OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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CAPTION: CHARLES CARLISLE, Petitioner

v. UNITED STATES

CASE NO: 94-9247

PLACE: Washington, D.C.

DATE: Tuesday, January 16, 1996

PAGES: 1-58

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - -X

3 CHARLES CARLISLE, :

4 Petitioner :

5 v. : No. 94-9247

6 UNITED STATES :

7 - - - - - - - - - - - - - - - -X

8 Washington, D.C.

9 Tuesday, January 16, 1996

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:11 a.m.

13 APPEARANCES:

14 JAMES A. CHRISTOPHERSON, ESQ., Traverse City, Michigan; on

15 behalf of the Petitioner.

16 PAUL A. ENGELMAYER, ESQ., Assistant to the Solicitor

17 General, Department of Justice, Washington, D.C.; on

18 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in Number 94-9247, Charles Carlisle v. The United

5 States.

6 Mr. Christopherson, you may proceed.

7 ORAL ARGUMENT OF JAMES A. CHRISTOPHERSON

8 ON BEHALF OF THE PETITIONER

9 MR. CHRISTOPHERSON: Mr. Chief Justice, may it

10 please the Court:

11 This case is about the authority of a district

12 court. The issue in this case is whether the district

13 court, up to sentencing, has the authority to make a

14 decision on whether or not the evidence against the

15 defendant was sufficient to convict him.

16 The Government's position in this case is that

17 the limitation on the ability of a defendant to file a

18 motion, the 7-day limitation in Rule 29(c), also limits

19 the court's authority.

20 It's our position that the rule is clear, it's

21 concise, and that it gives the court the authority to --

22 QUESTION: Well, the rule is clear. It imposes

23 the 7-day limit, and Rule 45 says that the court may not

24 extend the time for taking any action under Rule 29,

25 except to the extent and under the conditions stated

1 therein, and I don't know why that isn't sufficiently
2 clear that there's an absolute 7-day limit.
3 MR. CHRISTOPHERSON: It is not sufficiently
4 clear, Your Honor, because I think the second sentence in
5 subparagraph (a) of 29 gives the court the authority on
6 its own motion to rule on a judgment of acquittal based
7 upon the insufficiency of the evidence.
8 QUESTION: Now, you -- where do we find the
9 second sentence set out in haec verba in your brief or
10 somewhere else in the papers?
11 MR. CHRISTOPHERSON: It's actually, I think, set
12 out on page 2 of the Government's brief.
13 QUESTION: Page 2 of the Government's brief?
14 MR. CHRISTOPHERSON: Yes.
15 QUESTION: It's on page 2 of yours, I think.
16 MR. CHRISTOPHERSON: I think I put subparagraph
17 (c) there but not (a), if I'm -- it's in my reply brief,
18 also, but it's in the Government's brief.
19 That sentence, which is in mandatory language,
20 indicated that the court shall, gives the court the
21 authority to order a judgment of acquittal based upon the
22 insufficiency of the evidence after the evidence on either
23 side is closed. That sentence --
24 QUESTION: Now, whereabouts on page 2 are you
25 reading from, page 2 of the Government's brief?

1 MR. CHRISTOPHERSON: Subparagraph (a), the
2 second sentence, which starts, the court on motion of a
3 defendant.
4 QUESTION: Thank you.
5 QUESTION: In order to make that argument, you
6 have to ignore the title of the paragraph, of the
7 subparagraph, I take it.
8 MR. CHRISTOPHERSON: Well, the title to the
9 subpara -- that's correct, Your Honor. The title to the
10 subparagraph is not the text, and this Court should only
11 obviously look to the title if there's some ambiguity.
12 QUESTION: Well, it may not be the text, but it
13 gives you some indication of what category of cases the
14 rule is addressed to, and that suggests that Rule (a) is
15 addressed to motions made before submission to the jury.
16 MR. CHRISTOPHERSON: If you read -- I disagree
17 for this reason. If you read the first sentence of
18 subparagraph (a), that has nothing to do with motions
19 before submission to a jury.
20 The third sentence of subparagraph (a) --
21 QUESTION: Well, I think -- you're saying that
22 the statement motions for a directed verdict are
23 abolished, and motions for a judgment of acquittal shall
24 be used in -- have nothing to do with motions before
25 submission to the jury?

1 MR. CHRISTOPHERSON: No, I'm not saying they
2 have nothing to do, but I think that's a -- that's a
3 general statement which is not simply limited to motions
4 before submission to a jury.
5 QUESTION: Well, when do you ordinarily make a
6 motion for a directed verdict? It's always -- at least in
7 my experience, it was always before you had -- the case
8 was submitted to the jury.
9 MR. CHRISTOPHERSON: I think that's true in 99.9
10 percent of the cases. I think there certainly --
11 QUESTION: Well, tell us about the .1 percent of
12 the cases it's not --
13 MR. CHRISTOPHERSON: Well, I mean, it can be
14 submitted to a jury and somebody can still come in and ask
15 for a directed verdict.
16 QUESTION: No, you come in and ask for a
17 judgment N.O.V.
18 MR. CHRISTOPHERSON: After the verdict.
19 QUESTION: Yes.
20 MR. CHRISTOPHERSON: Yes.
21 QUESTION: So where else do you find this .1
22 percent?
23 MR. CHRISTOPHERSON: Well, once it's -- I guess
24 what I'm saying is, submission -- I guess you're getting
25 into the definition of what is submission to the jury. I

1 mean, there could be --

2 QUESTION: I didn't think there would be a

3 struggle over that.

4 MR. CHRISTOPHERSON: Theoretically, a case could

5 be submitted to the jury, and it could be before a

6 verdict.

7 But if I may, Your Honor, I think --

8 QUESTION: A case could be submitted to the

9 jury -- tell me that again.

10 MR. CHRISTOPHERSON: The jury could be out

11 deliberating, I guess is what I'm saying. It depends on

12 how you define submission to a jury.

13 QUESTION: And one would make a motion for a

14 directed verdict that one had not made before submission

15 to the jury. You would make it while the jury was out?

16 MR. CHRISTOPHERSON: It's certainly not a

17 preferred practice, but all I'm saying is that's a

18 possibility.

19 QUESTION: Mr. Christopherson, the origin of the

20 motion for directed verdict, it was just that. The judge

21 told the jury come in with a verdict, and then that was

22 eliminated, that formality was eliminated, but the words

23 mean what they say. It was a motion to direct the jury to

24 come in with such-and-such a verdict, so I don't think

25 you're going to get very far with trying to say that the

1 first sentence is broader than what the traditional
2 understanding of directed verdict is.
3 QUESTION: If we disagree with you, and if we
4 say that section (a) applies only to motions before the
5 jury retires, before the case is submitted to the jury, do
6 you lose the case?
7 MR. CHRISTOPHERSON: No, Justice Kennedy, and my
8 position is first of all that the second sentence of
9 Rule (a) is clear and gives the court the authority, but
10 if the Court does not agree with that, then my argument,
11 as I think I indicated in my briefs, that there's a line
12 of cases by this Court, from the unique circumstances
13 cases which were Thompson and Harris Truck Line, the Gaca
14 case discussing supervisory power, and Houston v. Lack,
15 that there are exceptions that may allow this to go
16 forward.
17 But if I can get back to the rule, I think I
18 would also like to make this argument under (c). If you
19 read the first sentence of (c), it talks about motions
20 which are made or renewed, and I think if you look at the
21 second sentence of (a), it talks about the court of its
22 own motion.
23 I think that's a distinction. Under (c) we're
24 talking about motions made or renewed. A court does not
25 make or renew a motion.

1 Sentence two --

2 QUESTION: Well, then you're -- are you saying

3 that it's just implicit in 29(c) that the judge has at any

4 time the authority sua sponte to enter the judgment of

5 acquittal?

6 MR. CHRISTOPHERSON: Up to the time of

7 sentencing, yes. There's nothing in (c) that limits the

8 judge. There's no specific language in (c) that says the

9 judge does not have the power sua sponte.

