Chapter 32

Motion for Acquittal (The "Prima Facie Motion")

§ 32.01 THE MOTION FOR ACQUITTAL

At the close of the prosecution's case, it is routine for defense counsel to move for a judgment of acquittal. (Terminology differs among jurisdictions. The motion is sometimes called a "motion to dismiss," a "*prima facie* motion," a "motion for a directed verdict" or a "demurrer to the evidence.") *But cf*. *Evans v. Michigan*, 568 U.S. 313, 329 (2013) (dictum) ("Nothing obligates a jurisdiction to afford its trial courts the power to grant a midtrial acquittal, and at least two States disallow the practice. See Nev. Rev. Stat. § 175.381(1) (2011); *State v. Parfait*, 96,1814 (La.App. 1 Cir. 05/09/97), 693 So.2d 1232, 1242.").

The motion for acquittal tests the legal sufficiency of the prosecution's evidence to sustain a verdict; that is, it asks the question whether a reasonable juror (or a reasonable judge in a bench trial), crediting the prosecution's testimony and drawing all rational inferences in the prosecution's favor, could find every element of the charge proved beyond a reasonable doubt. *See, e.g., Burks v. United States,* 437 U.S. 1, 16-17 (1978); *Musacchio v. United States*, 577 U.S. 237, 243 (2016) ("Sufficiency review essentially addresses whether 'the government's case was so lacking that it should not have even been submitted to the jury.' . . . The reviewing court considers only the 'legal' question 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"); *United States v. Hillie*, 14 F.4th 677 (D.C. Cir. 2021). More detailed discussion of this standard and its applications is found in §§ 35.01-35.06 *infra.*

The Supreme Court held in *In re Winship,* 397 U.S. 358 (1970), "that the Constitution requires proof of guilt beyond a reasonable doubt" (*Cool v. United States,* 409 U.S. 100, 104 (1972)), in state as well as federal prosecutions and in juvenile as well as adult criminal trials. *See also Ivan V. v. City of New York,* 407 U.S. 203 (1972); *Hurst v. Florida*, 577 U.S. 92, 97 (2016) ("The Sixth Amendment . . . 'right to . . . trial, by an impartial jury. . . .' . . . , in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt"). As a consequence, the constitutionally required standard for assessing the sufficiency of the prosecution's evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (*Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis omitted)). *See Pilon v. Bordenkircher,* 444 U.S. 1 (1979) (per curiam); *Tanner v. Yukins*, 867 F.3d 661 (6th Cir. 2017); *Travillion v. Superintendent, Rockview SCI*, 982 F.3d 896, 904 (3d Cir. 2020) (finding a clear violation of *Jackson* where a conviction was based solely on fingerprint evidence: "Travillion's fingerprints were only found on easily movable objects . . . and there was no evidence of his prints anywhere else at the crime scene. There was no evidence that the . . . [objects] were unavailable to Travillion prior to the robbery, no evidence as to the age of the prints, and no evidence as to how long the prints could remain on the . . .

[objects] after their impression."); *Tibbs v. Florida,* 457 U.S. 31, 41, 45 (1982) (dictum). *See also McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (per curiam) ("reversal for insufficiency of the evidence [under *Jackson v. Virginia*, *supra*] is in effect a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal").

Counsel should never neglect to make a motion for acquittal at the close of the prosecution's evidence. Many courts will not entertain a motion for a judgment of acquittal at the close of all the evidence (see §§ 35.01, 36.01 *infra*) if such a motion was not first made before the presentation of defense evidence. And, in many jurisdictions, unless a motion for acquittal has been entertained and denied on the merits, the sufficiency of the evidence to support an adjudication of delinquency cannot be raised on an appeal.

The applicable state or local rule or caselaw may require that counsel specify the grounds for dismissal of counts or of the entire charging paper. Counsel's failure to identify a particular ground may be treated on appeal as a waiver of the claim. *See, e.g.*, *Davis v. United States*, 367 A.2d 1254, 1269 (D.C. 1976); *People v. Santos*, 86 N.Y.2d 869, 658 N.E.2d 1041, 635 N.Y.S.2d 168 (1995). *But see State v. Lopez*, 907 N.W.2d 112 (Iowa 2018) (reversing a conviction on the ground of ineffective assistance of counsel where a defense attorney's stated grounds in moving for acquittal failed to include a valid contention that the defendant's conduct did not come within the terms of the statute defining the crime with which he was charged).

In arguing the motion in a bench trial, defense counsel should try to engage the judge in dialogue rather than to indulge in formal exhortation. The judge may deny the motion, but what s/he says may give an indication of how s/he views the prosecution's proof and therefore of the points to which defense testimony can most profitably be directed.

In a jury trial it is advisable to make the motion for acquittal out of earshot of the jury, since there may be some adverse effect of having the jury hear the judge deny a defense contention that the prosecution's case is insufficient. If a recess is going to be called at about this time, counsel can make the motion after the jury has gone out. If not, counsel should ask leave to approach the bench and should make the motion at sidebar.

