No.

In The

Supreme Court of the United States

DAVID G. BOWSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the legal duty to disclose, required for a criminal concealment of a material fact, 18 U.S.C. § 1001(a)(1), can be created by coupling a voluntary request for information with a certification of compliance subject to the false statement proscription of 18 U.S.C. § 1001(a)(2)?

Whether a defendant can obtain relief where a trial court, in violation of Fed.R.Crim.P. 29 and 48, refuses to rule on a motion for judgment of acquittal and, over the defendant's objection, instead permits the Government to dismiss the charge with prejudice?

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INTRODUCTION

The Constitution vests in Congress the legislative power to define criminal conduct. In 18 U.S.C. § 1001, Congress proscribed "two distinct offenses, concealment of a material fact and false representations." *United States v. Diogo*, 320 F.2d 898, 902 (2d Cir. 1963). The "prohibition of concealment is violated only when there exists a duty to disclose." *Hubbard v. United States*, 514 U.S. 695, 716-17 (1995) (Scalia, J., concurring). A duty to disclose can be created by a statute or a regulation or, on occasion, by a government form where the agency has authority to require the disclosure of certain categories of information and issues the form to specify the facts that it seeks.

In this case, however, the court below upheld the conviction of Mr. Bowser for concealment because he failed to produce certain documents to the Office of Congressional Ethics (OCE) in response to a voluntary Request for Information (RFI). The court held that the requisite duty to disclose was established by the RFI coupled with Mr. Bowser's signed affirmation, pursuant to the false statement provision of 18 U.S.C. § 1001(a)(2), that he fully complied with the RFI.

This holding is at odds with the precedents of this Court and all the other federal circuits. It transforms the law of criminal concealment in a dangerous fashion. First, it permits multiplicitous charges and convictions for violating both subsections of § 1001 through the same conduct, i.e.,

an allegedly false certification of compliance. More fundamentally, it abridges the limitation that a duty to disclose can only be created by Congress through lawmaking and agencies through rulemaking. Instead, it improperly empowers government officials to create duties to disclose simply by obtaining certifications of compliance with their voluntary requests for information. This invites abusive law enforcement tactics and prosecutions.

In addition, the decision below emasculates Federal Rules of Criminal Procedure 29 and 48 while depriving Mr. Bowser of his right to be acquitted of the theft charge against him. Rule 29 entitles a defendant to an acquittal when the prosecution's proof is insufficient to establish criminal liability. And Rule 48 entitles a defendant to insist on a disposition on the merits once trial commences, rather than permitting the Government to dismiss a charge.

In this case, the evidence was insufficient to sustain the theft charge and Mr. Bowser twice moved for a judgment of acquittal pursuant to Rule 29. Rather than rule on these motions, however, the district court permitted the Government to dismiss that charge with prejudice, over Mr. Bowser's objection. The court below rejected Mr. Bowser's appeal of this judicial malfeasance as moot. The circuit court held that it was impossible to grant Mr. Bowser any effectual relief because there is no meaningful difference between an acquittal and a dismissal with prejudice.

This astonishing ruling conflicts with the considered judgment of the framers of the Criminal Rules – the Advisory Committee, this Court, and Congress – as well as precedents from this Court and other federal appellate courts. Where the prosecution's case is legally insufficient, Rule 29 provides that the court "must" enter a judgment of acquittal. The conclusion that the district court's patent error is unreviewable – because the Government's dismissal of the charge was as good as an acquittal – is nonsense. Other federal appeals courts have recognized that an acquittal on the merits serves to clear a defendant's name, *see United States v. Mespoulede*, 597 F.2d 329, 335 n.9 (2d Cir. 1979), whereas a dismissal of charges does not because "[t]he stigma still remains." *United States v. Baskin*, 17 USCMA 315, 316 (1967) (citations omitted). This is precisely why Rule 48 gives a defendant the right, once trial commences, to object to a dismissal and insist on a decision on the merits. Plainly the drafters of this Rule did not believe that a dismissal was as good as an acquittal. The circuit court's ruling overrides their collective judgment, emasculates Rules 29 and 48, and leaves defendants like Mr. Bowser without any remedy where the trial court refuses to fulfill its duties under the Rules.