10 Paragraph -- I mean, it's the second sentence --

11 QUESTION: It wouldn't make much sense to limit

12 the motions to 7 days, so I mean, what do you -- you just

13 come in 10 days later and say, Your Honor, I'm not making

14 a motion, but I think it would be a good idea if you on

15 your own accord would enter a judgment of acquittal.

16 MR. CHRISTOPHERSON: I think --

17 QUESTION: Do you really think the rule is that

18 silly? You don't make -- you can't make a motion after 7

19 days, but you can ask the judge to use his inherent

20 authority to do this thing.

21 MR. CHRISTOPHERSON: I think the judge in that

22 case, if you follow my reading of the rule, could simply

23 tell the court, don't accept that motion, it's untimely.

24 It's the exceptional case, and remember that we're talking

25 about situations where the judge has sat through the

1 trial, and so the judge knows what happened. It's the
2 exceptional case.
3 Judge Enslin in this case, based upon the
4 transcript, said that what he did was initially in August,
5 when he denied the motion, he wrote two separate opinions
6 and two separate orders, and he said, this is the first
7 time in my judicial career I've ever done that.
8 Then, when it came time in October for
9 sentencing, he changed his mind, and it's my argument that
10 you can enforce the rule and say the 7 days applies, the
11 defendant has to file the motion by 7 days, but still
12 leave that authority for the court.
13 QUESTION: Well, what about subsection (b) of
14 Rule 45, which is on -- which Justice O'Connor mentioned,
15 which is page 2a and 3a in the appendix to the
16 Government's brief, where it says the court may not extend
17 the time for taking any action to rules 29, et cetera,
18 except to the extent and under the conditions stated in
19 that.
20 MR. CHRISTOPHERSON: I think this Court could
21 construe that to apply to the 7 days required when
22 defendant files a motion, but again, I say that, under
23 Rule (c), where it says made or renewed, that's a
24 defendant's motion, so 45 limits -- it could limit the
25 defendant's motion, but not the court on its own to make

1 that decision.

2 QUESTION: Well then, in effect you certainly

3 have a strong feeling here, from reading these rules, that

4 the people who made the rules thought it was desirable to

5 have these motions made promptly and disposed of promptly,

6 and yet in your view, although it couldn't be done by

7 motion, a judge could reopen the matter at any time before

8 sentencing, even though there were weeks afterwards.

9 Doesn't that seem rather strange in the light of these

10 very close time limits placed on the rule?

11 MR. CHRISTOPHERSON: No, I don't, because I, you

12 know, think the time limits can constrain defense counsel,

13 and I think there's good reasons to do that, but I think

14 the rationale is you want the court to do what Judge

15 Enslin did in this case, and that is give considered

16 thought to this and even rethink his position.

17 QUESTION: Well, what if he gave considered

18 thought to it for about 9 months?

19 MR. CHRISTOPHERSON: Well, obviously, I mean,

20 you have to go to sentencing promptly, and the court would

21 lose jurisdiction after sentencing, so I don't think that

22 it would be appropriate for the court to do that for that

23 long a period.

24 QUESTION: But could he defer sentencing if he

25 were still kind of turning the thing over in his mind?

1 MR. CHRISTOPHERSON: I think that's potentially
2 possible.
3 I'm not here, I guess, arguing for a bright line
4 saying that 6 months or 9 months, but obviously that's not
5 the facts of this case, where it only happened over
6 2 months, and sentencing proceeded promptly, and I also
7 think, if you look at the rationale in U.S. v. Smith,
8 which is the case relied upon by the Government, that
9 after a long passage of time, and of course in that case,
10 that was after appeal, that the trial judge doesn't
11 remember the case, that just doesn't apply here.
12 I mean, in fact, just the opposite. If you read
13 the transcript of that October hearing, Judge Enslin is
14 saying, I agonized over this. I wrote two separate
15 opinions. I wrote two separate orders.
16 I mean, he was thinking about this very
17 conscientiously, and so I think if you interpret the rule
18 in that manner, I think it's appropriate to allow him to
19 do that.
20 QUESTION: Mr. Christopherson, come -- walk
21 through subsection (c) with me. It's on, what, page 2 of
22 the Government's brief.
23 MR. CHRISTOPHERSON: Okay.
24 QUESTION: You say that it doesn't say anything
25 about the judge entering such an order on his own without

1 a motion, but it seems to me it does. The second sentence
2 says, if a verdict of guilty is returned, the court may,
3 on such motion, set aside the verdict and enter judgment
4 of acquittal, but read the next sentence.
5 If no verdict is returned, the court may -- and
6 it notably leaves out, on such motion. If no verdict is
7 returned, the court may enter judgment of acquittal,
8 period.
9 It seems to me what it's saying is, when no
10 verdict is returned, the court may enter judgment of
11 acquittal on motion or on its own, whereas, if a verdict
12 of guilty is returned, it may only on such motion -- that
13 is, a motion filed within 7 days -- enter judgment of
14 acquittal.
15 What is your explanation for the -- for leaving
16 out, on such motion, from the third sentence of (c)?
17 MR. CHRISTOPHERSON: Well, I think what I would
18 argue, Your Honor, is that when you read that in the
19 entire context of this rule, and especially the second
20 sentence of paragraph (a), where it says shall, I think
21 the word shall is a very strong word that gives the
22 court --
23 QUESTION: (a) -- I don't think (a) relates
24 here. You're not going to argue (a). Let's assume you
25 have to hobble along without (a) --

1 MR. CHRISTOPHERSON: Okay.

2 QUESTION: -- for my purposes.

3 MR. CHRISTOPHERSON: Well, then I think that

4 first of all we still have the first sentence, which says

5 made or renewed, and I believe that applies to a

6 defendant. I think the language, on such motion, perhaps

7 at best I would argue is ambiguous, and the Court then

8 should look at the policies under Rule 2 in trying to

9 interpret exactly what that sentence in Rule (c) means,

10 and the policies under Rule 2 are fairness of

11 administration, and trying to avoid undue delay and undue

12 cost.

13 QUESTION: Well, then you're saying that the

14 judge has authority -- I won't say inherent authority --

15 authority to enter a judgment of acquittal,

16 notwithstanding the provisions of Rule 29. He's not

17 limited by Rule 29.

18 MR. CHRISTOPHERSON: That's correct. That's

19 my --

20 QUESTION: But that again takes you away from

21 the rule.

22 MR. CHRISTOPHERSON: No, I don't -- because I

23 don't think the rule clearly states that the judge does

24 not have that authority, and so if the rules does not

25 state that and is ambiguous, then my argument is you have

1 to look at Rule 2.

2 That's the way you interpret the rest of the

3 rules, and I think when you do that, and you're talking

4 about fairness in the administration of justice, and

5 you're talking about avoiding undue cost and undue delay,

6 that clearly those policies support our position that the

7 court does have the authority up to the time of sentencing

8 to determine whether the evidence --

9 QUESTION: Where does it say that? You say --

10 unless your position is that the courts have all powers

11 that are not specifically excluded by the rules, unless

12 that's your position, where in the rules does it say,

13 other than subsection (a), which I don't agree with --

14 MR. CHRISTOPHERSON: Right.

15 QUESTION: Where in the rules does it say that

16 the court has this power, without motion, to set aside a

17 jury verdict?

18 MR. CHRISTOPHERSON: Well, I think the last

19 sentence of Rule 57 gives the court, I think, fairly broad

20 powers also.

21 QUESTION: Where is that?

22 MR. CHRISTOPHERSON: I don't know if that's

23 cited in the briefs, Your Honor. It's -- I'm sorry, it's

24 page 4(a), the Government has pointed out to me, in their

25 brief.

