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# DOUBLE JEOPARDY: THE PREVENTION OF MULTIPLE PROSECUTIONS

Since 1971, when Congress removed all statutory barriers to government appeals,[1] the double jeopardy clause[2] has become the sole determinant of the government's right to appeal in criminal cases. Accordingly, the United States Supreme Court for the first time has taken a self-defined "closer look" at policies underlying the double jeopardy clause in an attempt to bring restrictions on governmental appeal rights into sharper focus.[3] Concern for the accused underlies the Court's approach to double jeopardy. A second trial denotes greater risk, embarrassment, expense and ordeal, as well as conferring on the state a "potent instrument of oppression."[4] In taking a "closer look," the Court has viewed the main objective of the double jeopardy clause to be the prevention of multiple prosecutions; not the prevention of government appeals.[5] Following this objective, the Court has consistently allowed government appeals where success of those appeals would not require new prosecution.[6] Conversely, the Court has found the double jeopardy clause to bar any government appeal where a successful appeal would necessitate a new trial.[7]

A second prosecution is allowed, however, after a conviction is reversed on appeal.[8] Various rationales[9] have been offered to justify this result, which seems to be contrary to the purpose of the double jeopardy clause. A fairness rationale is used to justify retrial when the reversal is for a procedural error.[10] This rationale is logically sound and it is widely accept-

1. Title III of the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644 §14(a), 84 Stat. 1880 (1971) (amending 18 U.S.C. § 3731). *See* text accompanying notes 19-21 *infra*.

2. The fifth amendment to the United States Constitution provides in part that no "person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

3. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); United States v. Wilson, 420 U.S. 332, 339 (1975).

4. United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977). *See* United States v. Jorn, 400 U.S. 470, 479 (1971); Green v. United States, 355 U.S. 184, 187-88 (1957).

5. United States v. Wilson, 420 U.S. 332, 346-47 (1975). Another objective of the double jeopardy clause is to prevent the government from punishing a defendant twice for the same offense. *See Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1874).

6. United States v. Morrison, 429 U.S. 1 (1976); United States v. Rose, 429 U.S. 5 (1976); United States v. Wilson, 420 U.S. 332 (1975).

7. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); United States v. Jenkins, 420 U.S. 358 (1975); Fong Foo v. United States, 369 U.S. 141 (1962).

8. Bryan v. United States, 338 U.S. 552 (1950). *See* text accompanying notes 82-128 *infra*.

9. *See* text accompanying notes 86-114 *infra*.

10. United States v. Ball, 163 U.S. 662 (1895). *See* text accompanying notes 86-92 *infra*.

ed.[11] The fairness rationale means that it is simply fairer to both the defendant and the government to allow retrial because the accused's right to a fair trial corresponds to society's interest in punishing the guilty. As a practical matter, if double jeopardy barred retrial, appellate courts would not be as zealous as they now are protecting the accused's rights to a fair trial by overturning convictions. Thus, by allowing retrial, both the defendant's rights and society's interest are served.[12]

When reversal is for insufficient evidence, a waiver rationale is used to justify retrial.[13] This rationale is weak and has been severely criticized.[14] The waiver rationale rests on the principle that a defendant waives double jeopardy protection by requesting a new trial as a remedy on appeal.[15] This rationale allows retrial after a reversal for insufficient evidence even if the defendant prayed for an acquittal on the basis of insufficiency but alternatively requested a new trial on the basis of procedural error.[16] In other words, a remedial request for a new trial for procedural error constitutes a "waiver" of double jeopardy protection, and retrial is permitted although the ground for reversal was insufficient evidence.

This note will identify and examine the analytical framework which has emerged from the Court's "closer look" in government appeal cases. These cases include government appeals of, for example, post-verdict dismissals of indictments, post-verdict suppression orders, post-verdict acquittals, mid-trial acquittals, pre-trial dismissals, and acquittals after a jury is discharged for failure to reach a verdict. An examination of these cases will reveal that the court has consistently followed the general rule that a government appeal is permitted wherever its success will not require a second prosecution. Thus, any post-verdict ruling by a district court is appealable because its success will not require a second prosecution but merely the reinstatement of a guilty verdict.[17] Conversely, appeals of mid-trial acquittals and acquittals following a mistrial because of the jury's failure to reach a verdict are not allowed because multiple prosecutions would be required if these appeals were successful.[18]

11. *See, e.g.*, Sumpter v. DeGroote, 552 F.2d 1206 (7th Cir. 1977); United States v. Wilson, 420 U.S. 332, 343 n.11 (1975).

12. United States v. Tateo, 377 U.S. 463, 466 (1964).

13. *See* text accompanying notes 93-114 *infra*.

14. *See* text accompanying notes 114-131 *infra*.

15. *See* text accompanying notes 93-114 *infra*.

16. *See* text accompanying notes 116-118 *infra*.

17. United States v. Morrison, 429 U.S. 1 (1976); United States v. Rose, 429 U.S. 5 (1976); United States v. Wilson, 420 U.S. 332 (1975); United States v. Allison, 555 F.2d 1385 (7th Cir. 1977); United States v. Burnette, 524 F.2d 29 (5th Cir. 1975); United States v. De Garces, 518 F.2d 1156 (2d Cir. 1975).

18. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Fong Foo v. United States, 369 U.S. 141 (1962).

This note will then take its own "closer look" at rationales which permit multiple prosecutions after a conviction is reversed on appeal. The weakness of the Court's theoretical framework in this category of cases will be illustrated. In particular, the Court's adherence to a waiver rationale will be shown to be inconsistent with the principles which have emerged from the Court's look at government appeals.