OPINIONS BELOW

The district court's opinion granting in part, and denying in part, Mr. Bowser's motion for judgment of acquittal (Pet.App. 24) is at 318 F.Supp.3d 154. The D.C. Circuit's decision affirming (Pet.App. 1) is reported at 964 F.3d 26.

JURISDICTION

The D.C. Circuit issued its opinion and entered judgment on June 30, 2020, and denied a timely petition for rehearing on August 6, 2020. *See* Pet.App. at 22. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant statutory provision (18 U.S.C. § 1001) is at Pet.App. 68. The relevant Rules (Fed.R.Crim.P. 29 and 48) are at Pet.App. 70 and 73.

STATEMENT

The Government alleged that Mr. Bowser, as Chief of Staff, unlawfully used the Member's Representational Allowance (MRA) of Rep. Paul Broun (R-Ga.) to pay a communications coach for assisting the Congressman with his 2012 House re-election and 2014 Senate campaigns. It also alleged that Mr. Bowser obstructed a review of this issue by the OCE and, in so doing, made criminal false statements and concealed material facts. Mr. Bowser's defense was that the communications coach was properly paid from the MRA to provide services related to Broun's official duties, and that the coach volunteered his services to the campaigns. Mr. Bowser denied attempting to obstruct OCE's review or making any intentional false statements to OCE.

A. The Theft Charge

The evidence was undisputed that the communications coach actually provided official services to Rep. Broun for the entire time he was paid from the MRA. The coach was paid the lower rate he charged for official work (versus campaign work) and did not perform any campaign work at all during some periods. When the coach later started to perform significant amounts of campaign work, he repeatedly asked Mr. Bowser to be paid for such work and was told there were no funds available. Nonetheless, he agreed to continue the campaign work although neither Rep. Broun nor Mr. Bowser ever told him he would lose the official work if he did not also perform the campaign work. Still the Government contended that some of the MRA funds paid to the coach must be attributed to campaign services rather than official services, thereby constituting theft of government funds in violation of 18 U.S.C. § 641.

In order to bolster its case, the Government introduced evidence, pursuant to Fed.R.Evid. 404(b), that Mr. Bowser knew of, or participated in other violations of House Rules, consisting of minor episodes where staff performed campaign activities in Rep. Broun's congressional office, or used congressional supplies, time, phones or email for campaign purposes. In closing argument, the Government equated using MRA funds to hire the coach to these instances in which official resources had been used for campaign purposes. The Government portrayed Mr. Bowser as someone who

ignored legal constraints whenever he thought he could get away with it.

B. The Obstruction And Related Charges

The OCE conducted a review of Rep. Broun's use of MRA funds to pay the communications coach. The Government alleged that Mr. Bowser obstructed this review in violation of 18 U.S.C. § 1505, concealed material facts, in violation of 18 U.S.C. § 1001(a)(1), and made multiple false statements, in violation of 18 U.S.C. § 1001(a)(2).

As part of its review, OCE sent RFIs to members of Rep. Broun's staff, including Mr. Bowser, which sought all documents relating to the communications coach or his company. (Pet.App. 83-84.). Mr. Bowser produced responsive emails from his official account to OCE but did not produce any from his personal account, which he used for campaign activities. Mr. Bowser certified that he had not knowingly and willfully withheld any requested information. The Government contended that this was both a false statement and a concealment of material facts.

Mr. Bowser denied that he had sought to conceal relevant information from OCE by not producing his personal emails. He understood the focus of OCE's inquiry to be whether there was a legitimate basis for paying the coach from the MRA, *i.e.*, whether the coach had actually performed official services. Only Mr. Bowser's official emails were relevant to this issue. It was undisputed that the coach had also performed campaign services and

Mr. Bowser did not think OCE was interested in the details of that work. (Pet.App. 78-82.). Moreover, Mr. Bowser's omission of his personal emails was obvious. The OCE investigator testified that he expected any campaign activities to be discussed on personal, not official, emails. (Pet.App. 76.).

In addition, Mr. Bowser submitted to an interview by OCE. Mr. Bowser told OCE that the purpose for initially hiring the coach in 2012 was to assist Rep. Broun in the performance of official work, not campaign activities. The Government charged Mr. Bowser with making four separate false statements during this interview, each of which was an assertion that the coach had been hired to perform official work rather than campaign work. At trial, Mr. Bowser insisted that his testimony had been truthful. Rep. Broun did not need campaign help in 2012, when the coach was hired, because he was cruising to re-election. The coach, after being hired, had provided a few hours of assistance to Rep. Broun in preparing for debates with his token primary opponent, whom Broun trounced. Thereafter, the coach provided no campaign services for a number of months until Rep. Broun, after being re-elected to the House, decided to campaign for the seat of a Senator who made a surprise announcement that he would retire at the end of his term.

