also unavailing. The issue in this case is not whether the district court's initial ruling should be characterized as a resolution of facts that are determinative of guilt. Rather, the issue here is whether the district court's initial ruling was a final judgment of those factual issues. Neither Martin Linen Supply Co., nor Ball, addressed the question presented in this case.[6/]

Contrary to Byrne's arguments, the principle that a final judgment of acquittal, even if "egregiously erroneous," may not be appealed, is not the issue here (Br. 30, quoting Sanabria v. United States, 437 U.S. 54, 64 (1978)). The United States, of

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[6/] The Supreme Court had occasion to review the question presented here when the defendants petitioned for certiorari from the Second Circuit's judgments in United States v. Washington, 48 F.3d 73 (1995), and United States v. LoRusso, 695 F.2d 45 (1982). The Court declined, however, to review those cases. See Washington v. United States, 515 U.S. 1151 (1995); Errante v. United States, 460 U.S. 1070 (1983).

course, does not seek to appeal the district court's ruling. The issue is whether the district court's initial ruling deprived it of jurisdiction to reconsider that ruling. By stating that its first ruling was tentative, pending review of the transcript of Agent LaCosta's testimony (E.R. 79-80, 93; Tr. 1388-1389, 1403), the district court retained jurisdiction to reconsider the motion.

CONCLUSION

This Court should affirm the order denying Byrne's motion for judgment of acquittal, and remand the case for further proceedings on Count V of the indictment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is unaware of any appeals raising the questions presented in this appeal. This case is related to United States v. Burton, No. 98-50691 (9th Cir.).

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CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to Ninth Circuit Rule 32.4(e), I certify that the foregoing brief is double spaced, with non-proportionally spaced 12 point type, and contains 6,422 words.

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I hereby certify that on this 20th day of May 1999, two copies of the Brief For The United States As Appellee were mailed first class, postage prepaid, to the following counsel of record:

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