## GOVERNMENT APPEALS: A CLOSER LOOK

Federal governmental appeals in criminal cases cannot lie without express statutory authorization.[19] In 1971, Congress authorized the government to appeal in any criminal case except "where the double jeopardy clause of the United States Constitution prohibits further prosecutions."[20] Prior to the 1971 enactment, it was largely unnecessary for the Court to consider the constitutional limitations of government appeals because of the restrictions imposed by Congress on the government's authority to appeal.[21] However, after 1971, the Court had to take a "closer look" at restraints on government appeals.

### *Government Appeals of Post-Verdict Orders*

The Supreme Court initiated this approach in 1975 in *United States v. Wilson*.[22] The defendant in *Wilson* was found guilty by a jury of converting union funds to his own use.[23] The district court dismissed the indictment on a post-verdict motion, ruling that the delay between the offense and indictment prejudiced the defendant.[24] The government appealed the post-verdict ruling and the Court of Appeals for the Third Circuit held that the double jeopardy clause barred the government's appeal.[25] The United States Supreme Court then granted certiorari.[26]

The Court reversed the Third Circuit's dismissal of the government's appeal, reasoning that "(t)he development of the Double Jeopardy Clause from its common-law origins . . . suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those

19. United States v. Wilson, 420 U.S. 332, 336 (1975); United States v. Sanges, 144 U.S. 310, 318 (1892).

20. 18 U.S.C. § 3731 (1972). *See* note 1 *supra*. Prior to the 1971 amendment, the government was allowed to appeal in limited instances as authorized by Congress under the Criminal Appeals Act, ch. 2564, 34 Stat. 1246 (1907). *See* United States v. Wilson, 420 U.S. 332, 336-39 (1975) which traces statutory history. *See also* United States v. Sisson, 399 U.S. 267, 307-08 (1970). However, note that the statute of limitations is also a limitation to government appeals.

21. United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977).

22. 420 U.S. 332 (1975).

23. This was in violation of 29 U.S.C. § 501(c) (1970).

24. 420 U.S. at 333.

25. 492 F.2d 1345, 1348-49 (3d Cir. 1973).

26. 417 U.S. 908 (1974).

appeals would not require a new trial."[27] Because a successful appeal by the government would not require a new trial but would merely result in the reinstatement of the guilty verdict, the Court held that the appeal in *Wilson* was not barred by the double jeopardy clause.[28]

In determining constitutional restrictions on government appeals, *Wilson* found that the prohibition against multiple trials was the controlling constitutional principle.[29] Thus, any government appeal could be authorized by Congress as long as success of the appeal would not result in a second trial. At the heart of the policy of avoiding multiple trials is the concern that the state shall not be permitted to re-try the accused, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[30] A government appeal also involves for a defendant personal strain and anxiety as well as an obvious enhancement of the likelihood of conviction. In *Wilson*, the Court recognized these concerns but noted that "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial."[31]

In a companion case to *Wilson, United States v. Jenkins*,[32] the Court held that the double jeopardy clause barred government appeals where their success would result in "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged."[33] In *Jenkins*, the defendant was charged with violating the Selective Service Act for "knowingly refusing and failing to submit to induction into the armed forces of the United States."[34] After a bench trial, the district court filed written findings of fact and conclusions of law, dismissed the indictment, and discharged the defendant.[35] The government's appeal was dismissed by the Court of Appeals for the Second Circuit on the ground that the double jeopardy clause prohibited further prosecution.[36] The United States Supreme Court affirmed the Second Circuit's ruling, noting that success of the government's appeal would *not* result in reinstatement of a guilty verdict because no such finding had been made by the district court.

27. 420 U.S. at 342.
28. *Id.* at 352-53.
29. *Id.* at 345-46.
30. Green v. United States, 355 U.S. 184, 187-88 (1957).
31. 420 U.S. at 345.
32. 420 U.S. 358 (1975).
33. *Id.* at 370.
34. 50 U.S.C. App. § 462(a) (1970).
35. 349 F. Supp. 1068, 1073 (E.D.N.Y. 1972).
36. 490 F.2d 868, 880 (2d Cir. 1973).

In reaching its decision, the Court examined the district judge's findings of fact and conclusions of law. The government had argued that the district court's dismissal of the indictment was attributable to an erroneous conception of the law and that all the factual issues necessary to support a finding of guilt under the correct legal standard were present in the district judge's findings.[37] The Supreme Court, however, noting that there was no finding of the statutory element of "knowledge," was unable to determine whether the dismissal of the indictment was based on an erroneous conception of the law or whether the dismissal was premised on the failure of the state to prove each essential element of the offense.[38] The Court, therefore, treated the discharge of the defendant as an acquittal and found double jeopardy to bar any government appeal. The Court's rationale was that reversal and remand would have required further proceedings to resolve the factual issue of "knowledge," an element of the offense charged.[39] Thus, *Jenkins* expanded *Wilson* by holding that further proceedings going to the elements of the offense charged, although less than a full retrial, can trigger double jeopardy protection.