C. The Motions For Acquittal And The Jury's Verdict

Pursuant to Fed.R.Crim.P. 29(a), Mr. Bowser moved for judgment of acquittal at the close of the Government's case, (Dkt-72.), and again at the close

of all the evidence. (Dkt-86.) He urged that the theft charge was non-justiciable under *U.S. v. Rostenkowski*, 59 F.3d 1291, 1306-12 (D.C. Cir. 1995), because the separation of powers precludes prosecutors and juries from "allocating" the compensation paid to congressional employees between permissible and non-permissible ends. Misappropriation charges based on allegations that employees performed "little or no official work" for their pay are non-justiciable "except to the extent that the Government may prove that they did 'no … work at all.'" *Id.* at 1310 (emphasis added). Because it was undisputed that the coach had provided official services to Rep. Broun for the entire time he was paid from the MRA, the jury could not second guess whether his compensation covered only the official work or also covered campaign services as well.

In addition, Mr. Bowser urged that the obstruction charge failed because OCE is not within the scope of 18 U.S.C. § 1505, and that the concealment charge failed because Mr. Bowser had no legal duty to disclose any information to OCE. The district court reserved ruling on Mr. Bowser's motions pursuant to Fed.R.Crim.P. 29(b), and submitted all charges to the jury.

The jury deadlocked on the theft charge and returned a split verdict on the charges arising from the OCE review. It convicted Mr. Bowser of obstruction, concealment, and making a false statement by certifying that he had produced all responsive documents to the OCE. It divided on the four false statements allegedly made by Mr. Bowser

during the course of his interview, acquitting him of two counts but convicting on the other two.

Following trial, the district court ruled on Mr. Bowser's pending motions for judgment of acquittal. It declined to rule on the theft charge and, instead, allowed the Government to dismiss that charge with prejudice. The court rejected Mr. Bowser's argument that, under Fed.R.Crim.P. 48(a), the charge could not be dismissed without his consent. The court ruled that Mr. Bowser's consent was not required after trial and that, because the dismissal was with prejudice, Mr. Bowser faced no risk of prosecutorial harassment by being recharged. (Pet.App. 46). The court granted Mr. Bowser's motion for a judgment of acquittal on the obstruction count, but denied it as to the other counts. (Pet.App. 66).

D. The Decision Below

Mr. Bowser appealed his convictions and the district court's refusal to acquit him on the theft charge. The Government cross-appealed the district court's judgment of acquittal on the obstruction count. The D.C. Circuit affirmed all of the district court's rulings. It found the evidence sufficient to support Mr. Bowser's convictions on the concealment count, under 18 U.S.C. § 1001(a)(1), and three false statements counts under § 1001(a)(2). It ruled that Mr. Bowser's appeal of the district court's refusal to acquit him of the theft charge was moot because that charge had been dismissed with prejudice. And it rejected Mr. Bowser's claim that he had been prejudiced before the jury by the spillover effect of

evidence regarding the charges on which he should have been acquitted. (Pet.App. 19-21).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Permits Convictions For Criminal Concealment That Are Not Based On A Preexisting Legal Duty To Disclose

The concealment provision in 18 U.S.C. § 1001(a)(1) forbids an intentional omission that is "akin to an affirmative misrepresentation, and therefore logically falls within the scope of § 1001's prohibition on false and fraudulent statements." *United States v. White Eagle*, 721 F.3d 1108, 1117 (9th Cir. 2013). The "prohibition of concealment is violated only when there exists a duty to disclose." *Hubbard v. United States*, 514 U.S. at 716-17 (Scalia, J., concurring). ("[A] conviction under § 1001(a)(1) is proper where a statute or government regulation requires the defendant to disclose specific information to a particular person or entity." *United States v. White Eagle*, 721 F.3d at 1116-18. There must be a legal duty "to disclose material facts on the basis of specific requirements for disclosure of specific information." *United States v. Safavian*, 528 F.3d 957, 964 (D.C. Cir. 2008).