§ 32.02 RESERVING RULING ON THE MOTION; "HOLDING OPEN"

Some judges will attempt to reserve ruling until the close of the case. Judges are particularly likely to employ such a practice in a bench trial. If a judge expresses an inclination to reserve ruling on the motion, counsel should politely, but firmly, insist on getting a ruling before counsel has to decide whether to present any defense evidence. Counsel should point out that the deferral of a ruling until the close of the case would deny the respondent his or her right, central to the accusatorial system and protected by the constitutional privilege against self-incrimination (*see Brooks v. Tennessee,* 406 U.S. 605 (1972)), to have a judicial determination of the legal sufficiency of the prosecutor's case *before* the respondent is obliged to put in a defense. Because

any evidence that the respondent presents may be used against him or her to produce a guilty verdict and sustain it against a motion for acquittal at the close of all the evidence (*see, e.g.*, *Smith v. Massachusetts*, 543 U.S. 462, 472 (2005) (describing state rules to this effect)), a court's refusal to rule on such a motion before the defense elects to present evidence constitutes compelled self-incrimination – precisely the evil against which the Privilege is directed. *See, e.g.*, *State v. Smith*, 675 P.2d 521, 523-24 (Utah 1983) (the trial court erred in "reserv[ing] its decision until after the defendant presented his evidence, and then den[ying] the motion. We think that the defendant was entitled to a ruling before he commenced his own case in chief, and it was error for the trial court to have refused to rule promptly."; the state statute authorizing a motion for a directed verdict in a criminal proceeding "is founded on the basic concept that a defendant need not adduce any evidence in his defense unless the prosecution first adduces believable evidence of all the elements of the crime charged. Only then should the defendant be put to his proof."). *Cf. Smith v. Massachusetts*, 543 U.S. at 471-72 (stating, in the context of a double jeopardy claim, that a rule that would permit a trial judge to grant a motion for acquittal on one or more counts at the close of the prosecution's case and then to reconsider that ruling after "the trial has proceeded to the defendant's presentation of his case" on the remaining counts would create the "possibility of prejudice" by potentially "induc[ing] a defendant to present a defense to the undismissed charges when he would be better advised to stand silent"); *R.J.W. v. State*, 910 So.2d 357, 360-61 (Fla. App. 2005) (applying *Smith v. Massachusetts*, *supra*, in a delinquency case to hold that the judge, who had granted the defense's motion for dismissal at the conclusion of the State's case, violated the Double Jeopardy Clause by thereafter allowing the State to re-open its case and present additional evidence). *Compare Jackson v. United States,* 250 F.2d 897, 901 (5th Cir. 1958) (construing the then-existing version of FED. RULE CRIM. PRO. 29 to preclude trial judges from "reserv[ing] a ruling on a motion for acquittal . . . at the close of the Government's case," and explaining that otherwise the defendant would be "force[d] . . . to an election between resting and being deprived of the benefit of the motion" because "[t]he introduction of evidence after the denial of a motion made at the close of the prosecution's case waives any error in the denial of the motion"), *with* FED. RULE CRIM. PRO. 29(b) (as amended in 1994 to "permit[ ] the reservation of a motion for a judgment of acquittal made at the close of the government's case" (Advisory Committee Notes to Rule 29) and to specify that "[i]f the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved" (Rule 29(b)).

Occasionally the prosecutor will ask the court to "hold open" the prosecution's case-in-chief because some exhibit has to be tidied up before it can be put in or because some witness on a formal point has been delayed or for some other reason of convenience. The excuse generally sounds sensible, and the suggestion that the case be held open is beguiling from the point of view of practicality if a continuance can be avoided by this apparently simple device. But the effect of the device may be far from simple in a close case, and "holding open" should be resisted on the ground that the presumption of innocence comports "the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion . . . .'" (*Taylor v. Kentucky*, 436 U.S. 478, 484 n.12 (1978); *Bell v. Wolfish,* 441 U.S. 520, 533 (1979) (dictum)). See the discussion of *Brooks v. Tennessee, supra*, in § 9.12

penultimate paragraph *supra*.

§ 32.03 DISMISSAL OF SOME COUNTS OR OFFENSES

The court may grant a judgment of acquittal on some counts of a multi-count Petition and deny it on others. It may order an acquittal on the charge made in the charging paper but deny it for some lesser included offense. See §§ 36.01, 36.05 *infra.*

In a jury trial, if the motion is granted in part, counsel should ordinarily ask the court to so inform the jury before the presentation of any defense evidence. This avoids the adverse psychological set that some jurors may develop if they perceive that the defense is not responding to one of the prosecutor's contentions – a psychological block that may persist even when the jury learns, at the end of the whole case, that that contention will not be submitted to the jury. If the jurors are already negotiating their verdict (as juries do from time to time during breaks in the trial, notwithstanding the judicial admonition not to discuss the case), informing them that a particular charge has been dismissed also avoids the possibility that a pro-defense juror will compromise when there is nothing to compromise about.