Recently, the Supreme Court affirmed the principles of *Wilson* and *Jenkins* in *United States v. Morrison*.[40] In *Morrison*, the defendant was charged with possession of marijuana and the intent to distribute an unlawful substance. The district court denied the defendant's motion to suppress the marijuana on the grounds it was obtained by an illegal search and ultimately entered a guilty verdict. Before sentencing, the district court reconsidered and granted the motion to suppress. The government appealed this order and the court of appeals dismissed the appeal because it felt double jeopardy would bar retrial. On review by the Supreme Court, it was found that the government's appeal would not violate the double jeopardy clause because success of that appeal would result only in the reinstatement of the general finding of guilt rather than further factual proceedings relating to guilt or innocence.[41] Thus, the Court, by following the *Wilson* test, held that the government could appeal an order of suppression entered after a general finding of guilt.[42]

37. 420 U.S. at 367.
38. *Id.* at 367-68.
39. *Id.* at 368-70. If the Court had found that all the factual issues necessary to support a finding of guilt were present and that the district judge applied an improper legal standard, it apparently would have allowed a government appeal. If this were the case, query how a guilty verdict could be entered if the government's appeal of the dismissal of the indictment proved successful.
40. 429 U.S. 1 (1976).
41. *Id.* at 3-4.
42. *Id.*

*Government Appeals Of Pre-Trial Orders and Mid-Trial Acquittals*

Besides appeals of post-verdict orders,[43] the government can also appeal any pre-trial order which was granted before jeopardy attached.[44] The rationale justifying this type of appeal is that double jeopardy protection is afforded only if the accused has actually been placed in jeopardy.[45] Thus, in *Serfass v. United States*,[46] the Court held that the government could appeal a pre-trial order which dismissed an indictment.[47] The defendants in *Serfass* had claimed that the ruling of the district judge dismissing the indictment was based on the merits and, therefore, constituted the functional equivalent of acquittal. Disagreeing, the Court noted that the label "acquittal" was without significance until jeopardy had attached. The Court adhered to the view that jeopardy does not attach until a jury is empaneled or sworn, or, in a bench trial when the judge begins to receive evidence.[48] In other words, the government can appeal any order in the defendant's favor if the order was granted before double jeopardy attached.

Other constitutional rights become closely interrelated with double jeopardy rights when it is determined that jeopardy has attached.[49] For example, in *Fong Foo v. United States*,[50] the right of defendants to have a jury proceed to verdict was closely intertwined with the defendants' double jeopardy rights. The defendants in *Fong Foo* were brought to trial before a jury for conspiracy and concealment of material facts from a government agency.[51] During the testimony of the fourth government witness, the district judge directed the jury to return verdicts of acquittal.[52] The government appealed and the Court of Appeals for the First Circuit, noting that the district judge had no power to order the acquittal, vacated the judgment of acquittal and ordered the district court to reassign the case.[53] The United States Supreme Court accepted the defendants' claim that they had been twice placed in jeopardy and noted that once jeopardy attached in a jury

43. *See* text accompanying notes 22-42 *supra* and notes 73-84 *infra*.

44. Serfass v. United States, 420 U.S. 377 (1975).

45. *Id.* at 387, 389-94. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977); Illinois v. Somerville, 410 U.S. 458, 471 (1973) (White, J., dissenting); Downum v. United States, 372 U.S. 734, 737-38 (1963).

46. 420 U.S. 377 (1975).

47. *Id.* at 394.

48. *Id.* at 391.

49. United States v. Jorn, 400 U.S. 470, 484-85 (1971); Downum v. United States, 372 U.S. 734, 736 (1963); Wade v. Hunter, 336 U.S. 684, 689 (1949). *See* cases and commentaries cited in note 73 *infra*.

50. 369 U.S. 141 (1962).

51. *Id.* at 141.

52. *Id.* at 142.

53. *In re* United States, 286 F.2d 556, 565 (1961).

trial, a defendant is entitled to a verdict from the jury. The Court went on to hold that the district judge's mid-trial order directing the jury to return verdicts of acquittal triggered double jeopardy protection, was final, and could not be reviewed on appeal even though the acquittal was based upon an "egregiously erroneous foundation."[54] Thus, a mid-trial acquittal, correct or not, cannot be appealed by the government.

*Fong Foo* is a unique case because it involved an acquittal before the government's case-in-chief was closed. The district judge had no authority to grant the acquittal at this stage of the trial and notably no such authority exists today.[55] But *Fong Foo*'s holding is valid today and it is consistent with the Court's general rule which only allows the government to appeal where there will be no further prosecution. In *Fong Foo*, jeopardy attached when the jury was empaneled.[56] Although the acquittal had no valid foundation, it foreclosed the possibility of an acquittal from the original jury. A successful government appeal of this judgment would have necessitated a second jury and a second trial. This type of multiple prosecution is prohibited by double jeopardy. Therefore, the government cannot appeal a mid-trial acquittal.

### *Government Appeals of Acquittals After a Mistrial*

Both pre-trial orders[57] and post-verdict orders[58] are appealable by the government, whereas, mid-trial acquittals are not.[59] Yet, whether a defendant can be retried after a mistrial is declared because of the jury's failure to reach verdict depends on whether the district judge grants an acquittal. If no acquittal is granted after a mistrial, a second trial is possible.[60] Conversely, a second prosecution is not permitted if an acquittal is granted.[61]

This rule was announced in *United States v. Martin Linen Supply Co.*[62] *Martin* involved an acquittal granted under rule 29(c) of the Federal Rules of Criminal Procedure, which authorizes a defendant to move for judgments of acquittal at specified times.[63] In *Martin*, the question before

54. 369 U.S. at 142-43.
55. *See* note 63 *infra*.
56. *See* text accompanying notes 44-49 *supra*.
57. *Id*.
58. *See* cases cited in note 17 *supra*.
59. *See* text accompanying notes 51-56 *supra*.
60. *See* note 73 *infra*.
61. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).
62. *Id*.
63. FED. R. CRIM. P. 29 provides:

(a) *Motion before Submission to Jury*. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall 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

the Court was whether the double jeopardy clause prohibited a government appeal from a judgment of acquittal entered after the jury was discharged for its failure to reach a verdict. In answering this question in the affirmative, the Court reasoned that the district court's judgment of acquittal was a determination that the government's evidence was legally insufficient to sustain a conviction.[64] The district court's ruling thus represented a resolution of some or all of the factual elements of the offense charged and a termination of a trial in which jeopardy had long since attached. Further, the Court cited *Fong Foo* and noted that such a resolution, correct or not, was final and could not be reviewed because "a successful government appeal reversing the judgments of acquittal would necessitate another trial."[65]