Further, the concealment must be accomplished by a "trick, scheme, or device." *United States v. Woodward,* 469 U.S. 105, 108 (1985) (per curiam); *United States v. London,* 550 F.2d 206, 213 (5th Cir. 1977). An affirmative act of concealment is necessary to prove the "trick, scheme or device"

element and a false statement alone cannot constitute a "trick, scheme, or device." *See United States v. Woodward,* 469 U.S. at 108 n. 4; *United States v. St. Michael's Credit Union,* 880 F.2d 579, 589–90 (1st Cir. 1989).

A. The decision below conflicts with this Court's precedents and other circuits' decisions

The D.C. Circuit's decision conflicts with all of these requirements. The Government alleged in the indictment that Mr. Bowser violated the concealment prohibition by failing to disclose to OCE "the full nature, purpose, and extent of Brett O'Donnell's services for Congressman [Broun's] campaigns." Indictment, Count Three. But Mr. Bowser had no legal duty to disclose any information to OCE because its review process was entirely voluntary. And Mr. Bowser's allegedly false certification that he had voluntarily produced all responsive documents to OCE in response to its RFI did not create a duty to disclose, nor did it constitute the "trick, scheme, or device" necessary to commit a criminal concealment.

Nonetheless, the D.C. Circuit found the evidence sufficient to support a concealment conviction. It started from the premise that a government form can impose a duty to disclose. The court reasoned that the RFI "identified the 'specific information' that the [OCE]e sought." (Pet.App. 12). And Mr. Bowser's "affirm[ation] that he fully complied with a request for specific information that was issued during a duly authorized ethics inquiry ... establish[ed] a duty to disclose." (*Id.* at 13). This

rationale is a bootstrap. Mr. Bowser never had a legal duty to disclose any information to OCE. He had a legal duty, under 18 U.S.C. § 1001(a)(2), not to make a false certification to OCE. But even if he did make a false certification, that did not create any legal duty to disclose the information requested by the RFI.

While a government form sometimes can impose a legal duty to disclose, this occurs only where an agency already has legal authority to require the disclosure of certain categories of information and issues the form to specify the facts that it seeks. For example, in *United States v. Calhoon*, 97 F.3d 518, 526-27 (11th Cir. 1996), Medicare reimbursement regulations required disclosure of transactions with related organizations, and the relevant forms amplified that requirement. In contrast, the Seventh Circuit reversed a concealment conviction where "the underlying substantive duty … was based only on a form." *United States v. Moore*, 446 F.3d 671, 679 (7th Cir. 2006) (emphasis added) (discussing *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987)). Here, OCE never had the legal authority to require Mr. Bowser to disclose any information. It could not create that authority by sending him a written request to produce certain information. Nor could Mr. Bowser's certification to OCE create a legal duty to disclose the requested information. Furthermore, Mr. Bowser's certification could not constitute the requisite "trick, scheme, or device" to accomplish the concealment. *See United States v. Woodward*, 469 U.S. at 108 n. 4.

These same issues about evasion of a legal duty have also arisen in the context of the False Claims Act, which forbids using a false statement "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). In construing this provision, the courts have applied the same principles as with 18 U.S.C. § 1001(a)(1). Thus, they have held that "in order to be subject to the penalties of the False Claims Act, a defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness." *United States v. Q Intern. Courier, Inc.*, 131 F.3d 770, 773 (8th Cir. 1997). Furthermore, "the obligation must arise from a source independent of 'the allegedly fraudulent acts taken to avoid it.'" *U.S. ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1202 (10th Cir. 2006) (citation omitted). The D.C. Circuit's decision conflicts with both of these principles. It circumvents the absence of any statute or regulation that imposes a duty to disclose information by invoking Mr. Bowser's certification to create the supposed duty to disclose.

