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Robert Louis Quick

where the use of cognovit provisions is limited in some way and judgment is later sought in another state with unrestricted cognovit provisions. The state in which the judgment is sought could grant the judgment without notice and hearing either through the application of its own nonrestrictive laws or through application of its own procedural rules in conjunction with the substantive law regarding the use of cognovit provisions of the state of execution.

The district court's solution to this problem was to require disclosure in any case where it is *possible* for a creditor to obtain a judgment against the debtor through the use of a cognovit clause without notice and hearing. The court of appeals, by dwelling upon the language "in those States"[58] in the Board's Interpretation has replaced a solution that is more in keeping with the spirit and purpose of the Truth in Lending Act with one that seems technical and against the purpose of the Act. The impact of this decision is somewhat limited. As previously indicated, only a few states allow unrestrictied use of cognovit provisions.[59] Moreover, the *Swarb* and *Overmeyer* decisions raise grave doubts as to the constitutionality of the cognovit provisions employed by Beneficial in this case and in most consumer credit transactions.

D. STEVE ROBBINS

Criminal Law—Increased Sentences on an Appeal by Right from Inferior Courts

In 1969 the United States Supreme Court held in *North Carolina v. Pearce*[1] that a criminal defendant who had successfully appealed his original conviction could not receive a more severe sentence on reconviction unless the increase directly resulted from defendant's conduct subsequent to his original conviction. The Court concluded that while there was no absolute constitutional bar to an increased sentence on retrial,[2] due process precluded penalizing a defendant for having successfully

[58]469 F.2d at 456.

[59]*See* note 54 *supra*.

[1]395 U.S. 711 (1969).

[2]"We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." *Id.* at 723.

attacked his original conviction.[3] Since a defendant who feared judicial retaliation through vindictive sentencing could unconstitutionally be deterred from exercising his right to appeal, due process required that a defendant be freed of such an apprehension.[4] The Court therefore imposed a rule that severely limited the imposition of increased sentences on retrial.[5]

However, in 1972 the United States Supreme Court held in *Colten v. Kentucky*[6] that a criminal defendant who had exercised his absolute right to a trial *de novo* in a superior court following conviction in an inferior court could receive a more severe sentence upon reconviction in a court of general criminal jurisdiction. The Court concluded that the danger of being penalized for seeking a new trial was not inherent in the *Colten* situation,[7] nor would a defendant be deterred from exercising his absolute right to a new trial by a fear of judicial vindictiveness.[8] Thus due process did not require the application of the *Pearce* rule to *de novo* trials.[9]

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[3]*Id.* at 724; *see* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965). *See also* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

[4]395 U.S. at 725.

[5]The Court formulated the *Pearce* rule as follows:

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726.

[6]92 S. Ct. 1953 (1972).

[7]*Id.* at 1960.

[8]*Id.* For a discussion of the opposite view *see* Aplin, *Sentence Increases on Retrial After North Carolina v. Pearce*, 39 U. CIN. L. REV. 427, 455-60 (1970). *See also, The Supreme Court, 1968 Term*, 83 HARV. L. REV. 1, 187-92 (1969); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 837 (1969).

[9]The following cases have held that the *Pearce* Court's reasoning was applicable to trial *de novo*: Wood v. Ross, 434 F.2d 297 (4th Cir. 1970), *vacated and remanded on ground of possible mootness sub nom.* North Carolina v. Rice, 404 U.S. 244 (1971); Griffin v. Wilkerson, 335 F. Supp. 1272 (W.D. Va. 1972); Torrance v. Henry, 304 F. Supp. 725 (E.D.N.C. 1969); Bronstein v. Superior Court, 106 Ariz. 251, 475 P.2d 235 (1970); State v. Shak, 51 Hawaii 626, 466 P.2d 420 (1970); Eldridge v. State, ___ Ind. ___, 267 N.E.2d 48 (1971); Cherry v. State, 9 Md. App. 416, 264 A.2d 887 (1970); Commonwealth v. Harper, 219 Pa. Super. 100, 280 A.2d 637 (1971).