Chief Justice Burger dissented[66] and argued that *Martin* was indistinguishable from *United States v. Sanford*,[67] decided earlier in the term. In *Sanford*, after a jury trial had ended in a mistrial and a second trial was in its preparatory stages, the trial court dismissed the indictment. The Court characterized the dismissal as a pre-trial ruling made "prior to a trial that the Government had a right to prosecute."[68] Chief Justice Burger thus argued that once the jury was dismissed in *Martin*, the defendants ceased to be in jeopardy in that proceeding because they could no longer be convicted. He therefore felt that the judgment of acquittal was a ruling made prior to a trial that the government could rightfully bring.[69]

The majority decision, however, distinguished *Sanford*, on the grounds that, there, a judgment of acquittal was not entered. The Court noted that the critical factor was whether the appeal was of a pre-trial order or whether it was an appeal of "a legal determination on the bases of facts adduced at the trial relating to the general issue of the case."[70] To determine

offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
(b) *Reservation of Decision on Motion*. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
(c) *Motion after Discharge of Jury*. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

64. 430 U.S. at 572.
65. 430 U.S. 564, 570-73.
66. 430 U.S. 564, 581 (Burger, C.J., dissenting).
67. 429 U.S. 14 (1976).
68. *Id.* at 16.
69. 430 U.S. at 582-83.
70. *Id.* at 575-76.

the nature of the judge's ruling, the Court announced the test to be "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[71] Finding the district judge's ruling to be an acquittal in substance as well as form, the Court refused to attach any constitutional significance to the timing of the judge's ruling and concluded that "judgments under Rule 29 are to be treated uniformly."[72]

*Martin's* holding is consistent with the general rule that the government cannot appeal where a successful appeal will necessitate a second prosecution. Thus, the acquittal in *Martin* was final because reversal of that judgment would have required a second prosecution.

### *Government Appeals of Post-Verdict Acquittals: An Appellate Interpretation*

*Martin* and *Sanford* are the controlling Supreme Court authorities as to when a retrial may be permissible after a mistrial.[73] However, the broad language of *Martin* that rule 29 acquittals are to be treated uniformly has created some confusion as to whether a rule 29 acquittal rendered *after* a guilty verdict is appealable by the government. Before *Martin*, both the Second[74] and Fifth[75] Circuits had allowed such appeals by following the general rule that double jeopardy does not bar any appeal where its success will not require a second prosecution. Thus, these circuits had permitted the government to appeal judgments of acquittal entered after a jury verdict of guilty because a successful appeal would only result in reinstatement of the guilty verdict. Subsequent to *Martin*, the Seventh Circuit examined this

71. *Id.* at 571-73.

72. *Id.* at 573-76.

73. Where a mistrial is declared sua sponte, by a district court because of a hung jury and *no* rule 29 acquittal is made, *Sanford* notes that retrial *may be permissible*. 429 U.S. at 16. The classical test utilized by the Court in this situation to determine whether double jeopardy bars retrial was first stated in *United States v. Perez*, 9 U.S. (1 Wheat.) 579, 580 (1824):

> We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

If the defendant requested a mistrial the manifest necessity test does not apply. *See* United States v. Dinitz, 424 U.S. 600 (1976); United States v. Jorn, 400 U.S. 470, 484-85 (1971); Downum v. United States, 372 U.S. 734, 735-36 (1963); Gori v. United States, 367 U.S. 364, 368-69 (1961). *See generally* Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 U. VA. L. REV. 325 (1977) [hereinafter cited as *Twice in Jeopardy*]; Comment, 69 NW. L. REV. 887 (1975); Note, 33 MD. L. REV. 211 (1973); Comment, 45 MISS. L.J. 1272 (1974). *See also* United States v. Jorn, 400 U.S. 470, 484 n.11 (1971); United States v. Tateo, 377 U.S. 463, 468 n.3 (1964). *See* text accompanying notes 50-56 *supra*.

74. United States v. De Garces, 518 F.2d 1156 (2d Cir. 1975).

75. United States v. Burnette, 524 F.2d 29 (5th Cir. 1975), *cert. denied*, 425 U.S. 939 (1976).

question in *United States v. Allison*.[76] In its opinion the court discussed *Martin*, which was decided by the Supreme Court the day that *Allison* was argued orally.[77]

The defendant, Allison, was charged with knowingly making a false statement to the Department of Health, Education and Welfare.[78] After the jury found Allison guilty, the district judge set aside the verdict and entered a judgment of acquittal.[79] In deciding whether the government had a right to appeal, the Seventh Circuit interpreted the observation in *Martin* on the desirability of uniform treatment of acquittals under rule 29 as necessarily accepting the principles announced in *Wilson*. The focus of *Wilson* was whether a new trial would be necessary. Thus, the Seventh Circuit found "reason to distinguish" between an acquittal following a guilty verdict and an acquittal following a mistrial. In the former situation, no retrial is necessary because, if there is a reversal of the acquittal on appeal, the guilty verdict can be reinstated.[80]

The Seventh Circuit's interpretation of *Martin* is consistent with the theoretical framework of *Wilson* and *Jenkins*. Wherever success of a government appeal will not necessitate a new trial or further proceedings going toward the elements of the offense charged, but will only involve the reinstatement of a guilty verdict, the double jeopardy clause is inoperative. Thus, although the most fundamental rule of double jeopardy jurisprudence is that a verdict of acquittal cannot be reviewed on error or otherwise,[81] a judgment of acquittal under rule 29 following a jury verdict of guilty is appealable by the government. *Jenkins* provided direct support for this position when the Court stated:

