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

PURSUANT TO THIS COURT'S ORDER, DATED NOVEMBER 24, 1999, RESPONSE BY THE UNITED STATES IN OPPOSITION TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES: **PAGE**

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This opposition is submitted in response to the Court's order of November 24, 1999, directing the United States to file a response to the petition for rehearing and suggestion for rehearing en banc. The panel's judgment that the trial court did not err in denying Byrne's motion for a judgment of acquittal does not conflict with any decision of this Court or the Supreme Court and does not involve an issue of exceptional importance. Furthermore, the panel decision is correct. This Court should, therefore, deny Byrne's petition for rehearing and suggestion for rehearing en banc.

STATEMENT

1. On December 16, 1997, a federal grand jury returned an indictment against six former Marine Corps military policeman (R. 1). John Wolf, Shawn Simonet, Corey Gautreaux, Brian Gadway, and Mark Burton were charged with depriving undocumented migrant

workers of their federally protected rights by assaulting them and with entering into a conspiracy to commit the assault (E.R. 4-8; R. 1). The indictment also alleged that Charles Byrne made false statements and entered into a conspiracy to make such statements (E.R. 8-9; R. 1). With the exception of Burton and Byrne, the defendants pled guilty.[1/] United States v. Byrne, 192 F.3d 888, 890 (9th Cir. 1999). Burton and Byrne's trial began on June 12, 1998, and the defendants who pled guilty testified against them. Ibid.

2. On June 19, 1998, the United States rested its case against Burton and Byrne. Byrne, 192 F.3d at 890. That same day, Byrne filed his motion, under Fed. R. Crim. P. 29, for a judgment of acquittal as to Count V, which alleges that he violated 18 U.S.C. 3 by providing a false alibi while knowing that his co-defendants committed an offense against the United States (E.R. 8-9, 41; Tr. 1130).

On the next trial date, June 25, 1998, the district court heard oral argument on Byrne's Rule 29 motion. Byrne, 192 F.3d at 890. The district court made a tentative ruling granting Byrne's motion for a judgment of acquittal as to Count V. Ibid. Immediately following the court's statement, the Assistant United States Attorney asked the "court to reconsider after obtaining the transcript of Mr. LaCosta," the Agent from the Naval

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[1/] A seventh Marine, James Graham, pled guilty to an information charging him with making a false statement. At trial, he too testified against Burton and Byrne (Tr. 757-758).

Investigative Service who interviewed Byrne soon after the assault (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 [was] sufficient evidence to let it go to the jury" (E.R. 78-79; Tr. 1387-1388). The district court granted the government's request. Byrne, 192 F.3d at 890.

On June 30, 1998, the next scheduled trial date, the first matter the court addressed was Byrne's motion for a judgment of acquittal. Byrne, 192 F.3d at 890. The district court explained that, based on the government's evidence, it planned to reconsider its initial decision to grant the Rule 29 motion. 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 case is not an instance of a subsequent prosecution, because (1) the court made its ruling at the end of the last trial session; (2) Byrne had not presented his case; and (3) the jury was not told that 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.

After denying Byrne's motion for judgment of acquittal, the district court, at Byrne's request, severed Count V from the trial and allowed Byrne to file a notice of appeal. Byrne, 192 F.3d at 890.

3. On September 17, 1999, a panel of this Court affirmed the district court's determination that it could deny Byrne's motion for a judgment of acquittal after tentatively granting the motion. Byrne, 192 F.3d at 889-893. Byrne relied heavily upon

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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 informed Byrne's counsel that it would reconsider its ruling.

United States v. Blount, 34 F.3d 865, 866 (9th Cir. 1994), which involved a felony prosecution for "tree spiking" on federal lands under a statute that made the act a felony if damages exceeded $10,000 and a misdemeanor charge if damages were less. In Blount, the district court granted defendant's motion for judgment of acquittal because of the government's failure to present evidence of $10,000 damage. 34 F.3d at 867. The court announced to the jury that the tree spiking counts were "no longer in this case." Ibid. After the defense rested, the district court reinstated the counts as lesser-included misdemeanors. Ibid. This Court held that Blount was subjected to Double Jeopardy because the trial court announced the earlier grant of the Rule 29 motion to the jury and gave no indication that its judgment was tentative. Byrne, 192 F.3d at 891, citing Blount, 34 F.3d at 868.

The panel distinguished this case from Blount because, here, the district court indicated it might reconsider after reviewing Agent LaCosta's testimony, and because "unlike Blount, there was no announcement of the court's decision to the jury, and the trial did not resume until June 30, after the district court had denied Appellant's motion." Byrne, 192 F.3d at 891.

The panel found that this case was more analogous to United States v. LoRusso, 695 F.2d 45 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983), and to United States v. Washington, 48 F.3d 73 (2d Cir.), cert. denied, 515 U.S. 1151 (1995). As the panel explained, in both of those cases, the Second Circuit held that

it was not a violation of Double Jeopardy for a district court to initially grant a motion for judgment of acquittal; to reconsider upon the government's immediate request; and, before informing the jury that the counts had been earlier dismissed, to deny the motion. Byrne, 192 F.3d at 891-892.