1 QUESTION: Yes, but doesn't Rule 57 say in all
2 cases not provided for by rule, the district judge may
3 regulate their practice, and so forth, and the answer to
4 that is that in this case it is provided for by rule?
5 MR. CHRISTOPHERSON: The rule does not state
6 that the court does not have the power to look at the
7 sufficiency of the evidence and make that decision prior
8 to sentencing. The rule is not that specific, and so I
9 don't believe that when you look at the last sentence of
10 Rule 57, that my interpretation of Rule 29 is in any way
11 inconsistent with these rules.
12 QUESTION: Well, so you think the Western
13 District of Michigan in Grand Rapids could have a rule
14 saying that the judge can do this any time up to
15 sentencing, and the Eastern District in Detroit could have
16 a rule saying that no, you have to comply with Rule 29?
17 MR. CHRISTOPHERSON: I think the local courts
18 could adopt rules, given the fact that this rule is
19 ambiguous. I was --
20 QUESTION: If we interpreted the last sentence
21 of Rule 57 the way you want us to, namely it has to
22 conflict with a particular disposition of the rules, you
23 wouldn't need the first phrase, in all cases not provided
24 for by rule. What it says is, in all cases not provided.
25 That means when the general subject has not been provided

1 for by rule, magistrate judges may regulate their practice
2 in any manner not inconsistent with these rules.
3 The way you -- the way you're interpreting it,
4 you do not need the preliminary phrase. You're just
5 saying the district judges are not regulating their
6 practice here in a manner inconsistent with these rules,
7 and therefore it's okay.
8 MR. CHRISTOPHERSON: I think the issue you raise
9 begs the question of what is not provided for by the
10 rules.
11 QUESTION: Well --
12 MR. CHRISTOPHERSON: Your argument is that
13 generally --
14 QUESTION: It gives a meaning to that phrase.
15 How does your argument give a meaning to that phrase?
16 MR. CHRISTOPHERSON: Well, I'm -- I guess I'm
17 looking at it more specifically.
18 In other words, in this case, the rule does not
19 say that the court does not have jurisdiction or authority
20 to decide whether or not the evidence was insufficient
21 prior to sentencing.
22 QUESTION: You're quite right, and if it did say
23 that, then to act otherwise would be to act in a manner
24 inconsistent with these rules, and you would be violating
25 the last half of their sentence.

1 MR. CHRISTOPHERSON: I agree.

2 QUESTION: But that only -- you only get to the

3 last half of the sentence if you pass the first part,

4 which says, in all cases not provided for by rule, and I

5 think that refers to subjects not handled by the rules,

6 such as the subject of when -- the subject of setting

7 aside a jury verdict, which is handled by the rules.

8 MR. CHRISTOPHERSON: But again, I mean, I don't

9 believe that specific issue we have today is handled by

10 the rules, and you have to get back to what the standard

11 is you're going to use to interpret the rules. Rule 29 --

12 QUESTION: Mr. Christopherson, as far as Rule 57

13 is concerned, this really isn't an area, is it, where it

14 would be appropriate for one district judge to act one way

15 and another district judge to act another way?

16 I thought the Federal Rules require certain

17 uniformity, and where they don't require uniformity, then

18 there's scope for local rules, and where neither requires

19 uniformity, then there's discretion, but you can't be

20 arguing that Judge Enslin can grant a motion to acquit in

21 8 days, whereas Judge X will do it only for 7. They can't

22 both be right. Either district judges have this authority

23 or they don't.

24 MR. CHRISTOPHERSON: I agree with that

25 statement. I think the question I was arguing before was

1 whether the judges in different districts could adopt
2 local rules, as this rule is currently worded, that might
3 be inconsistent. Obviously, that begs the second part of
4 my que -- I mean, the second part of my argument here
5 whether or not the court in any way can go outside that
6 rule, but I think if you'd follow my first argument that
7 what was done in this case is not inconsistent with the
8 rule, yes, I think it should be consistent, but
9 theoretically I think local district courts could adopt
10 rules the way it's worded right now that might be
11 inconsistent.
12 QUESTION: But absent the adoption of rules of
13 the court that would prohibit this late consideration, I
14 take it that it would be an abuse of discretion for the
15 district judge not to sua sponte consider a motion for
16 acquittal if he had doubts. He couldn't say, before
17 sentencing, now, I have some real doubts about the
18 sufficiency of the evidence here, but you didn't file a
19 motion, and I'm just going to exercise my discretion not
20 to think about that.
21 That's a very strange hypothetical, but I take
22 it that in your view he is mandated to make that
23 consideration and to enter a judgment of acquittal if he
24 thinks the evidence, or she thinks the evidence is
25 insufficient.

1 MR. CHRISTOPHERSON: Absolutely, I agree with
2 that, and I think that's what the judge did in this case,
3 and I think that's what we'd want judges to do if they
4 have a doubt as to the sufficiency of the evidence, and I
5 think that's the policy this Court should try to --
6 QUESTION: Let me ask you a question I'm going
7 to ask your opponent, so he can think about it in the
8 meantime, too.
9 What about the power of the judge to act on his
10 own motion within the 7-day period? What does the rule --
11 how does the rule speak to that question?
12 MR. CHRISTOPHERSON: My argument is, it doesn't
13 matter. I mean, if --
14 QUESTION: Nothing in the rule authorizes the
15 judge to grant a judgment of acquittal in the first 6
16 days, but supposing a judge is concerned that there really
17 is no evidence at all here, but he has a lousy lawyer in
18 front of him, he thinks he won't get around to filing the
19 motion until 10 days later, could the judge take care of
20 the situation within the 6- or 7-day period?
21 MR. CHRISTOPHERSON: I think if you adopt the
22 Government's position, the argument is no, and I think
23 that's an intolerable result, because if you look at the
24 language --
25 QUESTION: And the judge might have to say,

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1 counsel, the court will entertain a motion to set aside
2 the jury verdict. I mean, that wouldn't be the end of the
3 world, would it?
4 MR. CHRISTOPHERSON: Well --
5 QUESTION: Well, supposing the lawyer isn't
6 available, he's in the hospital or something.
7 MR. CHRISTOPHERSON: I mean --
8 QUESTION: Is he without power, that's the
9 question.
10 MR. CHRISTOPHERSON: And I think if you look at
11 the facts of this case where, I mean, actually what
12 happened at the end of the proofs was the attorney made a
13 motion saying that the defendant in this case had not been
14 tied to the conspiracy, but just asked that the statements
15 be dismissed and didn't ask for, you know, a Rule 29
16 motion, I think, you know, that there was an issue here as
17 to how effective that counsel was. I mean, obviously --
18 QUESTION: Well, one could also say that the
19 district judge had a change of heart about the new trial
20 only when he found out what the sentence was going to be.
21 MR. CHRISTOPHERSON: Well, but I don't think the
22 transcript bears that out, because I think if you look at
23 the October transcript -- I mean, the judge said it's the
24 first time he's done this in nearly 20 years on the bench,
25 where he's written two separate opinions, two separate

1 orders, it came down, and he finally decided one way.
2 I mean, so going back to August, he was
3 obviously deeply split on this issue, and it wasn't simply
4 looking at a presentence report and then changing it,
5 because he had already -- because he had made -- he was
6 agonizing over this long before that.
7 QUESTION: Mr. Christopherson, I understood that
8 you would answer Justice Stevens' question by saying yes,
9 he may raise this on his own motion, and in fact I
10 understood that you would have answered Justice Ginsburg's
11 question yes, that Judge X can decide to do it within
12 9 days, whereas Judge Y says no, I will only do it within
13 7, and that in each instance your reason would be an
14 inherent Article III power which was independent of the
15 rules. Do I understand you to take that position?
16 MR. CHRISTOPHERSON: I'm arguing, I think, along
17 those lines in the alternative. My first argument is
18 that --
19 QUESTION: Right.
20 MR. CHRISTOPHERSON: -- Rule 29 allows this.
21 QUESTION: Yes.
22 MR. CHRISTOPHERSON: But there are a long line
23 of cases from this Court, the last one being Houston v.
24 Lack, where this Court has found a basis where there are
25 circumstances such as exist in this case to grant relief.