> [W]here the jury returns a verdict of guilty but the trial court thereafter enters a judgment of acquittal, an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict.[82]

Further, there is direct support for the *Allison* Court's position in the Advisory Committee Notes explaining rule 29(c).[83] The Notes state that "(n)o legitimate interest of the government is intended to be prejudiced by permitting the court to direct an acquittal on a post-verdict motion."[84]

76. 555 F.2d 1385 (7th Cir. 1977).
77. *Id.* at 1386.
78. *Id.* at 1386-87.
79. The judgment was entered under FED. R. CRIM. P. 29(c). *See* note 62 *supra*.
80. 555 F.2d at 1387.
81. United States v. Ball, 163 U.S. 662, 671 (1896).
82. 420 U.S. at 365.
83. *See* FED. R. CRIM. P. 29(c) and accompanying Advisory Committee Notes, 18 U.S.C.A. app. R. 29.
84. *Id.*

If the Court in *Martin* desired to change the theoretical framework of *Wilson* and *Jenkins*, the Court should have stated this explicitly. Therefore, the broad language of *Martin* regarding its refusal to attach constitutional significance to the timing of an acquittal should be limited to the factual situation of *Martin*, in other words, to mistrial cases. Any post-verdict ruling by a district court in the defendant's favor should be appealable. This is true whether the ruling is an order to suppress evidence as in *Morrison* or a dismissal of an indictment as in *Wilson* or an acquittal which is a determination that the evidence is insufficient to sustain a conviction as in *Allison*. However, a mid-trial acquittal as in *Fong Foo* or an acquittal rendered after a mistrial as in *Martin* should not be appealable because there is no guilty verdict to reinstate and a successful appeal will necessitate a second prosecution.

## REVERSALS OF CONVICTIONS AND RETRIAL

The theoretical framework that has emerged from the Supreme Court's "closer look" at governmental appeal cases has had its effect elsewhere. Many lower courts have applied the principles, which have emerged from the Court's "closer look," in determining the issue of retrial of a defendant whose conviction has been reversed on appeal.[85] Any retrial is contrary to the policy underlying the double jeopardy clause, the prevention of multiple prosecutions. Therefore, modern courts, in determining the issue of retrial, are careful to scrutinize the rationales justifying another prosecution.

### *Rationales for Retrial After Reversal for Procedural Error: From Presumptive Waiver to the Fairness Rationale*

Over eighty years ago in *United States v. Ball*,[86] the United States Supreme Court held that double jeopardy did not bar retrial of a defendant whose conviction was reversed on appeal because of a procedural error. In *Ball*, the reversal was due to a defective indictment. The theory underlying that decision is that a convicted defendant waives his right to plead former jeopardy by the mere act of filing an appeal.[87] In other words, if the defendant's appeal is successful, he has presumptively waived his double jeopardy rights under the fifth amendment.

85. *See, e.g.*, Sumpter v. DeGroote, 552 F.2d 1206 (7th Cir. 1977); United States v. Wiley, 517 F.2d 1212, 1215-21 (D.C. Cir. 1975); United States v. Barker, 425 F. Supp. 1283, 1285 (W.D. Mo. 1977). *See generally* People v. Woodall, 61 Ill. 2d 60, 64-65, 329 N.E.2d 203, 205-06 (1975); People v. Brown, 99 Ill. App. 2d 281, 293-302, 241 N.E.2d 653, 660-64 (1968); Hervey v. Colorado, 178 Colo. 38, 495 P.2d 204, 208 (1972); State v. Moreno, 69 N.M. 113, 364 P.2d 594 (1961).

86. 163 U.S. 662 (1896).

87. *See* Trono v. United States, 199 U.S. 521, 531-34 (1905); *Twice in Jeopardy*, *supra* note 73, at 330.

A little over sixty years after *Ball*, the Court rejected this presumptive-waiver theory in *Green v. United States*.[88] There, the Court noted that a waiver involves a "voluntary knowing relinquishment of a right." The Court labeled the presumptive-waiver theory "fictional" because a defendant has "no meaningful choice" in deciding whether to serve his sentence or appeal his conviction and "waive" constitutional rights.[89]

The current explanation by the Court for a *Ball* result is that it is "fairer to both the defendant and the Government." This position was first announced by Justice Harlan in *United States v. Tateo*[90] and was finally adopted by a majority of the Court in *Wilson*,[91] the first case to take a "closer look." Justice Harlan in *Tateo* explained the fairness rationale as follows:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.[92]

Because *Wilson* affirmed the result of *Ball* and adopted the "fairness rationale," courts freely permit retrial where reversal is for procedural error. In this situation, retrial is justified by the "fairness rationale" despite the objective of the double jeopardy clause, prevention of multiple prosecutions.

### *Rationales for Retrial After Reversal for Insufficient Evidence: The Affirmative Waiver Theory*

In *Bryan v. United States*,[93] decided in 1950, the Court expanded the *Ball* rule to situations where the reversal was based on insufficient evi-

88. 355 U.S. 184 (1957).
89. *Id.* at 191-92.
90. 377 U.S. 463, 466 (1964).
91. 420 U.S. 332, 343 n.11 (1975).
92. United States v. Tateo, 377 U.S. 463, 466 (1964).
93. 338 U.S. 552, 560 (1950).

dence. Besides the presumptive-waiver theory, *Bryan*'s holding is also underlied by a closely related waiver theory. This theory, which may be termed an affirmative-waiver theory, postulates that a defendant's request on appeal for a new trial affirmatively waives his double jeopardy rights. In *Bryan*, the defendant sought a new trial on appeal as one of his remedies.[94] Thus, two possible theories, the presumptive-waiver theory and the affirmative-waiver theory, comprise the basis of *Bryan*'s holding.