Contra: Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017 (1970); Mann v. Commonwealth, ___ Mass. ___, 271 N.E.2d 331 (1971); People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969); Kansas City v. Henderson, 468 S.W.2d 48 (Mo. 1971); State v.

Lewis Colten was tried and convicted of disorderly conduct in a Kentucky inferior court.[10] Inferior courts in Kentucky have jurisdiction over those criminal offenses which are punishable by a maximum of one year's imprisonment and a five hundred dollar fine.[11] Trials in the inferior courts, the first tier of the Kentucky two-tier system, are generally speedier and less costly than trials conducted in a court of general jurisdiction, but they lack some of the constitutional safeguards available in the superior courts.[12] The defendant in the inferior court may either enter a defense to the charge or plead guilty. In either case, a defendant convicted in an inferior court has an absolute right to a trial *de novo* in a superior court.[13] In the trial *de novo* the case proceeds as if brought in the superior court in the first instance.[14] When Colten was given an increased sentence following his conviction in the trial *de novo*, he appealed his conviction on the basis that the *Pearce* rule was applicable to the trial *de novo*.[15] The Kentucky Court of Appeals affirmed his

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Stanosheck, 186 Neb. 17, 180 N.W.2d 226 (1970); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); Johnson v. Commonwealth, 212 Va. 579, 186 S.E.2d 53, *cert. denied*, 407 U.S. 925 (1972); Evans v. City of Richmond, 210 Va. 403, 171 S.E.2d 247 (1969).

[10]The defendant was originally convicted in the Quarterly Court of Fayette County, Kentucky. The Quarterly Court, a court of limited criminal jurisdiction, does not make a record of its proceedings. Defendant was there fined ten dollars, and he exercised his right to appeal to a superior court. Colten v. Commonwealth, 467 S.W.2d 374 (Ky. 1971).

[11]KY. REV. STAT. ANN. §§ 25.010, 26.010 (1970).

[12]The extent to which inferior courts afford a defendant full protection of his constitutional rights varies from state to state. Many inferior courts make no record of the proceedings, fail to insure a jury trial, and generally conduct trials in a more relaxed manner than the trials conducted in a court of general criminal jurisdiction.

[13]KY. R. CRIM. P. 12.06. For an example of judicial application of a prior formulation of this rule *see* Brown v. Hoblitzell, 307 S.W.2d 739 (Ky. 1957).

[14]KY. R. CRIM. P. 12.06 provides that: "Appeals taken to the circuit court shall be docketed by the clerk thereof as a regular criminal prosecution and shall be tried anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed to the extent of the punishment, if any, adjudged against the defendant in the circuit court ...." Many states have similar statutory provisions: ARIZ. REV. STAT. ANN. § 22-371 (1956), § 22-375 (Supp. 1972-73); ARK. STAT. ANN. § 44-509 (1964); COLO R. CRIM. P. 37; FLA. STAT. ANN. §§ 924.41-.45 (Supp. 1972-73); IND. ANN. STAT. § 9-713 (1956); KAN. STAT. ANN. §§ 22-3609 to -3610 (Supp. 1972); ME. REV. STAT. ANN. tit. 4, § 156 (1964); MD. ANN. CODE art. 5, § 43 (Supp. 1972); MICH. STAT. ANN. § 28.1226 (Supp. 1972); MINN. STAT. ANN. §§ 488.20, 633.20-.22 (Supp. 1973); MISS. CODE ANN. §§ 1201-02 (Supp. 1972); MO. SUP. CT. R. 22; MONT. REV. CODES ANN. §§ 95-2004, -2009 (1947); NEB. REV. STAT. §§ 29-601, -611 (1964); NEV. REV. STAT. §§ 189.010-.080 (1967); N.H. REV. STAT. ANN. §§ 502:18, 502-A:11-12 (1968); N.M. STAT. ANN. §§ 36-15-1 to -3 (1972); N.C. GEN. STAT. § 15-177 (1965), § 15.177.1 (Supp. 1971); N.D. CTN. CODE § 33-12-40 (1960); TEX. CODE CRIM. PRO. art. 44.17 (1966); WASH. REV. CODE ANN. § 35.20.070 (1965); W. VA. CODE ANN. § 50-18-2 (1966).