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1 QUESTION: Well, what do we do in the case in
2 which there is a rule which specifically addresses it, and
3 let's assume for the sake of argument that you lose on the
4 first point and we say 7 days means 7 days, and that's it,
5 and whatever the judge can do, he can't do anything
6 outside of 7 days, and so we're in the situation that we
7 are in this case.
8 Do you take the position that the -- that when
9 there is a direct conflict between the purported act based
10 on inherent authority, and the rule which would limit the
11 judge and preclude the judge from taking that conduct,
12 that the inherent authority always wins, and that the rule
13 is defeasible, given an exercise of that inherent
14 authority?
15 MR. CHRISTOPHERSON: I take the position that
16 the inherent authority exists, and I think it's similar
17 to --
18 QUESTION: Does it always trump the rule if
19 there's a conflict between what the judge wishes to do
20 with that authority and the content or the provision of
21 the rule?
22 MR. CHRISTOPHERSON: No. It has to be --
23 QUESTION: When do we know which is which?
24 MR. CHRISTOPHERSON: Well, there's two lines of
25 cases from this Court, I think. The first cases are the

1 unique circumstances cases, and the second line of cases
2 are the cases which have dealt with issues where, for
3 example, prisoners in the Houston v. Lack case were unable
4 to timely file their notices.
5 QUESTION: But interesting, in that case the
6 court came up with a rule when you deposit the paper with
7 the jailer, so it wasn't something that for one judge it's
8 9 days, for another judge -- there was -- the court came
9 up with a rule. It may have been different from the rule
10 that was written into the Federal Rules.
11 MR. CHRISTOPHERSON: It was different than what
12 was written in the Federal Rule, and of course then the
13 Federal Rule was changed to conform with that decision.
14 QUESTION: Yes, but in Houston v. Lack, the
15 Court did not rely on some inherent power of the judge to
16 ignore the rule. It redefined what filing meant, and that
17 was how it reached the result it did in Houston v. Lack,
18 so I don't think you have a lot of support in our cases,
19 at least in the recent cases, for just saying there's some
20 inherent power of the judge, no matter what the rule says.
21 MR. CHRISTOPHERSON: If that's the ruling of
22 Houston v. Lack, then I would suggest that same rationale
23 applies to this case, in that the Court could do the same
24 to Rule 29 that it did to Rule 4.
25 QUESTION: What word do we turn into rubber

1 here? I mean, what's your candidate?
2 (Laughter.)
3 QUESTION: It's one thing for us to take
4 liberties with the text here, it's another thing to let
5 the district judge take liberties with it.
6 (Laughter.)
7 MR. CHRISTOPHERSON: I don't think you should
8 take liberties with the text. I think -- again, the way I
9 read the sentence two of subparagraph (a), and I know some
10 of you may disagree with me, but that's clear, and I don't
11 see how you --
12 QUESTION: Okay, but if subparagraph (a) is out,
13 are you out on this second argument?
14 MR. CHRISTOPHERSON: No. No, I --
15 QUESTION: All right, then what is the malleable
16 language in (c) which supposedly is going to be flexible
17 enough to give way to this inherent power?
18 MR. CHRISTOPHERSON: Well, again, (c) is
19 ambiguous. It does not prohibit what the judge did in
20 this case, and so I think if we were to redraft (c)
21 similar to the way 4 was redrafted in Houston v. Lack,
22 that there should be a specific statement in (c) which
23 would allow the court --
24 QUESTION: So the rule is, whenever the rule
25 does not specifically prohibit the court from doing

1 something, it may do it?

2 MR. CHRISTOPHERSON: I wouldn't -- I don't know

3 if I'd draw that broad a rule, but I guess in this case

4 where it doesn't prohibit it, and when -- again, I think

5 (a) does talk about shall, (c) --

6 QUESTION: Forget (a).

7 MR. CHRISTOPHERSON: Okay.

8 QUESTION: I'm not an (a) man here.

9 MR. CHRISTOPHERSON: Okay.

10 QUESTION: So assume I've got to decide this

11 without (a).

12 MR. CHRISTOPHERSON: You still have (c), which

13 talks about made or renewed, which obviously in my opinion

14 is a defendant's made or renewed motion, so now you have a

15 rule which is silent.

16 I think when the rule is silent -- I mean, you

17 can make the argument either way, and so if you look to --

18 I think you have to look to Rule 2, which talks about

19 interpreting the rule in fairness to the administration of

20 justice and to avoid undue delay and undue cost and,

21 obviously, in our opinion it doesn't make sense to have to

22 go through appeal or collateral proceedings in that it's

23 not deficient.

24 If it please the Court, I'd like to reserve some

25 time for rebuttal.

1 QUESTION: Very well, Mr. Christopherson.

2 Mr. Engelmayer, we'll hear from you.

3 ORAL ARGUMENT OF PAUL A. ENGELMAYER

4 ON BEHALF OF THE RESPONDENT

5 MR. ENGELMAYER: Mr. Chief Justice, and may it

6 please the Court:

7 Federal Rule of Criminal Procedure 29(c)

8 provides that a motion for judgment of acquittal may be

9 made or renewed within 7 days after the jury is discharged

10 or within such further time as the Court may fix during

11 the 7-day period.

12 Our position is that when a defendant makes a

13 judgment, motion for judgment of acquittal outside that

14 time limit, as occurred in this case, the district court

15 lacks authority to grant that motion.

16 We also take the position that the district

17 court's authority to enter a judgment of acquittal on its

18 own motion is constrained by that same time limit.

19 To begin with, the mandatory nature of the

20 Rule 29(c) time limit is dictated, in our view, by the

21 plain language of Rule 45(b), which this Court took up in

22 United States v. Robinson.

23 Rule 45(b) allows district courts to enlarge

24 most time limits under the Federal Rules either upon a

25 showing of cause or after the time limit has lapsed upon a

1 showing of excusable neglect, but it carves out a specific
2 exempt -- exception for Rule 29.
3 It provides that the Court may not take any time
4 for taking -- extended time for taking any action under
5 Rules 29, 33, 34, and 35, except to the extent and under
6 the circumstances stated in those rules, and in Robinson
7 this Court stated and held that that language was, in the
8 Court's terms, quite plain and clear.
9 QUESTION: But it hasn't extended the time for a
10 motion here. It hasn't extended any time limit that's set
11 forth.
12 MR. ENGELMAYER: That's absolutely right. The
13 motion was at all times untimely. Had the district court
14 within the 7 days said to the defendant, you may make a
15 motion on the eighth day, he would have complied with the
16 rule. That didn't happen here, and in Robinson this Court
17 held that, except where the specific circumstances set
18 forth in the governing rule, in this case 29, have been
19 complied with, there's otherwise no basis for extending
20 time limits under the rules.
21 QUESTION: What happens if the attorney is on
22 his way to the court and is abducted, or has a heart
23 attack, and misses the filing deadline by a few hours?
24 What can the judge do?
25 MR. ENGELMAYER: Well, Justice Kennedy, the

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1 district court, of course, itself has the power --

2 QUESTION: No, no, I'm assuming that the 7 days

3 expires.

4 MR. ENGELMAYER: I think the text of the rule

5 admits of no excusable neglect exception, and whether or

6 not that is wise as a matter of policy, the rule says

7 no -- that it is not subject to an excusable neglect

8 exception, even though that's -- your hypothetical surely

9 would be excusable neglect.

10 QUESTION: Surely an appeal would still lie.

11 MR. ENGELMAYER: Absolutely.

12 QUESTION: That there wasn't sufficient evidence

13 to sustain the jury verdict, right?

14 QUESTION: You get exactly the same inquiry on

15 appeal as you do from the district judge on a motion for

16 judgment of acquittal.

17 MR. ENGELMAYER: That's absolutely right, Mr.

18 Chief Justice, on appeal, whether or not the motion was

19 timely made in the district court, the court of appeals

20 will be reviewing de novo the question of whether the

21 Jackson v. Virginia standards --

22 QUESTION: My goodness, Jackson v. Virginia is

23 not the same, is it, as whether you're deciding a

24 sufficiency of the evidence 100 percent, it's just that?