The presumptive-waiver theory was rejected by the Court in *Green v. United States*[95] seven years after *Bryan*. In contrast, the affirmative-waiver theory clearly retains vitality in the Supreme Court as well as lower federal courts.[96]

The affirmative-waiver theory was evident in *Yates v. United States*.[97] There, the Court reversed the convictions of fourteen defendants who were charged with Smith Act[98] violations and ordered the acquittal of five defendants against whom the evidence was clearly insufficient. However, in remanding the other nine defendants for a new trial, the Court, citing *Bryan*, noted that a retrial order and a refusal to order acquittal would be justified "even where the evidence might be deemed palpably insufficient *particularly since petitioners have asked in the alternative for a new trial* as well as for acquittal."[99]

The affirmative-waiver theory was also implicit in the Court's decision in *Forman v. United States*.[100] In *Forman*, the Court of Appeals for the Ninth Circuit reversed the defendant's conviction because of improper jury instructions and remanded the case with instructions to enter a judgment of acquittal.[101] However, upon rehearing the court of appeals modified its ordered for an acquittal and entered one directing a new trial.[102] The defendant argued before the Supreme Court that the appellate court's initial order was final and that the modified order for a new trial violated double-jeopardy.[103] The Court was unpersuaded and affirmed the appellate court's order for a new trial. In *Forman*, *Ball* and *Bryan* were relied on by the

94. *Id.* at 560.
95. 355 U.S. 184 (1957). *See* text accompanying notes 88-89 *supra*.
96. *See* text accompanying notes 97-119 *infra*.
97. 354 U.S. 298 (1957).
98. Smith Act, § 2(a)(1)(3), 18 U.S.C. §§ 371, 2385 (1940) (repealed 1948).
99. 354 U.S. at 328 (emphasis added).
100. 361 U.S. 416 (1960).
101. 259 F.2d 128 (9th Cir. 1958). *Forman* involved a reversal for procedural error and not one for insufficient evidence. It was decided after the presumptive-waiver theory was rejected but before the fairness rationale was adopted. Today, its result would rest on the fairness rationale. However, it is discussed here because of its relevance to the affirmative-waiver theory.
102. 261 F.2d 181, 183 (1958).
103. 361 U.S. at 421.

Court for the general principle that a person can be retried when his conviction has been set aside on appeal and he requests a new trial as one of his remedies.[104]

The defendant in *Forman* relied on *Sapir v. United States*.[105] In *Sapir*, the defendant's motion for acquittal was denied by the district court. On appeal, the conviction was reversed, and the cause was remanded with instructions to dismiss the indictment because the evidence was insufficient to sustain a conviction.[106] The government then succeeded in persuading the court of appeals to modify its order and grant a new trial on the basis of newly discovered evidence. The Supreme Court vacated the modified order, reinstating the former one which instructed the trial court to dismiss the indictment. The Court, in a brief per curiam opinion, gave no citations or justifications for its decision. However, Justice Douglas concurred and noted that the guarantee against double jeopardy prevents retrial of a defendant who is acquitted on appeal for insufficient evidence, just as it prohibits retrial of a defendant who is acquitted by a trial judge for the same reason.[107]

The Court in *Forman* distinguished *Sapir* in three ways and limited *Sapir* to its own facts. First, it noted that the action of the court of appeals in *Sapir* was based on new evidence. Second, it noted that *Sapir* involved insufficient evidence while *Forman* dealt with an improper jury instruction. Finally, the Court noted that the defendant in *Forman* requested a new trial whereas no such motion was made in *Sapir*. The *Forman* court cited to the Douglas concurrence in *Sapir*, noting that Justice Douglas felt the controlling factor determining retrial was whether the defendant requested one.[108]

*Bryan, Sapir, Yates* and *Forman* find the affirmative-waiver theory to have constitutional significance. Following this theory, the Second,[109] Fifth,[110] Seventh[111] and Eighth[112] Circuits allow retrial after a reversal for insufficient evidence. These courts similarly hold that a defendant can only preserve his double jeopardy rights by not requesting a new trial on appeal. Thus, they only permit a second prosecution if the accused requests one. *United States v. Robinson*[113] illustrates the approach of these circuits. In *Robinson*, the defendant's conviction was reversed for insufficient evi-

104. *Id.* at 425-26.
105. 348 U.S. 373 (1955).
106. 216 F.2d 722, 724 (10th Cir. 1954).
107. 348 U.S. at 374 (Douglas, J., concurring).
108. 361 U.S. at 425-26.
109. United States v. Robinson, 545 F.2d 301, 304 n.5 (2d Cir. 1976).
110. Greene v. Massey, 546 F.2d 51, 53-56 (5th Cir. 1977); United States v. Carter, 516 F.2d 431 (5th Cir. 1975); United States v. Blake, 488 F.2d 101, 107 (5th Cir. 1973).
111. United States v. Fusco, 427 F.2d 361, 363 (7th Cir. 1970).
112. United States v. Diggs, 527 F.2d 509, 513 (8th Cir. 1975).
113. United States v. Robinson, 545 F.2d 301 (2d Cir. 1976).

dence. In deciding the issue of retrial, the Court of Appeals for the Second Circuit found the controlling factor to be whether the accused requested a new trial. The Second Circuit thus interpreted *Bryan* as sustaining a court's power to order a retrial only when the defendant asks for one. Because no such request was made in *Robinson*, the Second Circuit held that double jeopardy barred a second prosecution.[114]

