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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JASON PATRICK, Defendant	Case No. 3:16-CR-00051-BR-09 DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION IN LIMINE: EVIDENCE OF ACQUITTALS

There is no Supreme Court case expressly dealing with the issue of the admissibility of acquittal evidence. Federal courts that have addressed the issue have held that evidence of a prior acquittal is generally not admissible on three primary grounds:

1. The prior acquittal is hearsay,
2. The prior acquittal is not relevant,
3. The prior acquittal should be excluded under Rule 403.

See for example, Segundo-Villa v. California Department of Corrections, 2014 WL 4105105 (C.D. California, E.D., Aug. 18, 2014)(surveying federal cases). Some state courts addressing the issue have allowed that acquittal evidence may be admissible in a subsequent trial. *See for*

example Williams v. United States, 77 A.3d 425, 432-435, (District of Columbia Court of Appeals, 2013) (discussing federal and state cases). Although the federal cases can be read as a general bar to admissibility, for the reasons that follow, they should not be read as an absolute bar to the introduction of acquittal evidence.

I. The prior acquittals of the first seven defendants are not necessarily hearsay

The Judgments of acquittal are a public record under FRE 803(8). The Ninth Circuit has repeatedly held that judgments of conviction that did not meet the admissibility test for prior convictions under FRE 803(22) can be admitted under FRE 803(8). *See United States v. Nguyen*, 465 F.3d 1128, 1132 (9th Cir. 2006), *United States v. Loera*, 923 F.2d 725, 730 (9th Cir.1991); *United States v. Wilson*, 690 F.2d 1267, 1275 n. 2 (9th Cir.1982). It is improper to admit such convictions under FRE 803(8) to prove that the defendant committed the crimes thereunder. *Id.* This is because admission of the judgments of ***conviction*** for that purpose would violate the more specific rule in FRE 802(22) which limits the admissibility of such prior convictions. *United States v. Nguyen*, 465 F.3d at 1132. There is no Federal Rule of Evidence that speaks directly to evidence of a judgment of acquittal. Therefore, there should be no similar bar to the admissibility of such under FRE 803(8).

II. The prior acquittals are not necessarily irrelevant

The federal test for relevance is a liberal one. FRE 401 provides:

> Evidence is relevant if:
>
> (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and
> (b) The fact is of consequence in determining the action.

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Mr. Patrick contends that the failure of the government to prove beyond a reasonable doubt that the first seven defendants tried were members of the conspiracy charged herein, has at least some tendency to make the existence of the conspiracy itself, and these defendants' participation in it, less probable. This is particularly true when the government seek to introduce the statements and actions of acquitted defendants as made in furtherance of said conspiracy. *See Williams v. U.S.*, 77 A.3d at 433, *Kinney v. People*, 187 P.3d 548, 557 (Colo. 2008).

III. Excluding evidence of the prior acquittals invites more prejudice than the introduction of the acquittals themselves.

The jury in trial two will no doubt see and hear evidence of the acts and words of at least some of the acquitted defendants from the first trial. *See United States v. Peralta, 941 F.2d 1003 (1991)*(discussing the admissibility as co-conspirator statements of the statements of acquitted defendants) The out of court statements of some of the acquitted defendants will no doubt be introduced by the government as statements of co-conspirators under Federal Rule of Evidence 801(d)(2)(D). Some of those defendants are likely to testify at the second trial. The jury in this trial is likely to hear also of the arrests and perhaps prosecution of the of the seven acquitted defendants. Exhibits in the form of videos, photgraphs and audio files involving the acquitted defendants will be received into evidence in this trial. Additionally, media coverage of the events surrounding the protest at the MNWR as well as coverage of the first trial was pervasive. Prospective jurors will no doubt have at least some familiarity with media reports concerning the protest and the first trial. Undoubtedly some jurors will be aware that the first trial resulted in the acquittal of most of the defendants as to most charges. This "lay" knowledge brought into the case will not easily reconcile with the technical instructions the jury will be given concerning

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conspiracy, conspirators and co-conspirator statements, unless the jury receives some evidence or instruction on the prior acquittals.

Admitting the out of court statements of acquitted co-defendants as co-conspirators invites confusion and juror speculation. The defense seeks the admission into evidence of these acquittals for the purpose of avoiding such speculation. Evidence of the prior acquittals will also prevent any of the jurors in trial two from making the erroneous inference that because they have heard and seen evidence concerning the first seven defendants participation in the events underlying this case, including in all likelihood evidence of their arrests and the fact of a prior prosecution, that some of the first seven were found guilty of the offense(s) charged. *See for example Williams v. United States*, 77 A.3d 425, 432-435, (District of Columbia Court of Appeals, 2013) (surveying federal and state cases).

The United States Supreme Court has in passing approved the admission of acquittal evidence by instruction when a jury in a criminal trial was presented evidence of a defendant's prior conduct from a trial in which he had been acquitted. In *Dowling v. United States*, The Supreme Court upheld the admission of prior bad act evidence to prove the identity of the defendant even when that evidence stemmed from a prior trial in which the defendant had been acquitted. The Court noted:

> When Henry left the stand, the District Court instructed the jury that petitioner had been acquitted of robbing Henry, and emphasized the limited purpose for which Henry's testimony was being offered. The court reiterated that admonition in its final charge to the jury.

Dowling v. United States, 493 U.S. 342, 345–46, 110 S. Ct. 668, 671, 107 L. Ed. 2d 708 (1990)(internal citations omitted). In this case, admission of the prior acquittals as a matter of

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judicial notice, and/or through the testimony of any of the acquitted defendants in this case is relevant, non-hearsay evidence that will avoid any potential jury speculation or confusion.

IV. The Court may take Judicial Notice of the Judgments of Acquittal under FRE 201.

The judgments of acquittal are facts that are subject to judicial notice. Federal Rule of Evidence 201 allows the court to judicially notice the fact of these acquittals because the judgments of acquittal are not subject to reasonable doubt as they are this court's own records whose accuracy cannot be reasonably disputed. *F.R.E. 201*, *No Cost Conference, Inc. v. Windstream Commc'ns, Inc.*, 940 F. Supp. 2d 1285, 1295 (S.D. Cal. 2013*), United States v. Howard*, 381 F.3d 873, 876 n.1 (9th Cir. 2004), *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir 1980).

Federal Rule of Evidence 201 provides in a criminal case that the jury must be instructed that they do not have to accept the noticed fact as conclusive. *F.R.E. 201(f)*. Should the court take judicial notice of the acquittals, Mr. Patrick seeks further leave of the court, after conferral with the United States Attorney's Office, to submit a proposed jury instruction pertaining to the acquittal evidence. It seems counterintuitive to allow the jury to reject the indisputable fact of the judicially noticed acquittals as provided under Rule 201.

RESPECTFULLY SUBMITTED This 6th day of January, 2017.

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