25 In other words, in the habeas cases, every

1 habeas judge is supposed to go and look at all of the
2 State determinations of guilt and see if they're -- would
3 survive a motion of directed verdict for acquittal?
4 MR. ENGELMAYER: I guess all I'm saying, Justice
5 Breyer, is that there's an adequate recourse on it.
6 QUESTION: Is that adequate if, in fact, then
7 the court of appeals doesn't go and, looking for plain
8 error, apply the same standard to the evidence as
9 otherwise?
10 MR. ENGELMAYER: Our position, Justice Breyer,
11 and I think this is consistent with the way the courts of
12 appeals have addressed the issue of sufficiency where no
13 timely -- where the issue is not --
14 QUESTION: I don't remember ever going back
15 looking, combing through records where, you know, there
16 are close questions and so forth, in the absence of a
17 motion, where they say you have to find plain error. I
18 thought plain error is pretty narrow. Maybe we weren't
19 doing it right, but nobody ever complained too bitterly
20 about it.
21 MR. ENGELMAYER: I think the court on appeal
22 obviously is going to have to be guided in large part by
23 the submissions of the parties as to what the evidence at
24 trial showed. Our view, though, is that on a plain error
25 review from the court of appeals, if the evidence in the

1 court of appeals' mind clearly showed -- clearly was
2 insufficient to prove all the elements of the offense
3 beyond a reasonable doubt, that would be -- fall within
4 the plain error standard. In other words, it would have
5 been plain error.
6 QUESTION: But that's certainly not the same as
7 the trial judge -- you made a distinction in the brief
8 yourself. Here, a trial judge said, I would give -- grant
9 the motion to acquit, and yet the Sixth Circuit didn't,
10 apparently must have found the evidence sufficient --
11 MR. ENGELMAYER: Justice Ginsburg, the Sixth
12 Circuit did not reach the issue of sufficiency. Rather,
13 it remanded for sentencing, understanding that that
14 issue --
15 QUESTION: Well, what was it -- remanded for
16 sentencing, not for doing anything with the verdict any
17 more.
18 MR. ENGELMAYER: That's right, but the -- under
19 the Sixth Circuit's remand, following sentencing in the
20 case, the defendant would have been free to raise the
21 substance of a sufficiency claim in the court of appeals
22 under a plain error standard as well as any other trial
23 errors, as well as any objections to sentencing.
24 QUESTION: Well, and a sufficiency claim is very
25 difficult to make out as a practical matter, isn't it? To

1 say that the evidence was in -- all inferences have to be
2 resolved in favor of the Government, all questions of
3 credibility have to be resolved in favor of the
4 Government. It's not like a motion for new trial at all.
5 MR. ENGELMAYER: That's right.
6 QUESTION: Well, that's sort of interesting,
7 because the -- to me, is that we used to get hundreds -- I
8 mean, that was the most common thing. The evidence
9 doesn't support the verdict.
10 I've never seen so many claims come up that make
11 that, all the time, and often the trials are very
12 complicated, and often they involve unbelievable numbers
13 of witnesses on conspiracy, and this person says this, the
14 other one says that, and is what the Government's position
15 now is that in the courts of appeals, and indeed, in
16 district courts on habeas, that it -- the fact that the
17 person didn't make the motion in the trial court for a
18 directed verdict for acquittal is irrelevant.
19 Basically, the courts of appeals and the
20 district courts are supposed to go through all those
21 records and review the same way they would do it if, in
22 fact, at the trial court level somebody had made a motion
23 for a directed verdict and the district judge had had a
24 chance to pass on it.
25 MR. ENGELMAYER: Justice Breyer, let me address

1 that first with regard to direct appeal plain error and
2 then with regard to sufficiency, if I might.
3 On direct appeal, it is our view that the court
4 of appeals, if the evidence is marshalled properly by the
5 defendant and indicates that the evidence is insufficient
6 to prove one of the elements of the offense, it would --
7 it is appropriate to reverse because it was plain error
8 for the district court, within the proper time limits, not
9 to sua sponte dismiss the -- overturn the conviction for
10 insufficient evidence.
11 QUESTION: Not appropriate, mandatory. I --
12 MR. ENGELMAYER: Mandatory.
13 QUESTION: -- agree, right.
14 MR. ENGELMAYER: Absolutely.
15 QUESTION: But wait a minute, may I just -- may
16 I just -- I hate to interrupt, but I want to be sure
17 you're -- what if he didn't do it sua sponte within the
18 7 days? Could he do it so -- you didn't really address my
19 hypothetical.
20 MR. ENGELMAYER: And I was going to get to that,
21 and I'd like to turn in a moment, if I may, just to the
22 text of the rule, because I -- the answer to your
23 hypothetical would be yes, the district court does have
24 the power under Rule 29(c), in our view, to act within the
25 7 days after the verdict to grant the judgment of

1 acquittal, but --

2 QUESTION: Without a motion.

3 MR. ENGELMAYER: On its own motion, absolutely,

4 and I'd like, if I may in just --

5 QUESTION: Well, you've --

6 MR. ENGELMAYER: -- a moment to turn to the text

7 of that.

8 QUESTION: Is it also obligated to?

9 MR. ENGELMAYER: Yes, it would be. That was

10 what the plain error standard means, that it would have

11 been plain error for the district court not to have

12 entered a judgment of acquittal.

13 QUESTION: Yes, but what's the source of the

14 obligation, is what I want to know? It's not the rule.

15 QUESTION: And what's the source of the

16 authority?

17 MR. ENGELMAYER: I think the source of the

18 authority is that the lack of sufficient evidence is a due

19 process violation.

20 QUESTION: The obligation was not to allow the

21 case to go to the jury in the first place. I mean --

22 MR. ENGELMAYER: That's right, and it's plain

23 error if the district court --

24 QUESTION: -- go to the jury.

25 MR. ENGELMAYER: -- allows on its watch an

1 insufficient case to result in a verdict and does not
2 overturn --
3 QUESTION: But that does not depend on the rule.
4 That is an obligation inherent in the exercise of the
5 judicial power.
6 MR. ENGELMAYER: Much as it would be for other
7 abuses that could occur at trial, such as prosecutorial
8 misconduct, for example.
9 QUESTION: But these things are never plain.
10 They're never plain. I mean, in case after case this
11 person says, a little shaded this, this person says, a
12 little shaded that. The person who knows about it is the
13 trial judge who's been sitting there. A court of appeals,
14 at least in my experience, can't really know what's going
15 on at the trial and who's believable, or what the
16 situation --
17 MR. ENGELMAYER: Justice Breyer --
18 QUESTION: -- it's too complicated.
19 MR. ENGELMAYER: -- the defendant pays a price
20 there for not having properly raised this below and
21 perhaps obtained a more careful, thoughtful discussion
22 from the district court.
23 QUESTION: Suppose on the eighth day, as was
24 alleged to have happened in this case, there's a new
25 opinion from the court of appeals indicating that it was

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1 clear error to introduce certain testimony, and without
2 that testimony the verdict simply can't stand?
3 MR. ENGELMAYER: Let me address that in two
4 steps. First of all, the claim in this case is wrong.
5 The citation that petitioner has referred to in
6 his claim that is new law is a Sentencing Guidelines case
7 called Jenkins. It simply addresses the issue of how one
8 goes about determining what quantity of drugs are
9 attributable to a defendant for calculating mandatory
10 minimums.
11 It has nothing to do with sufficiency, and I
12 think that's clear from the oral discussion, which is
13 reprinted in the joint appendix, that the district court
14 goes through.
15 But more generally, even if there is a change of
16 law outside the time limit set by Rule 29(c), the rule
17 simply does not authorize a district court to revisit the
18 issue, to open up the issue on sufficiency outside that
19 time limit.
20 Now, there is a different recourse in the rules.
21 Under Rule 48(a), the Government is authorized to move to
22 dismiss an indictment, and after trial has commenced that
23 must be with the consent of the defendant.
24 If, let us say, a intervening Supreme Court
25 decision came down that made clear that under new

1 standards the evidence at trial was clearly insufficient,
2 a decision like McNalley or Ratzlaf, or something like
3 that, the Government would be perfectly free, and a
4 responsible Government hopefully would take action --
5 QUESTION: Well, and even if it didn't, the new
6 law would certainly have to be applied by the court of
7 appeals on appeal, wouldn't it, in deciding whether the
8 case should have ever gone to the jury?
9 MR. ENGELMAYER: There actually is a circuit
10 split, Justice Scalia, where the issue is not raised below
11 as to which law to apply under a plain error standard, but
12 where it was preserved, there's no question that you would
13 be applying the new law.
14 QUESTION: Mr. Engelmayer, I think Justice
15 Breyer and I may disagree, and I'd be interested to know
16 the Government's position as to whether the district
17 judge, in passing on a motion for a new trial, applies the
18 same standard as the court of -- or, not a motion for a
19 new trial, a motion for judgment of acquittal.
20 It's my opinion that a district judge passing on
21 a motion for judgment of acquittal applies exactly the
22 same standard as the court of appeals. You know,
23 insufficiency of the evidence to support the verdict. The
24 district judge doesn't make any credibility determinations
25 any more than the credib -- any more than the court of

1 appeals would.