[15]Colten v. Kentucky, 92 S. Ct. 1953, 1956 (1972). On trial *de novo* defendant was again convicted, this time in the circuit court, a court of general criminal jurisdiction. He was then fined

conviction.[16] Colten then appealed to the United States Supreme Court.[17]

Colten argued that the rationale used by the Court in *Pearce* to limit the imposition of increased sentences on appeal was equally applicable to the trial *de novo*:[18]

> Both . . . involve reconviction and resentencing, both provide the convicted defendant with the right to "appeal" and in both—even though under the Kentucky scheme the "appeal" is in reality a trial *de novo*—a penalty for the same crime is fixed twice, with the same potential for an increased penalty upon a successful "appeal."[19]

The only real distinction, according to Colten, was in the source of authority for his new trial. In *Pearce* the new trial was granted after an appellate court determination that the decision of the trial court could not stand; in *Colten* the authority for the trial *de novo* came directly from a statutory provision.[20] Since no record was made of the inferior court proceedings, appellate review in *Colten* was impossible. The statute, therefore, compensated for a lack of review of the inferior court trial by assuring the defendant of a right to a new trial. Thus the distinction was in form and not substance and should not afford a basis for withholding the *Pearce* limitation on increased sentences to the trial *de novo* situation.[21]

The Court concluded, however, that there were in fact several meaningful distinctions between a retrial on remand and a trial *de novo*.[22]

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fifty dollars and costs. The circuit court judge offered no explanation for the more severe sentence. Colten v. Commonwealth, 467 S.W.2d 374, 378 (Ky. 1971).

[16]The defendant appealed the decision of the circuit court to the Kentucky Court of Appeals. He challenged the constitutionality of the Kentucky Disorderly Conduct Statute as well as the imposition of a more severe sentence in the circuit court. The Kentucky Court of Appeals upheld the constitutionality of the statute and the imposition of the increased sentence. Colten v. Commonwealth, 467 S.W.2d 374, 378-79 (Ky. 1971).

[17]Colten argued that the disorderly conduct statute was unconstitutionally broad and vague both on its face and as applied, and that the increased sentence twice placed him in jeopardy and deprived him of due process of law. Brief for Appellant at 15, 32, 38, Colten v. Kentucky, 92 S. Ct. 1953 (1972).

[18]*Id.* at 40.

[19]Colten v. Kentucky, 92 S. Ct. 1953, 1960 (1972).

[20]*See* note 13 and accompanying text *supra*.

[21]Brief for Appellant at 41.

[22]Mr. Justice Marshall, in dissent, took the view that *Pearce* was based upon the recognition that "whenever a defendant is tried twice for the same offense, there is inherent in the situation the danger of vindictive sentencing the second time around, and that this danger will deter some defendants from seeking a second trial." 92 S. Ct. at 1965.

> We note first the obvious: that the court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly. Nor is the *de novo* court even asked to find error in another court's work.[23]

Furthermore, the Court concluded that there was no reason to believe that the superior court would deal any more strictly with a trial *de novo* defendant than with a defendant initially appearing before that court.[24]

The reasons offered by the Court to distinguish *Pearce* from the trial *de novo* situation in *Colten* are not completely convincing. The Supreme Court seemed to believe that the danger of vindictiveness was greater in *Pearce* because he was sentenced on retrial by the same court from which he had successfully appealed. Technically it was the same court, the Superior Court of North Carolina sitting in Durham County,[25] but two different judges presided over the two trials.[26] If the Court meant that Pearce was sentenced twice by the same judge, the Court was clearly wrong. If the Court meant only that *Pearce* was sentenced twice in the Superior Court in Durham County, the Court was correct but its argument was greatly weakened.