Byrne also argued that, because the amendments to Rule 29(b) permit a court to consider a motion for judgment of acquittal at the close of the government's case or at the close of all the evidence, a court could not reconsider a tentative ruling on a motion. Byrne, 192 F.3d at 892-893. The panel found that the purpose of the 1994 amendments was "to allow the district court to defer a motion brought at the end of the government's case in the same way the prior revision allowed this deferral if the motion was brought after presentation of all the evidence." Id. at 892. The panel explained that the court's actions here were consistent with the Advisory Committe Notes to the 1994 amendments, which state that amended Rule 29(b) "'should remove the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision.'" Id. at 892-893. The panel found that the "language reflects the intent that Rule 29(b) allow a district court to reconsider its ruling with a more careful analysis of the evidence." Id. at 893.

ARGUMENT

Byrne has failed to identify any issue in this case that meets the standards, under Fed. R. App. P. 35(b), for an en banc

rehearing. The unanimous panel decision does not conflict with any decision of this Court or the Supreme Court. After a detailed analysis of the only decision from this Court upon which Byrne relies -- United States v. Blount, 34 F.3d 865 (1994) -- the panel found this case distinguishable from Blount. Byrne has not identified a Supreme Court decision that precludes the action of the district court here. Furthermore, the panel decision is correct and presents no issue of exceptional importance.

Nor has Byrne presented grounds that warrant the grant of a petition for rehearing under Fed. R. App. P. 40. Contrary to his argument (Pet. 7), the panel did not overlook any fact. The panel correctly held that when a district court makes a tentative ruling granting a motion for judgment of acquittal but, at the same time, states that it will reconsider after reviewing the transcript of relevant testimony, the initial ruling is not a final judgment.

1. The Byrne panel applied the same legal standard as the Court used in United States v. Blount, 34 F.3d 865 (9th Cir. 1994). The panel properly distinguished Blount from this case. In Blount, the defendant was tried for tree-spiking, a violation of 18 U.S.C. 1864, which is a felony if the offense results in $10,000 damage. 34 F.3d at 866. The district court initially granted the defendant's motion for judgment of acquittal as to the entire count because of the United States' failure to present evidence of $10,000 damage. Id. at 867. The trial court announced its decision to the jury. Ibid. After the government

rested its case, the court reinstated the lesser-included charge of tree-spiking, which does not require proof of $10,000 damage. Ibid.

A panel of this Court reversed the Blount district court for the following reasons:

> The district court discussed its concerns about the evidence with the parties, and offered the government the chance to modify its charge; the government declined to do so. The court then made its ruling of acquittal, and announced its decision to the jury. The trial on the remaining counts then proceeded and the court did not return to the § 1864 counts until the next day. The court even acknowledged that the counts had been dismissed without any reservation of the misdemeanor charges. Thus, there is no suggestion in this case that the district court's oral grant of the motion for acquittal was tentative or subject to reconsideration.

34 F.3d at 868 (emphasis added).

This Court held that Blount's Double Jeopardy rights had been violated, because the trial court: (1) announced to the jury that it had granted a motion for a judgment of acquittal, and (2) gave no indication that its earlier decision was tentative.

As the panel here determined, the facts are significantly different from Blount. In this case, the district court initially indicated, in the June 25, 1998, hearing on the motion for a judgment of acquittal, that it would grant the motion. Byrne, 192 F.3d at 891. But, in the same hearing and upon the United States' immediate request, the court reserved final decision until it reviewed the transcript of Naval Investigative Service Agent LaCosta who interviewed Byrne after the assaults

had taken place. Ibid. The district court did not announce to the jury that it had dismissed Count V from the trial. Ibid. The trial was adjourned from the June 25, 1998, hearing until June 30, 1998. Ibid. The morning of June 30, 1998, the court denied Byrne's motion for a judgment of acquittal. Ibid.

The panel's judgment that Byrne's Double Jeopardy rights were not violated is completely consistent with the Blount Court's rationale. In Blount, the government asked the Court to apply the Second Circuit's holding in United States v. LoRusso, 695 F.2d 45, 53 (1982), cert. denied, 460 U.S. 1070 (1983), in which the Second Circuit held that the district court's reconsideration of a motion for judgment of acquittal did not violate Double Jeopardy. 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 868, quoting LoRusso, 695 F.2d at 54 (emphasis added). The panel analogized the facts in this case to LoRusso (192 F.3d at 891) which the Blount Court considered clearly consistent with its rationale in Blount. The Blount Court's rationale, therefore, contradicts Byrne's contention that the panel decision here conflicts with that decision.

Furthermore, there can be little argument that the trial court indicated its initial ruling on the Rule 29 motion was tentative (E.R. 77-79; Tr. 1386-1388). During the June 30, 1998, hearing, the trial court stated to Byrne's counsel that it was

clear to all parties, at the June 25, 1998, hearing, that it would reconsider the motion for judgment of acquittal after reading Agent LaCosta's transcript, and Byrne's counsel responded: "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" (E.R. 93-94; Tr. 1403-1404).