2 Now, is that the Government's position, or do

3 you agree that the district court somehow makes

4 credibility determinations in passing on a motion for

5 judgment of acquittal?

6 MR. ENGELMAYER: What you stated is our

7 position. The only deference that is due is to the jury's

8 verdict, and that is under the Jackson v. Virginia

9 standard that all credibility findings must be construed

10 in the light most favorable to the verdict.

11 I think as a practical matter a defendant

12 obviously gets a real advantage if his counsel is savvy

13 enough to make an intelligent motion in the district

14 court.

15 QUESTION: I guess my question does not turn on

16 credibility or not credibility. I just notice these

17 things are incredibly complicated, very often, and the

18 trial judge as a practical matter is in a far better

19 position, often, to decide what's going on than a court of

20 appeals.

21 Now, maybe the legal standard written down in

22 terms of credibility would sound the same, but it doesn't

23 seem to me in practice that it's the same, in that judges

24 normally at an appeals court level know they haven't heard

25 all the evidence.

1 Now that seems to me to make a difference. Now,
2 maybe you're saying it doesn't make a difference.
3 MR. ENGELMAYER: Well, I think what I'm saying
4 in the same practical spirit in which your question was
5 phrased is that it does, as a practical matter, make it
6 a -- put the defendant on much more of an uphill road in
7 order to establish insufficiency in the court of appeals
8 than in the district court, and that is the price the
9 defendant pays for not having made the motion.
10 If the district court, however, out of time
11 suddenly has the revelation that maybe there was something
12 insufficient about the evidence, I suppose there's nothing
13 that would prevent the district court from making those
14 views known, perhaps in the context of granting bail
15 pending appeal, or something like that.
16 QUESTION: Mr. Engelmayer, may I ask you about
17 the possibility of a theoretical difference, and I mean, I
18 understand your answer to say that there isn't this
19 difference, but wouldn't it be possible for the district
20 judge, ruling on a motion made within the time, to say,
21 no -- the conviction depends upon acceptance of the
22 testimony of X.
23 No reasonable jury could find X credible on the
24 crucial evidence, and therefore I will enter a judgment of
25 acquittal, or -- yes -- whereas a court of appeals could

1 not make that credibility determination, as I understand
2 it.
3 Isn't that theoretical difference possible?
4 MR. ENGELMAYER: I don't think so. I think it
5 is conceivable that in a sufficiency analysis one might,
6 in a very odd case, turn to the credibility of a witness,
7 but only based on objective facts at trial.
8 For example, if a witness is contradicted by a
9 videotape, let us say, that is something that the court of
10 appeals perhaps would be able to review, and a district
11 court would be in the same position, but in the more
12 impressionistic sense that we think of credibility, I
13 don't think the district court has any more discretion
14 than the court of appeals to turn to that issue.
15 QUESTION: Yes.
16 QUESTION: May I ask you to return before the
17 time expires to my hypothetical? I still don't understand
18 where it is that you find authority in the rule for the
19 judge to do what you say he obviously has the power to do.
20 MR. ENGELMAYER: Right. Rule 29(c) attaches a
21 time limit, Justice Stevens, to what it terms a motion for
22 judgment of acquittal.
23 QUESTION: Right.
24 MR. ENGELMAYER: Our position --
25 QUESTION: It does not speak to the judge's

1 action.

2 MR. ENGELMAYER: Well, I think it's a general

3 term, unlike Rule 29(a), which specifically identifies the

4 two movants. In other words it says, the defendant's

5 motion, and then it also says, the court on its own

6 motion.

7 QUESTION: Right.

8 MR. ENGELMAYER: So our view is that the general

9 term, motion for judgment of acquittal in 29(c) properly

10 encompasses both of the previous types of motion,

11 defendant's and the court's, that are listed in 29(a), and

12 as a result the court is bound by the same 7-day deadline.

13 I'd make -- I --

14 QUESTION: But what is -- but you would agree,

15 you have to look at paragraph (a) to find the authority in

16 paragraph (c), is that right, then?

17 MR. ENGELMAYER: I think -- I think --

18 QUESTION: You see, some of us were inclined to

19 say well, let's not even look at (a), and you kind of

20 agree with your opponent that we should look at (a).

21 MR. ENGELMAYER: Well, I think my opponent

22 suggests that there is no temporal aspect, temporal

23 limitation to (a) in that the text of the -- the clear

24 text, the clear headline of (a) which says, before

25 verdict, is irrelevant.

1 That, by the way, is inconsistent with authority
2 from this Court, including most recently INS v. National
3 Center for Immigrants' Rights, to the effect that the
4 court does and can look to the title of an enactment in
5 determining its meaning.
6 But more generally, we would find (a) relevant
7 in the sense that (a) identifies two specific types of
8 motion --
9 QUESTION: For acting on its own motion.
10 MR. ENGELMAYER: -- and (c) is a general term,
11 and if --
12 QUESTION: Well, but Mr. --
13 QUESTION: But you know, there's no -- could I
14 just finish this one thought? There's no prohibitory
15 language in (c), and there's no authorization to the judge
16 to act on its own motion in (c) itself.
17 MR. ENGELMAYER: Right, but it's a general term.
18 We think it's best read that way.
19 The alternative is --
20 QUESTION: So you would find the -- I want to be
21 sure, you would find the authority for the judge to act on
22 his own arising from (a) rather than from any inherent
23 power in the judge.
24 MR. ENGELMAYER: We would find the authority for
25 the judge to act on his own to arise in (c) under the

1 term, motion for judgment of acquittal, and we would
2 find -- we would help give meaning to the (c) term, motion
3 for judgment of acquittal, from the language in (a) where
4 two types of motions is listed, and one of those is, and I
5 quote, on its own motion, referring to the court.
6 QUESTION: I understand, yes.
7 MR. ENGELMAYER: And I would point out that that
8 is a more favorable reading to the district court than the
9 alternative, where there is a strong negative implication
10 that the court has no authority after the verdict at all
11 because (a) affirmatively sets out the authority in the
12 preverdict phase.
13 QUESTION: Mr. Engelmayer, two questions. First
14 of all, this case, I take it, does not require us to
15 decide this matter of what a judge can do, sua sponte.
16 MR. ENGELMAYER: Strictly speaking, that is
17 correct, Justice O'Connor.
18 QUESTION: This was a motion made by the
19 defendant that was late.
20 MR. ENGELMAYER: That is right.
21 QUESTION: Okay. Second question. Subsection
22 (c) possibly does distinguish between motions by
23 defendants and the court's own motion, where it says, if a
24 verdict of guilty is returned, the court may on such
25 motion, referring back to the motion for a judgment of