B. The decision below is untenable and dangerous to the development of the law

"It is well established that [18 U.S.C. § 1001] encompasses within its proscription two distinct offenses, concealment of a material fact and false representations." *United States v. Diogo*, 320 F.2d at 902. "What must be proved to establish each offense, however, differs significantly." *Id.* But the D.C. Circuit's theory of concealment effectively merges these two distinct offenses where a defendant makes

an allegedly false certification of compliance with a government request for information. As in this case, it permits multiplicitous charges alleging violations of both subsections of § 1001, and multiple convictions for the same offense conduct, i.e., an allegedly false certification of compliance.[1]

The D.C. Circuit's decision will spawn innumerable future concealment prosecutions based on the fallacious theory that a government request for information, coupled with a certification form, creates a legal duty to disclose that information. It empowers government officials to wield certification forms to create duties to disclose rather than recognizing that this authority is reserved to Congress through lawmaking and agencies through rulemaking. This is an invitation to abusive law enforcement tactics and prosecutions. Suppose, for example, that government investigators start seeking certifications under 18 U.S.C. § 1001(a)(2) in conjunction with witness interviews they conduct. Even if the witness does not make an affirmative false statement during the course of the interview, can a prosecution for concealment under § 1001(a)(1) be brought if the witness does not disclose certain information within the ambit of the inquiries?

Section 1001 is a workhorse for federal criminal prosecutions and it is vital that it be construed correctly. The D.C. Circuit's decision conflicts with the decisions of this Court and other

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[1] In this case, Mr. Bowser was convicted and sentenced both for concealment (Count Three) and for making an affirmative false statement, i.e., the certification (Count Eight).

circuits, and expands the bounds of a concealment offense under § 1001(a)(1). It invites misuse and abuse of the concealment provision in future prosecutions. For these reasons, it warrants review by this Court.

II. The Decision Below Undermines Two Federal Rules Of Criminal Procedure And Deprives Defendants Of Their Right To A Decision On The Merits At Trial

Once jeopardy attached at the start of trial, Mr. Bowser had a right to be acquitted of the theft charge under *U.S. v. Rostenkowski*. This right is guaranteed to him by Fed.R.Crim.P. 29, which governs motions for judgment of acquittal, and Fed.R.Crim.P. 48(a), which governs dismissal of a charge by the Government. Mr. Bowser was deprived of his right to an acquittal when the district court (over Mr. Bowser's objection) permitted the Government to dismiss the theft charge with prejudice following the trial instead of ruling on Mr. Bowser's pending motions under Rule 29. The D.C. Circuit erred in ruling that Mr. Bowser's appeal of the district court's action was moot. The dismissal of a charge by the Government is not the same as an acquittal and Mr. Bowser's claim of error is therefore not moot.

Rule 29 entitles a defendant to an acquittal as a matter of right where the evidence is insufficient to establish a charge. It provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." (emphasis

added). This rule safeguards the due process right that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). Where the prosecution's case is legally insufficient, the defendant is "entitled to a judgment of acquittal." *Carmell v. Texas*, 529 U.S. 513, 530 (2000); *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 318 (1984) (same).

Mr. Bowser moved for a judgment of acquittal on the theft charge at the close of the government's case and again at the close of all evidence. The district court reserved ruling on these motions pursuant to Rule 29(b), which authorizes a court to "reserve decision" on a motion for judgment of acquittal made before submission to the jury. (emphasis added). Then, following trial, the district court – over Mr. Bowser's objection – permitted the Government to dismiss the theft charge rather than rule on the pending motions for judgment of acquittal. The court thereby violated Mr. Bowser's rights under both Rule 29 and Rule 48.

Rule 48(a) provides that "the government may, with leave of court, dismiss an indictment … [but] [t]he government may not dismiss the prosecution during trial without the defendant's consent." "If the trial has commenced, the defendant has a right to insist on a disposition on the merits." Fed.R.Crim.P. 48 advisory committee's note. The district court permitted the Government to dismiss the theft count pursuant to Rule 48 rather than rule on Mr. Bowser's pending Rule 29 motions. It reasoned that Mr. Bowser's consent to the dismissal was not

required because the trial had concluded. The court abdicated its duty to rule on the Rule 29 motions, misusing its authority to defer ruling to instead avoid ruling on the sufficiency of the evidence. The court also deprived Mr. Bowser of his right, under Rule 48, to a disposition on the merits once jeopardy attaches.