### *The Fallacy of the Affirmative-Waiver Theory*

The fallacy of the affirmative-waiver theory is that it does not involve a voluntary waiver. In *Green v. United States*,[115] the Court rejected the presumptive-waiver theory noting that a waiver involves a "voluntary knowing relinquishment of a right." The Court labeled the presumptive-waiver theory "fictional" because the defendant had "no meaningful choice" in deciding whether to serve his sentence or appeal his conviction and "waive" constitutional rights.[116]

Similarly, the affirmative-waiver theory does not involve a meaningful choice. Instead, it involves coercion because an appellant is forced to limit his appeal to the sole issue of insufficency. If he prays alternatively for a new trial on the basis of a procedural error of law by the trial judge, he will "waive" his constitutional rights of not being placed twice in jeopardy. This is an absurd result since a defendant's assertion of one right on appeal forces him to forfeit a constitutional right. It is particularly unjust because most appeals involving claims of insufficiency also involve claims of error pertaining to procedural matters. In other words, a remedial request for a new trial for procedural error should not be taken as a quid pro quo surrender of constitutional protection against double jeopardy.[117]

One district court forced by stare decisis to follow the affirmative-waiver theory, nevertheless stated:

> to make the right of retrial dependent upon the filing of an alternative motion for a new trial by a convicted defendant may have a chilling effect on the defendant's desire to seek an alternative order for a new trial in the district court for trial errors, when he believes he has a meritorious motion for judgment of acquittal.[118]

The affirmative-waiver theory developed as a conclusory label for a *Ball* result. In these situations a request for a new trial was used by courts as a convenient label for a conclusion that retrial was permissible. For a court

114. *Id.* at 304 n.5.
115. 355 U.S. 184 (1957). *See* text accompanying notes 88-89 *supra*.
116. 355 U.S. at 191-92.
117. *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 470 (1969); *Twice in Jeopardy*, *supra* note 73; Comment, 31 U. CHI. L. REV. 365, 367-68 (1964); *see generally* Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 U.C.L.A. L. REV. 81, 81-83 (1967).
118. United States v. Barker, 425 F. Supp. 1285 (W.D. Mo. 1977).

to say simply that "you asked for it" is a superficial rationale. The real constitutional principle allowing retrial is not that the defendant "asked for it" but that society has a great interest in re-trying a defendant whose guilt was clear but who did not receive a procedurally fair trial.[119]

### *Sumpter v. DeGroote:*

### *A Proposed Model Utilizing the Fairness Rational*

The "closer look" government appeal cases illustrate that the double jeopardy clause is aimed at the prevention of multiple prosecutions. However, a multiple prosecution is allowed where a defendant's conviction is reversed because of a procedural error of law. This is justified by the "fairness rationale." On the other hand, the affirmative-waiver theory, though still utilized, is not a valid rationale justifying retrial of a defendant whose conviction has been reversed for insufficient evidence. However, can retrial in this situation be justified by the "fairness rationale?"

Recently, the Seventh Circuit examined this question in *Sumpter v. DeGroote*.[120] This case is representative of a methodology which applies the principles of the Supreme Court's "closer look" in government-appeal cases to situations involving reversals of convictions. In *Sumpter*, the defendant was charged with prostitution under an Indiana statute which provided in part that "*any female* who frequents or lives in a house of ill fame, knowing the same to be a house of ill fame, or who commits or offers to commit one (1) or more acts of sexual intercourse or sodomy for hire, shall be deemed guilty of prostitution."[121]

Sumpter's conviction by a jury was reversed on appeal because the state failed to present any evidence that Sumpter was a female.[122] The state appealed to the Indiana Supreme Court. That court affirmed Sumpter's conviction in part and remanded the case to the trial court for a determination of her sex.[123] On remand, Sumpter's claim of double jeopardy was overruled and the trial court took judicial notice that Sumpter was a female, rejected Sumpter's rebuttal evidence and found her guilty. Sumpter appealed, claiming that the limited remand placed her in double jeopardy. Her

119. *See* authorities cited in note 117 *supra*.

120. Sumpter v. DeGroote, 552 F.2d 1206 (7th Cir. 1977).

121. IND. CODE § 35-30-1-1 (1971) (emphasis added). The statute, amended in 1975, now provides for "any person" rather than any female. 1975 Ind. Acts 325, § 8.

122. Sumpter v. State, 296 N.E.2d 131, 133 (Ind. App. 1973).

123. Sumpter v. State, 261 Ind. 471, 483, 306 N.E.2d 95, 104 (1974). The Indiana Supreme Court determined that the method of proof to determine a defendant's sex was in need of modification. Therefore, they established a new procedure whereby the lower courts would take judicial notice of the defendant's sex and remanded the case to determine Sumpter's sex according to the new procedure. *Id.* at 473-74, 306 N.E.2d at 98-99.

double jeopardy claim was subsequently accepted by the Court of Appeals for the Seventh Circuit,[124] which received the case on appeal from a district court's dismissal of her petition for a writ of habeas corpus.