Other distinctions utilized by the Court to distinguish *Pearce* from *Colten* are similarily questionable. The Court correctly stated that the trial *de novo* court in *Colten* was not even "asked to find error in another court's work."[27] However, this is equally true of the court that retried Pearce. Only the appellate court that remanded *Pearce* had the responsibility of finding error in another court's work. The duty imposed on the court that retried Pearce was identical to the duty imposed on the trial *de novo* court in *Colten*; that duty was to afford the defendant a fair trial consistent with constitutional safeguards.

The Court also declared that while judicial impatience towards a defendant who has already had one fair trial was perhaps understanda-

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[23] *Id.* at 1960.

[24] *Id.*

[25] State v. Pearce, 268 N.C. 707, 151 S.E.2d 571 (1966).

[26] Pearce was originally sentenced by Judge Williams. Having successfully appealed this convicion, Pearce was given an increased sentence on retrial by Judge McLaughlin. State v. Pearce, 268 N.C. 707, 709, 151 S.E.2d 571, 572 (1966). The North Carolina Supreme Court in *State v. Sparrow* noted this fact but still argued that the *Pearce* rule should not apply to trial *de novo*. 276 N.C. 499, 505, 173 S.E.2d 897, 901 (1970).

[27] 92 S. Ct. at 1960.

ble, the trial *de novo* court's attitude was "much more likely" to recognize the fact that the inferior courts were not designed to offer error-free trials.[28] The conclusion of this argument would seem to be that therefore the trial *de novo* court will not become impatient with a defendant who has appealed from the inferior courts since he has probably not been afforded all of his constitutional protections.

The reason that Pearce was retried at all, however, was because the North Carolina Supreme Court determined that he had not received a trial that was consistent with constitutional procedures.[29] It seems, then, that the court that retried Pearce was in the same position as a trial *de novo* court. Neither court should have become impatient with a defendant who was before the court because he had not been afforded all of his constitutional rights in his first trial. Yet the *Pearce* Court acknowledged the possibility of judicial impatience, while the *Colten* Court did not.

Moreover, the Court's argument assumes that the trial *de novo* court will act appropriately: that the court will recognize the deficiencies of the inferior courts and will render a fair decision unaffected by the knowledge of defendant's prior trial. Both Pearce and Colten, however, asserted that their respective judges had not acted appropriately in imposing sentence. The *Pearce* Court accepted the possibility that this had occurred, and having recognized the extreme difficulty of proving that a judge had been motiviated by vindictiveness towards a defendant in determining his sentence,[30] the Court acted to eliminate the danger. The standard of proof required to formulate the *Pearce* rule, therefore, was something less than actual proof of judicial vindictiveness. There should be grave concern in light of *Pearce* as to whether the *Colten* Court was warranted in assuming that the trial *de novo* court will be "much more likely"[31] to recognize the deficiencies of the inferior courts and act appropriately. Nevertheless, the Court's critical conclusion was based on that assumption:

> We see no reason, and none is offered, to assume that the *de novo* court will deal any more strictly with those who insist on a trial in the superior court after conviction in the Quarterly Court than it would with those defendants whose cases are filed originally in the superior

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[28] *Id*; *see* Aplin, *supra* note 8, at 458-59.

[29] State v. Pearce, 266 N.C. 234, 145 S.E.2d 918 (1966).

[30] 395 U.S. at 725 n.20.

[31] 92 S. Ct. at 1960.