Mr. Bowser appealed the district court's ruling, arguing that he is entitled to an acquittal – a disposition on the merits – rather than a voluntary dismissal by the Government. The difference between an acquittal and a dismissal will affect his reputation, his employment prospects, and even his legal rights. The D.C. Circuit rejected his argument, ruling that Mr. Bowser's claim was moot. It reasoned that "[a] favorable ruling under *Rostenkowski* would not announce [Mr. Bowser's]s innocence; instead, it would announce that trying the theft charge risks judicial intrusion 'into the sphere of influence reserved to the legislative branch.' *Rostenkowski*, 59 F.3d at 1306." Pet.App. 19. Therefore, "[b]ecause Bowser's argument under *Rostenkowski* would not entitle him to the declaration of innocence that he seeks, we cannot redress this alleged reputational harm." *Id.*

A. The decision below conflicts with precedents from this Court and other federal appellate courts

The circuit court mischaracterized the relief that Mr. Bowser seeks, which is a judgment of acquittal, not a declaration of innocence. Indeed, a criminal trial never produces a declaration of innocence; it produces a judgment of conviction or a

judgment of acquittal. A "Rule 29 judgment of acquittal is a substantive determination that the prosecution has failed to carry its burden." *Smith v. Massachusetts*, 543 U.S. 462, 468 (2005). Moreover, an acquittal does establish a defendant's legal innocence. This Court has stated that "[a] verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final." *Bullington v. Missouri*, 451 U.S. 430, 445 (1981). "[A]n acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' . . . If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Swisher v. Brady*, 438 U.S. 204, 214 (1978) (quoting *Arizona v. Washington*, 434 U.S. 497, 503–505 (1978)).

The D.C. Circuit claimed to be applying this Court's guidance that a claim becomes moot if "it is impossible for a court to grant any effectual relief whatever." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). But, clearly, that court could have directed that Mr. Bowser should be acquitted. Thus, its mootness ruling amounts to a determination as a matter of law that there is no meaningful difference between an acquittal on a charge and a dismissal of that charge with prejudice. This ruling conflicts with precedents from this Court and other federal appellate courts.

While an acquittal and a dismissal with prejudice both provide protection against double jeopardy, there is a fundamental difference between them. An acquittal is a determination on the merits

"that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans v. Michigan*, 568 U.S. 313, 318 (2013). An acquittal pursuant to *Rostenkowski* would establish that the prosecution's proof was insufficient to establish criminal liability on Mr. Bowser's part. In contrast, "[t]he government's decision to dismiss a charge … turns in part on considerations of strategy and available resources. … [U]nlike an acquittal, a prosecutor's agreement to drop a charge does not depend solely on the sufficiency of the evidence." *United States v Bedoya*, 878 F.2d 73, 76 (2d Cir. 1989).

"An acquittal in a criminal case … serve[s] to clear a man's name" [and to remove] a permanent stigma …, a pall cast over his reputation." *United States v. Mespoulede*, 597 F.2d at 335 n.9. In contrast, "it is acknowledged that dismissal of charges is not tantamount to acquittal on the merits or discharge under circumstances amounting to acquittal. The stigma still remains." *United States v. Baskin*, 17 USCMA at 316 (citations omitted).

B. The decision below emasculates Rules 29 and 48

This fundamental difference between an acquittal and a dismissal is precisely why Rule 48(a) gives a defendant the right, once trial commences, to object to a dismissal and insist on a decision on the merits. The drafters of the Rule -- the Advisory Committee, this Court, and Congress -- viewed this right as an important one. Plainly, they did not believe that a dismissal was as good as an acquittal.

The circuit court's ruling overrides their collective judgment. This ruling would "render Rule [48(a)] nugatory and meaningless and would defeat its limitations." *United States v. Carter*, 15 F.R.D. 367, 369 (D.D.C. 1954) (Holtzoff, J.).

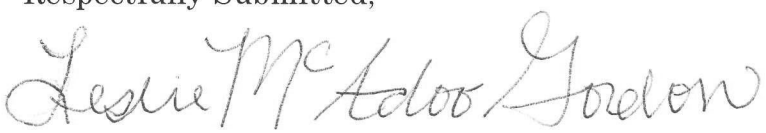
Furthermore, if upheld, the circuit court's ruling means that a district court's blatant violation of two rules of federal criminal procedure is of no moment and cannot be remedied on appeal. It would encourage other district courts to shirk or ignore their obligation under Rule 29 to acquit defendants whenever the evidence presented at trial is insufficient.

For all of these reasons, the circuit court's ruling on this issue warrants review by this Court.

CONCLUSION

This Court should grant the petition and Mr. Bowser respectfully asks the Court to do so.

Respectfully Submitted,



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