1 acquittal in the first sentence, and then the next
2 sentence, if no verdict is returned, the court may enter
3 judgment of acquittal, not referring to motion.
4 Now, conceivably those two phrases indicate some
5 different role for the defendant and the court, sua
6 sponte.
7 MR. ENGELMAYER: Our reading would be, rather,
8 that the term motion, not being subject in either of those
9 sentences to any limiting language, applies to both types
10 of motion set forth in (a), and I think there's actually
11 an interesting analogue under the Federal Rules, and --
12 QUESTION: Before we get to analogues, just tell
13 me why it says, may on such motion in one sentence, and
14 conspicuously does not say on such motion in the next
15 sentence. Do you have any explanation for that?
16 MR. ENGELMAYER: I don't, but I think it may
17 just be that --
18 QUESTION: I thought not.
19 MR. ENGELMAYER: It may be that it is -- but I
20 don't think it may be -- it may not be a --
21 QUESTION: It's quite obvious and conspicuous.
22 If a verdict of guilty is returned, the court may on such
23 motion set aside the verdict --
24 QUESTION: Where are you reading from?
25 QUESTION: (c), the second and third sentences

1 of (c). If a verdict of guilty -- the court may on such
2 motion set aside the verdict and enter judgment of
3 acquittal. If no verdict is returned, the court may enter
4 judgment of acquittal.
5 MR. ENGELMAYER: Right.
6 QUESTION: It just sticks out like that, and you
7 say there's no explanation for it.
8 MR. ENGELMAYER: Let me try -- let me give you
9 the analogue, because I think it actually may help to
10 answer this question. In Rules -- and I apologize in
11 advance that this was not in the brief. It's something
12 that came up in the course of preparing for this argument.
13 In Rules 33 and 34, those rules were initially
14 read simply, the court may grant either a motion for a new
15 trial or a motion for arrest of judgment. There was no
16 limiting language attached.
17 After this Court's decision in Smith, where it
18 was pointed out -- where the Court pointed out you could
19 have a double jeopardy problem if the court were
20 authorizing a new trial without the defendant having
21 sought or consented to that relief, the framers of the
22 rule in 1966 added the limiting language, on motion of the
23 defendant, and that would seem to us to be the terms that
24 the rules use, as they do in 29(a), when they want to
25 denote specifically that a motion must be made by the

1 defendant as opposed to sua sponte.

2 When there is a more general term, such as

3 motion, that is used, it seems to us that, particularly in

4 light of the antecedent reference in (a) to both types of

5 motion, it's an umbrella word. I think that's also

6 confirmed by 29(d).

7 29(d) says, if a motion for judgment of

8 acquittal after verdict of guilty under this rule is

9 granted, the court may order a -- may make a conditional

10 finding as to the propriety of a new trial depending on

11 what happens on appeal. There's no reason --

12 QUESTION: Mr. Engelmayer, there's one concern

13 that I had about an earlier answer you gave. You said the

14 judge can act on his own motion within the 7 days because

15 he may have made a mistake, he may have realized he made a

16 mistake in submitting the case to the jury.

17 MR. ENGELMAYER: Or for another reason, if I

18 may, Justice Ginsburg, which is that the court may have

19 wished to preserve the Government's right to appeal under

20 the Double Jeopardy Clause a conviction whereas had --

21 QUESTION: Yes. As a typical thing they do let

22 it go to the jury so that all possibilities are preserved.

23 MR. ENGELMAYER: Right.

24 QUESTION: Right, but you were -- you recognized

25 the possibility of a judge's own -- in the judge's mind,

1 she has missed something. Isn't it common when you deal
2 with appointed counsel to do just what was suggested
3 before, if someone doesn't make a motion to suggest that
4 the district judge will suggest, counsel, don't you want
5 to make a motion?
6 Do we make no distinction? It was court-
7 appointed counsel in this case, was there not?
8 MR. ENGELMAYER: Yes, it was.
9 QUESTION: Do we make no distinction between the
10 slips made by a representative that the State has provided
11 to the defendant?
12 MR. ENGELMAYER: This rule makes no distinction,
13 and the text of the rule, I think, governs, but your point
14 that a court can informally prod a defendant's counsel as
15 the time is running to make such a motion is certainly a
16 correct one. I'm sure it accords with practice in many
17 courts.
18 The alternative situation, which is the one the
19 Court addressed in Smith, though, would be created by the
20 other way of looking at the problem, which is, if the
21 court was to have inherent sua sponte authority that
22 lasted after the defendant's right to move had expired,
23 you would have this undesirable consequence of a defendant
24 through proxies, making informal entreaties to the court
25 through friends or counsel asking it to enter relief that

1 the defendant could not formally ask for, otherwise that
2 motion would be time-barred.
3 QUESTION: I wasn't clear where you went with
4 your explanation to us about Rules 33 and 34. The double
5 jeopardy problem is not present with a motion of --
6 MR. ENGELMAYER: Oh, I --
7 QUESTION: -- with a judgment of acquittal.
8 MR. ENGELMAYER: I certainly agree with that.
9 My point was more that the way that the Federal Rules, and
10 29, 33, and 34 and 35 are something of a package under
11 45(b), the way they choose to limit who may make a motion
12 is, to the defendant is to add after the expression, on
13 motion of a defendant -- that was what was added in 1966.
14 QUESTION: Yes, but I -- that's a very
15 interesting argument, but I don't see how it doesn't work
16 against you, because in this case there is no double
17 jeopardy problem, and so the court's power to enter the
18 acquittal should be greater, and the rules may recognize
19 that, arguably, by this silence.
20 MR. ENGELMAYER: And the court's powers are
21 greater, Justice Kennedy, in that, unlike in the new trial
22 context the court does, in our view, under 29(c) have the
23 power to order a judgment of acquittal following the
24 verdict, even if the defendant has not asked for that
25 relief.

1 QUESTION: Yes.

2 MR. ENGELMAYER: It just so happens, though that

3 that, the time limit that the court is constrained by is

4 the same 7-day, unless timely extended, time limit that

5 the defendant is constrained by in Rule 29(c).

6 If I may just turn to the policies that are

7 served by the rule --

8 QUESTION: Before you do that, why is it

9 constrained by the same -- I mean, it's not -- it isn't

10 granted by (c), and why is it constrained by (c), the time

11 in which the judge can act on his own?

12 MR. ENGELMAYER: If one construes in (c) the

13 expression, a motion for judgment of acquittal, to include

14 a motion for judgment of acquittal on the court's own --

15 on the court's initiative, which is a type of motion that

16 is adverted to in (a), then such a motion on the court's

17 own initiative must be made with 7 days after the jury is

18 discharged, or within time extended afterwards.

19 So, for example, the court might say several

20 days after a verdict, I'm troubled, I don't -- I'm not

21 sure whether the evidence --

22 QUESTION: What if he says, I forgot to ask the

23 clerk to make the entry but I told myself I was going to

24 extend the time a few days?

25 MR. ENGELMAYER: That would -- I think would

1 really get more towards the formality of what constitutes
2 a motion, I would think.
3 QUESTION: But how do you rule in that case?
4 MR. ENGELMAYER: I think the judge would have to
5 put something on the record in a timely fashion --
6 QUESTION: Within the 7 days.
7 MR. ENGELMAYER: -- because otherwise --
8 QUESTION: Well, doesn't that suggest that
9 there's some flaws in your argument that a judge can do --
10 act on his own within 7 days? You're just opening up
11 things like that, whereas if you require it to be done by
12 a -- on a motion of counsel or not at all, you have formal
13 records.
14 MR. ENGELMAYER: Mr. Chief Justice, I think we
15 might well require that the judge put on the record, say,
16 after a verdict that I'm troubled by the close nature of
17 the sufficiency here, and I'm going to reserve to myself
18 the right to enter judgement of acquittal up through
19 sentencing, or whatnot, and I don't think that would be
20 any problem. All the court would need to do would be to
21 note that in the transcript for the parties or in some
22 formal correspondence or some such.
23 I think there's little focus --
24 QUESTION: But you are bending the rules to a
25 certain extent. You're asking us to draft a -- the rules

1 don't say anything like that.

2 MR. ENGELMAYER: Well, it says on a -- if the

3 court may enter a judgment of acquittal on --

4 QUESTION: Once you say that motion means on the

5 court's own motion, I mean, you can make up all sorts of

6 things.

