

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CR. NO. 2:10cr186-MHT
)	
MILTON E. McGREGOR,)	
)	
Defendant.)	

MOTION TO DISMISS BASED ON DOUBLE JEOPARDY

Milton McGregor respectfully moves to dismiss all remaining charges against him based on Double Jeopardy. Mr. McGregor respectfully suggests that this motion does not require a separate briefing schedule, and that it can be considered along with the pending renewed motion for judgment of acquittal (Doc. 1753).

1. Mr. McGregor seeks the dismissal of all remaining counts against him, based on the issue-preclusion component of Double Jeopardy, and based on the jury's not-guilty verdicts on certain counts. The law and facts regarding this issue have been addressed in Mr. McGregor's brief in support of his renewed motion for judgment of acquittal. Out of an abundance of procedural caution, Mr. McGregor makes this motion as a motion to dismiss based on Double Jeopardy, in addition to having raised the contention as grounds for a judgment of acquittal. Mr. McGregor does not believe that additional briefing is required, because the briefing on the motion for judgment of acquittal will cover the issues.

2. Mr. McGregor preserves the contention that Double Jeopardy prohibits the Government from trying him a second time on any charge, because the Government failed to obtain a conviction at the first trial. Mr. McGregor recognizes that this broad contention is contrary to current caselaw, *e.g.*, *Yeager v. United States*, 129 S.Ct. 2360, 2366 (2009) (“Despite the argument's textual appeal, we have held that the second trial [after an initial trial results in a hung jury] does not place the defendant in jeopardy ‘twice.’”), but preserves the point in case the caselaw changes.

3. Mr. McGregor also preserves the contention that Double Jeopardy prohibits the Government from trying him a second time on any charge as to which the evidence was insufficient at the first trial. Mr. McGregor recognizes that this contention is also contrary to current caselaw. *See, e.g.*, *Richardson v. United States*, 468 U.S. 317 (1984). And, aside from the question of whether an immediate appeal of a denial of a motion to dismiss on this basis is available (it is not, under *Richardson*, at 326 n.6), the question is probably academic. That is, even aside from Double Jeopardy law, this Court will decide the sufficiency of the evidence when the Court rules on the pending Rule 29 motion. And review of any adverse ruling on that motion would be available, on appeal from a final judgment, even apart from Double Jeopardy doctrine. *See, e.g.*, *United States v. McCrimmon*, 362 F.3d 725, 730 (11th Cir. 2004) (reviewing sufficiency of the evidence at first trial, which had resulted in hung jury, after conviction in second trial). Nonetheless, the contention is preserved out of an abundance of caution in case it ever turns out to be more than academic.

Respectfully submitted,

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I hereby certify that on September 16th, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

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