> court and who choose to put the State to its proof in a trial subject to constitutional guarantees.[32]

At least one commentator has reached a contrary conclusion:

> Procedural complication also increases the pressure on officials to dispose of cases with the acquiescence of the accused. An ironic result of over-reliance on discretionary disposition is that, however compassionate its intent, the need to gain this acquiescence leads officials to place a heavy price in the form of enhanced severity on those who invoke the formal process but do not succeed in avoiding punishment.[33]

Yet one recent study dramatically supports the Court's conclusion.[34] The results of this survey show that forty-four percent of the defendants who had appealed their convictions in the inferior courts of Boston, Massachusetts, were given lighter sentences in the superior courts, while only one percent of those defendants were given increased sentences.[35] These figures seem to support the conclusion that trial *de novo* courts do not, as a general policy, impose more severe sentences on defendants who appeal from the inferior courts. Yet *Pearce* was not based on a finding that courts followed such a policy, but only on the finding that increased sentences did occur with sufficient frequency to require protection of defendant's rights.[36] Conversely, the *Colten* Court did not base its decision on the infrequency of increased sentences in the superior court. *Colten* thus cannot be distinguished from *Pearce* on this basis.

Colten also argued that Kentucky's two-tier court system placed an unconstitutional burden on defendant's right to a fair trial.[37] A defendant who is charged with a misdemeanor in Kentucky is generally required to stand trial in a court which was not designed to afford the defendant a trial consistent with constitutional requirements. When the defendant seeks such a trial, however, he is told that he may suffer a more severe sentence than that received in the inferior court. Colten

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[32]*Id.*

[33]Rosett, *Discretion, Severeity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12, 26 (1972).

[34]*See* Note, *Abolition of Trial De Novo—An Error in Judgment*, 6 SUFFOLK U.L. REV. 919, 923 (1972).

[35]*Id.*

[36]395 U.S. at 725. *See also* 92 S. Ct. at 1960.

[37]Brief for Appellant at 46-47.

argued that this was contrary to fundamental notions of procedural fairness. Thus defendant was unduly disadvantaged in seeking a fair trial.

The Court concluded that Kentucky's two-tier court system did not disadvantage defendants as long as a trial in a court of general jurisdiction was available to them.[38] The Court noted the advantages a defendant received in the inferior court: simple and speedy proceedings, lenient sentences, the opportunity to learn about the prosecution's case, the aid of counsel if confronted with the realistic threat of a prison sentence, and the opportunity to dispense with the inferior court trial by pleading guilty and then promptly receiving a trial *de novo* in a superior court.[39] The state had none of these options. The Court characterized the inferior court trial as merely "an offer in settlement" of defendant's case which the defendant was free to accept or refuse.[40]

It is clear that the defendant does suffer some disadvantages in being tried in the inferior court. The defendant does not have the option of electing whether he will receive an inferior court trial.[41] Therefore some defendants who want a trial in the inferior court do not receive one, while other defendants are forced to go into the inferior court when they have no intention of waiving their right to a trial fully protected by constitutional safeguards. A defendant who is represented by a lawyer in both the inferior and superior courts will suffer an increase in attorney's fees. Also, defendant may suffer a greater delay in receiving a final determination of his case than if he were permitted to go directly to the superior court. Further, in order to bypass an inferior court trial the defendant must plead guilty. The Court believed that these disadvantages were balanced by the advantages available to the defendant in the two-tier system. Since any burden on defendant's right to appeal was offset by the benefits he received, there was no violation of due process.[42]

The Court also concluded that if the *Pearce* rule were applied to the trial *de novo*, inferior court judges might cease imposing lenient

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[38]92 S. Ct. at 1961. The Court seems here to adopt implicitly the view that a burden on defendant's right to appeal does not violate due process as long as that burden is a reasonable one. *See* Lemieux v. Robbins, 414 F.2d 353, 355-56 (1st Cir. 1969); Mann v. Commonwealth, ___ Mass. ___, 271 N.E.2d 331, 334-35 (1971).

[39]92 S. Ct. at 1961.

[40]*Id*; *see* Lemieux v. Robbins, 414 F.2d 353, 355 (1st Cir. 1969).

[41]The arresting officer in the Kentucky system has the option of selecting the court in which defendant is to stand trial. *Id.* at 1958.