7 (Laughter.)

8 QUESTION: Whatever the court, you know,

9 speculates in oral conversation with counsel can be deemed

10 to be an expression of the court's own motion. I mean, I

11 guess you -- you know, you could write something that way.

12 I certainly wouldn't.

13 MR. ENGELMAYER: If the court can make its own

14 motion before the verdict, I don't see why it couldn't

15 make it afterwards. Of course, as --

16 QUESTION: Why does the Government take a

17 position like this? I can see the Government figuring

18 maybe a court is going to come down with something like

19 this, because they're going to feel sorry for a defendant

20 whose counsel doesn't make the motion, but it doesn't seem

21 to me it's in the Government's interest.

22 MR. ENGELMAYER: I think it's the correct

23 reading of the rule, Mr. Chief Justice, and the

24 alternative, of course, would simply be for the court, if

25 it was stripped of power after the verdict, to call up

1 defense counsel and say, you might think of coming down to
2 my courtroom within the next 7 days and making -- making
3 such a motion yourself, with the same effect.
4 QUESTION: But don't many judges ask, just as a
5 matter of course at the end of the trial, is there a
6 motion going to be filed under rule 29?
7 MR. ENGELMAYER: Yes, and --
8 QUESTION: I mean, they do.
9 MR. ENGELMAYER: And in the typical case --
10 QUESTION: I think this is an aberration, this
11 thing.
12 MR. ENGELMAYER: I think the whole case is an
13 aberration in the sense that the overwhelming -- in the
14 overwhelming majority of cases these motions are made --
15 QUESTION: It's an aberration, but it is rather
16 unusual to have a fellow who everybody thinks is innocent
17 sitting in jail.
18 MR. ENGELMAYER: Well, it's not everybody who
19 thinks he's innocent.
20 QUESTION: Well, I mean, at least if you take
21 the judge's analysis of the record, which we're doing for
22 purposes of this appeal.
23 MR. ENGELMAYER: We the Government believe the
24 evidence was sufficient. If we felt the evidence was
25 insufficient, we certainly would be empowered, under Rule

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1 48(a), to trigger the process of getting the indictment
2 dismissed, but that's not the case, and as a result, this
3 is something that is going to have to be taken up either,
4 depending on who prevails below in the court of appeals,
5 with the Government or the defendant appealing.
6 QUESTION: What is the scope of the district
7 judge's authority on a postverdict motion? Say a -- say
8 there's a 2255 application made to this same district
9 judge.
10 MR. ENGELMAYER: The district judge
11 realistically, because of the theory of plain error which
12 I've set out earlier, and we're not aware, by the way, of
13 any court of appeals that has ever held that the plain
14 error standard was decisive on a sufficiency claim that
15 the nature of the standard mattered, realistically a
16 district court will almost never have to get to a 2255
17 motion, because one way or the other, plain error analysis
18 on the sufficiency question on direct appeal should
19 dispose of it. In theory --
20 QUESTION: If I'm right, though, that that
21 failed here, that the Sixth Circuit considered -- there
22 wasn't only one question raised on the appeal from the
23 judgment, was there? Isn't it implicit in the Sixth
24 Circuit instruction to sentence, that they had considered
25 all questions relating to the trial?

1 MR. ENGELMAYER: Not in this case. Remember
2 that the defendant in this case had not yet been sentenced
3 and as a result, after the defendant would be sentenced
4 after the remand, the defendant would have the right to
5 file time --
6 QUESTION: But let's assume the Sixth Circuit
7 affirmed, didn't find any plain error, so there's another
8 appeal after the sentence --
9 MR. ENGELMAYER: Right.
10 QUESTION: -- and then we're left with what,
11 2255?
12 MR. ENGELMAYER: And the 2255 would fail under
13 any theory, because sufficiency will have been raised and
14 lost in the court of appeals, and ineffective assistance
15 of counsel would fail to show prejudice because there
16 would be a legal sufficiency, and therefore any timing
17 mess-up by the lawyer would have been, in effect, harmless
18 error, so --
19 QUESTION: I thought you had raised those two
20 possibilities as discrete, but now you're saying if you
21 lose one, if you lose the plain error review on the
22 circuit, you can forget the 2255.
23 MR. ENGELMAYER: Except in the highly
24 exceptional case, Justice Ginsburg, where the existence of
25 reasonable doubt was so much in equipoise that maybe the

1 plain error standard was dispositive, and therefore,
2 except in that situation there would be -- it would be
3 duplicative to raise an ineffective assistance claim.
4 In that rare situation, I suppose, a defendant
5 could come back and say, but for the plain error standard,
6 I would have prevailed on appeal, and it was only because
7 of my counsel's lapse that the plain error standard wound
8 up being used on appeal, ergo I should have a good
9 ineffective-assistance-of-counsel claim. I really don't
10 think that that -- we're ever going to get to that stage
11 in this case or others like it.
12 Finally, it's just important just to point out
13 the purposes of this rule, that they're to expedite the
14 termination of district court review to make sure that,
15 for example, the -- that there aren't eleventh hour
16 motions made raising sufficiency just before sentencing
17 that puts off sentencing.
18 It helps to ensure that, if the district court
19 is going to be tossing out a conviction based on
20 insufficiency, that that be done sufficiently in advance
21 of sentencing that the court, the probation office, the
22 defendant, and the prosecutor don't waste time going
23 through the needless exercise of preparing for sentencing.
24 Those interests are very much furthered by the
25 barrier, the 7-day barrier applying to the district court

1 as well as to the defendant.

2 Now, it's true that the rule obviously doesn't

3 impose any time limit on whether the motion has to be

4 resolved. That's because -- thank you.

5 QUESTION: Thank you, Mr. Engelmayer.

6 Mr. Christopherson, you have 3 minutes

7 remaining.

8 REBUTTAL ARGUMENT OF JAMES A. CHRISTOPHERSON

9 ON BEHALF OF THE PETITIONER

10 MR. CHRISTOPHERSON: Mr. Chief Justice, if it

11 please the Court:

12 There are a couple of points I'd like to make.

13 Justice O'Connor asked the question, well, this really

14 wasn't sua sponte by the court. In fact, this was by a

15 motion, but I think procedurally if you look at what

16 happened in this case the motion was filed, the motion was

17 denied. There was no motion pending in front of the court

18 when the judge made his decision in October.

19 Now, it's true that Judge Enslin back in August

20 had written two separate opinions and two separate orders,

21 and then just changed them and then did -- on the order

22 does say it's based on a motion by the defendant, but I

23 think it's clear in this case there was no motion pending,

24 and the judge made that decision sua sponte.

25 QUESTION: Do you know if he denied the motion

1 one time?

2 MR. CHRISTOPHERSON: He denied the motion in

3 August and, again, in the transcript he said, I agonized

4 and wrote two separate opinions, and then when it came the

5 day for sentencing he called the counsel in and on the

6 record explained that he had changed his mind.

7 The other point I'd like to raise is I think, in

8 looking at the rule, this Court has to look at what rule

9 is going to be used to construe that rule, and one point

10 I'd like to make to the court is that the day that Houston

11 v. Lack was decided this Court also decided the Torres

12 case.

13 In that case the Court indicated that in

14 construing the rules they should be construed liberally

15 with a view that cases should be decided on their merits

16 as opposed to on procedure, and I think if you use that

17 type of analysis that the majority used in the Torres

18 case, apply it to Rule 29, that under these facts the

19 court should have the power to consider the issue of

20 insufficiency of the evidence prior to the time of

21 sentencing.

22 Thank you.

23 CHIEF JUSTICE REHNQUIST: Thank you,

24 Mr. Christopherson.

25 The case is submitted.

1 (Whereupon, at 12:10 p.m., the case in the

2 above-entitled matter was submitted.)

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CHARLES CARLISLE, Petitioner
v. UNITED STATES

CASE NO: 94-9247

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BY Ann Mari Federico

(REPORTER)