2. Contrary to Byrne's arguments (Pet. 4, 6), the panel's decision is not in conflict with either United States v. Ball, 163 U.S. 662 (1896), or United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). Byrne does not discuss the particulars of those opinions; neither case involved facts similar to those here.

In United States v. Ball, 163 U.S. 662, 664 (1896), a jury initially acquitted one defendant and convicted two others for murder. The Supreme Court, upon its first review of the case, dismissed the indictment because it failed to assert the time or place of the murder. Ibid. The grand jury returned another indictment that charged the defendants with murder, including the defendant who was initially acquitted. Id. at 665. The second jury found all three defendants guilty. Id. at 666. The Supreme Court held that the defendant who was initially acquitted could not be retried. Id. at 668-669. Unlike Ball, the government did not attempt to retry Byrne, because Count V never reached the jury.

In Martin Linen, the defendants filed a motion for a judgment of acquittal after the jury was discharged. 430 U.S. at 566. The district court granted that motion, and the United States appealed from the grant of the judgment of acquittal. Id. at 567. The court of appeals dismissed the appeal, and the Supreme Court affirmed, holding that the government may not appeal from a judgment of acquittal. Id. at 567. This case does not involve a government appeal from a judgment of acquittal.

Byrne cites Martin Linen for the principle that "'what constitutes an acquittal is not to be controlled by the form of the judge's action;'" a court must determine "'whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not'" (Pet. 6, citing, 430 U.S. at 571). The Court used this language to respond to the United States' argument that the government may retry a defendant after a mistrial. The United States is not making that argument here. The language Byrne quotes from Martin Linen simply suggests that a reviewing court should look to the substance of a trial court's ruling to determine if its judgment is final. That is exactly what the panel did here, and it correctly found the trial court's initial decision was not final. Byrne, 192 F.3d at 890, 892.

3. Nor is there anything exceptional about the court of appeals' analysis of the 1994 amendments to Fed. R. Crim. P. 29(b). Byrne argues (Pet. 10-11) that the 1994 amendments to Rule 29(b) prohibit the district court's decision to deny his motion for a judgment of acquittal. The panel considered the

language of Rule 29(b), both before and after the 1994 amendments, as well as the pertinent legislative history, and correctly rejected this argument. Byrne, 192 F.3d at 892-893. 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. Then, the statute read: "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 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. See Fed. R. Crim. P. 29(b), Advisory Committee Notes. But, as the panel determined (Byrne, 192 F.3d at 892-893), there is no evidence

that, to accommodate that interest, Congress intended the amendments to Rule 29(b) to prevent a district court from issuing a tentative ruling granting a motion for judgment of acquittal, when the court specifies it will withhold judgment pending review of the transcript of testimony already presented. Indeed, the Advisory Committee Notes for the 1994 amendments to subsection (b) explained that one of the purposes of the amendments was to "remove the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision." A court's careful consideration of a transcript before issuing a final judgment of acquittal furthers those purposes. There is nothing in Rule 29 to support Byrne's contention (Pet. 11) that if the government fails to ask the court to defer ruling on a motion for judgment of acquittal until after the presentation of all the evidence, the government cannot ask the court to review a transcript of evidence and reconsider an initial grant of the motion.

The "primary evil" that the Double Jeopardy clause of the Fifth Amendment protects against is that of "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 that its initial ruling on a Rule 29 motion will not be final until it reviews the trial transcript; the court does not inform the jury of the initial ruling; and the court then enters a final judgment denying the motion for judgment of acquittal.

4. Byrne's petition for rehearing is also meritless. He has failed to establish that the panel overlooked any fact material to whether the district court's judgment is final. To support this claim, Byrne lists (Pet. 7-8) the facts he considered material: the district court set a time and date for argument on Byrne's Rule 29 motion; the government submitted a lengthy, written memorandum of law opposing the motion; the district court discussed its concerns about the evidence; the district court initially granted Byrne's motion and stated why; and the court entered the ruling in the court's minutes.

Byrne presented these facts in its Appellant's Brief (at pp. 21-22). The panel's recitation of the procedural history of the trial court's initial ruling and its final decision to deny Byrne's motion clearly demonstrates the panel was aware of the district court's actions. Byrne, 192 F.3d at 890. Thus, what Byrne essentially protests here is the panel's analysis of the facts. But the panel's decision that the district court's initial ruling was not final is correct. The district court made a clear statement that it would review Agent LaCosta's testimony and would reconsider the motion, and the court did not inform the jury of its initial grant of the Rule 29 motion. These factors clearly outweigh the factors Byrne lists for arguing that the district court's initial ruling was final.

CONCLUSION

This Court should deny Byrne's petition for rehearing and suggestion for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 1999, two copies of the Response by the United States in Opposition To Petition for Rehearing and Suggestion For Rehearing En Banc were mailed first class, postage prepaid, to the following counsel of record:

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