In dicta, the court critized the *Bryan* rule. It noted the inequity of retrying defendants whose convictions were reversed for insufficient evidence because they might have received the acquittals to which they were entitled if they had been before other trial judges.[125] Further, the Seventh Circuit examined whether the "fairness rationale" would justify retrial. The court concluded that it did not, since there is no societal interest in punishing a defendant whose guilt is not clear and who was entitled to an acquittal at the first trial as a matter of law.[126] Thus, the court felt that *Bryan*'s holding was not justifiable and was contrary to the objective of the double jeopardy clause. However, instead of ignoring the *Bryan* rule, the Seventh Circuit found *Bryan* not to be controlling. The court noted that the reversal in *Bryan* was followed by a retrial in which the state was required to prove every essential element of the crime, whereas, the remand in *Sumpter* affirmed her conviction in part and only required the state to prove one of the essential elements of the crime—her sex. Relying on this distinction, the Seventh Circuit in a narrow holding held that the limited remand violated Sumpter's double jeopardy rights.[127]

It would be better jurisprudence to apply the "fairness rationale" uniformly to all reversals whether they be grounded on insufficiency of the evidence or based on procedural errors of law. The fairness rationale, unlike the affirmative-waiver theory, focuses on the real constitutional principle. The real constitutional principle is that society's interest in punishing the guilty must be balanced against the defendant's right to a fair trial.[128] The controlling question should not be whether a defendant's attorney requested a new trial as one of his many remedies on appeal. Utilization of the "fairness rationale" would not automatically bar retrial of all defendants whose convictions were reversed for insufficient evidence. For example, some courts might feel that a full retrial of the defendant in *Sumpter* would have been justified under the fairness rationale since her guilt was clear except for the legal technicality of her sex. In most cases, however, if the accused was given a fair trial but was convicted without sufficient evidence,

124. Sumpter v. DeGroote, 552 F.2d 1206 (7th Cir. 1977). Before getting into federal court, Sumpter appealed on the basis of double jeopardy to the Indiana Supreme Court. Sumpter v. State, 261 Ind. 471, 340 N.E.2d 764 (1976). Her claim was rejected and, subsequently, her petition to the United States Supreme Court was denied. 425 U.S. 952 (1976).

125. Sumpter v. DeGroote, 552 F.2d 1206, 1211-12 (7th Cir. 1977).

126. *Id.*

127. *Id.* at 1214-16.

128. *See* text accompanying notes 116-119 *supra*.

the conviction should be reversed and the defendant should be acquitted by the appellate court. Surely there is no societal interest in retrying a defendant who could not as a matter of law be found guilty on the government's evidence.

Federal courts are authorized to direct appellate acquittals under title 28, section 2106, of the United States Code[129] and indeed many courts are using this statutory authority to avoid the harshness of *Bryan*.[130] Such acquittals are not necessarily final. The government can petition for a rehearing as well as certiorari to the United States Supreme Court. These appeals are not barred by the double jeopardy clause because their success would merely result in the reinstatement of a guilty verdict.[131]

## CONCLUSION

The Supreme Court has viewed the double jeopardy clause of the fifth amendment to be aimed at the prevention of multiple prosecution, not the prevention of government appeals. Consequently, the Court has denied the defendant any benefit from errors of law made by a trial judge by allowing the government to appeal wherever a second prosecution will not be necessary. Thus, any appeal which will merely result in the reinstatement of a guilty verdict is permitted. Accordingly, the government can appeal any post-verdict order whether the order be a motion to suppress as in *Morrison* or an acquittal as in *Allison*. Similarly, it can appeal any order that is granted before the attachment of jeopardy because double jeopardy protection is only afforded once the accused has been placed in jeopardy. Thus, a pre-trial dismissal of an indictment is appealable as in *Serfass*. Conversely, those appeals which will necessitate a second prosecution are not permitted. This is true even if a successful government appeal will not require a full retrial but only further proceedings going to the elements of the offense charged as in *Jenkins*. Therefore, double jeopardy bars any appeal from a mid-trial acquittal as in *Fong Foo* or an acquittal after a mistrial as in *Martin*.

However, the state is allowed to benefit from an error of law by the trial judge because the government is allowed to re-try a defendant whose conviction was reversed on appeal. This result is contrary to the main objective of the double jeopardy clause, the prevention of multiple prosecu-

129. 28 U.S.C. § 2106 (1970).

130. *See, e.g.*, United States v. Grimes, 332 F.2d 1014 (6th Cir. 1964).

131. *But see* Sapir v. United States, 348 U.S. 373 (1955). The test for acquittal by an appellate court is identical to the test applied by a trial court in determining a rule 29 acquittal. The applicable standard is whether, viewing the evidence most favorable to the government, reasonable minds could find the accused guilty beyond a reasonable doubt. United States v. Arias-Diaz, 497 F.2d 165 (5th Cir. 1974).

tions. The Court has offered rationales to explain this result. The fairness rationale justifies retrial where the reversal is for a procedural error. It is logically sound and examines the competing interests of society and the accused. However, no logically sound justification exists for permitting retrial where the reversal is for insufficient evidence. Instead, logic demands that the government should not be able to re-try a defendant who, as a matter of law, was entitled to an acquittal the first time. Yet courts since 1950 have permitted retrial in this situation by following the affirmative-waiver theory.

The affirmative-waiver theory is clearly too weak to constitute a justification for permitting a second prosecution which the government-appeal cases prohibit. The Court has already rejected a closely related theory, the presumptive-waiver theory, by noting that a defendant has no meaningful choice in deciding whether to serve his sentence or appeal and waive double jeopardy protection. Similarly, the affirmative-waiver theory does not involve a meaningful choice because it forces a defendant to limit his appeal to the sole issue of insufficiency. If he requests alternatively for a new trial on the basis of procedural error, he waives double jeopardy protection. The distinction between these two theories seems too slight to be given constitutional significance. Indeed, it is legal fiction for courts to continue to do so. Accordingly, courts forced by stare decisis to follow the affirmative-waiver theory have been critical of the theory and have indicated their reluctance to follow it, as seen in *Sumpter* and *Robinson*.

It is now time for the United States Supreme Court to take another "closer look" at double jeopardy protection, this time for defendants whose convictions are reversed for insufficiency of the evidence. Such a decision will help to clarify the actions of lower courts and, hopefully, will terminate the inequities caused by the affirmative-waiver theory.

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