[42]*Id.* at 1960-61.

sentences in order to allow superior court judges full discretion in sentencing defendants on reconviction.[43] This is one possible result of applying the *Pearce* rule to trial *de novo*. Another possibility is that nearly all defendants might exercise their right to a trial *de novo* if they were protected from the threat of increased sentences in the superior courts. Defendants then would have nothing to lose by appealing. Either of these possibilities would result in so many appeals to the superior courts that the existence of the inferior courts would be threatened.

These predictions, however, conflict with actual experience. In Minnesota application of the *Pearce* rule to trial *de novo* did not result in an undue burden on the superior courts.[44] Also, New Mexico has had a statute since 1968 which prohibits increased sentences in the superior court.[45] Apparently the inferior courts of New Mexico are still operating effectively to relieve the caseload burden of the superior courts despite the fact that defendants have nothing to lose by appealing the sentence of the inferior courts. Perhaps the best explanation of this experience is that the majority of criminal defendants in the inferior courts are guilty.[46] For many of these defendants the only question is the severity of the sentence to be imposed.[47] Since sentences in the inferior courts are not characteristically severe,[48] the defendant realizes that while he has nothing to lose by demanding an appeal he does not really have anything to gain.

The question still remains, however, as to why the Court in *Colten* rejected the same argument that was successful in *Pearce*. One answer concerns the relative increase in severity of the sentences. In *Pearce* the sentence of one defendant was increased from ten to twenty-five years.[49] The *Pearce* Court felt that this great increase in punishment by itself was sufficient to compel a recognition of possible judicial vindictiveness absent other mitigating evidence.[50] Apparently, the fatal deficiency in Colten's case was that his original fine of ten dollars when increased to

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[43]*Id.* at 1961; *see* State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

[44]Brief for Respondent at 20-21, North Carolina v. Rice, 404 U.S. 244 (1971).

[45]N.M. STAT. ANN. § 36-15-3(B)(2) (Supp. 1972).

[46]*See* Note, 6 SUFFOLK U.L. REV., *supra* note 34, at 930. *See also* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (Tent. Draft, 1967) [hereinafter cited as ABA].

[47]ABA 1.

[48]Note, 6 SUFFOLK U.L. REV., *supra* note 34, at 929.

[49]395 U.S. at 714.

[50]*Id.* at 725-26.

a fine of fifty dollars by the superior court was not shocking enough by itself to compel the conclusion that the increased sentence had been motivated by judicial vindictiveness. The *Colten* Court therefore required some evidence indicating why the superior court had treated the defendant any differently or more severely than defendants originally before the court.[51] In *Pearce* the increased sentence itself was sufficient. In *Colten* the Court found the increased sentence insufficient without more evidence. Whether the Court was motivated by the factual distinctions between the two types of appeals or by the belief that such a decision was required to preserve the effectiveness of the inferior court system, the rationale for the decision is debatable.

The effects of *Colten* on the practical operation of the inferior court system remain to be seen. Whether a criminal defendant convicted in an inferior court will now more readily accept the sentence of the lower court or whether inferior court judges will become more disposed to offer lenient sentences as an incentive to defendants to accept their judgment as final cannot be predicted. Yet two effects of this decision are certain: the benefits of the inferior court system in terms of facilitating the efficient administration of criminal justice have been protected from one possible threat of erosion, and the potential threat of isolated instances of vindictive sentencing in less serious criminal cases has not been eradicated.

ROBERT LOUIS QUICK

Criminal Procedure—Use of the Reasonable Doubt Standard in Ruling on a Motion for Judgment of Acquittal

Rule 29(a) of the Federal Rules of Criminal Procedure instructs the trial judge to "order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."[1] For many years the various federal courts of appeals set different standards for a trial judge in ruling on motions for judgment of aquittal. However, the recent decision in *United States*

[51] 92 S. Ct. at 1960.

[1] FED. R. CRIM. P. 29(a).