Comment

Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal

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I. INTRODUCTION

The traditional relief demanded and received upon appellate court reversal of a criminal conviction has been remand for a new trial. Although it is generally considered to be within an appellate court's power to order an appellant discharged by entering a judgment of acquittal, this power is exercised sparingly and only in cases in which remand for a new trial is barred by some constitutional or statutory rule of law.[1] In recent years

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[1]Among others, retrial could be barred by reason of a statute of limitations or because of a denial of the accused's right to a speedy trial or the privilege against double jeopardy. Once there has been an adjudication that prosecution of the crime is barred by the statute of limitations, principles of res judicata preclude a second litigation of the issue. United States v. Oppenheimer, 242 U.S. 85 (1916). Similarly, dismissal for denial of the right to speedy trial is a bar to further prosecution. *See* State v. Taylor, 235 Ind. 632, 137 N.E.2d 537 (1956); State v. Soucie, 234 Ind. 98, 123 N.E.2d 888 (1955). But when there is a pretrial dismissal of the prosecution before jeopardy has attached, the State may take a direct appeal from the ruling and, if successful, the defendant is subject to retrial. It is only when the dismissal stands on appeal that res judicata precludes a second prosecution. Accordingly, IND. CODE § 35-1-47-4 (IND. ANN. STAT. § 9-2307, Burns 1956) provides:

> An appeal taken by the state shall in no case stay, or affect the operation of the judgment in favor of the defendant until the judgment is reversed: Provided, That if an appeal be taken by the state from an order or judgment by which the defendant is discharged prior to trial, the said order or judgment shall not be or constitute a bar to further prosecution of the defendant, if said order or judgment is reversed, and the trial court shall order a warrant to issue for his re-arrest, returnable forthwith.

It is quite a different matter, however, if the dismissal order is entered after jeopardy has attached, *i.e.*, after the jury is sworn or, in the case of a trial to the court, after the first witness is sworn. *See, e.g.*, Kelley v. State, 295

courts have begun to address the queston of whether appellate acquittal is appropriate when the evidence adduced against the defendant at trial is found to be insufficient to sustain a criminal conviction. On the theory that such a defendant was entitled to an acquittal in the trial court and, therefore, should be granted an acquittal at the appellate level, the appellate courts of a few states now order defendants discharged without remanding the cases for retrial. Furthermore, the appellate acquittal has the same effect as an acquittal in the trial court: retrial is barred by reason of the constitutional prohibition against double jeopardy. The precise issue addressed in this Comment is whether Indiana should join the growing number of states which have adopted the emerging doctrine of appellate acquittal.

Whether a finding of insufficient evidence on appeal constitutes a double jeopardy bar to retrial for the same offense has not been decided by the Indiana courts. That the issue has not been fully considered may, in part, be the result of the reluctance of appellate courts to review the fact-finding process which occurred at the trial. It is a basic principle of Indiana appellate procedure that a reviewing court will not reconsider issues of fact decided against the defendant at trial. The presumptions are in favor of the decision of the lower court; if there is any evidence in the trial court record to support the verdict and judgment, the conviction will be sustained regardless of the weight and credibility of the evidence. It is the function of the trier of fact to evaluate the demeanor and credibility of witnesses and ultimately determine the truth, a task for which appellate courts are particularly unsuited. Accordingly, it is the established rule in Indiana that the reviewing court will consider only the evidence most favorable to the State in determining the sufficiency of the

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N.E.2d 372 (Ind. Ct. App. 1973); Crim v. State, 294 N.E.2d 822 (Ind. Ct. App. 1973); Armentrout v. State, 214 Ind. 273, 15 N.E.2d 363 (1938); Joy v. State, 14 Ind. 139 (1860); Weinzorpflin v. State, 7 Blackf. 186 (Ind. 1844). *See also* United States v. Jorn, 400 U.S. 470 (1971). After jeopardy has attached, the judgment may constitute an acquittal, in which case the State may not appeal for the purpose of gaining a new trial. *See, e.g.*, State v. Newkirk, 80 Ind. 131 (1881); State v. Davis, 4 Blackf. 345 (Ind. 1837). *See also* United States v. Sisson, 399 U.S. 267 (1970) (government may not appeal from so-called order in arrest of judgment which in reality is a judgment of acquittal). Even when an appeal is authorized as a reserved question under IND. CODE § 35-1-43-2 (IND. ANN. STAT. § 9-2102, Burns, 1956), a judgment on appeal in favor of the State does not act to reverse the judgment of acquittal below and the defendant may not be tried a second time. *See, e.g.*, State v. Patsel, 240 Ind. 240, 163 N.E.2d 602 (1960); State v. Torphy, 217 Ind. 383, 28 N.E.2d 70 (1940); State v. Kubiak, 210 Ind. 479, 4 N.E.2d 193 (1936); State v. McCaffrey, 181 Ind. 200, 103 N.E. 801 (1914).

proof to support a judgment of conviction.[2] Thus, while a trial court, upon a request for a new trial, may sit as the "thirteenth juror" and weigh the evidence, courts of appellate jurisdiction regularly refuse frequently tendered invitations to do so.[3]

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[2]*See, e.g.*, Richardson v. State, 247 Ind. 610, 220 N.E.2d 345 (1966); Bush v. State, 246 Ind. 574, 207 N.E.2d 625 (1965); Schweigel v. State, 245 Ind. 6, 195 N.E.2d 848 (1964); Blood v. State, 214 Ind. 578, 16 N.E.2d 874 (1938).

It should be noted that the standard of review in Indiana is less favorable to the accused than it is in many other jurisdictions. For example, in Florida the courts on appeal will reverse judgments of conviction even if the evidence is legally sufficient but is so weak that retrial should be granted in the interest of justice. The rule frequently is invoked in cases of convictions for sex offenses when the State's evidence consists chiefly of the testimony of the prosecuting witness. *See* Sosa v. Maxwell, 234 So. 2d 690 (Fla. Ct. App. 1970); Smith v. State, 239 So. 2d 284 (Fla. Ct. App. 1970). In Indiana, however, the courts will reverse only when the evidence is insufficient as a matter of law, in which case reversal is required as a matter of due process of law. See note 5 *infra*. Except when otherwise indicated, the term "insufficient evidence" is used in this Comment in the latter sense, *i.e.*, that the evidence is insufficient as a matter of law to sustain the conviction.

Whether the Indiana standard of review does in fact meet the requirements of due process is a different question, since there are two basic due process issues which are not necessarily coextensive in scope. The standard does meet the requirements to the extent that convictions are reversed when there is no evidence on a material element of the offense charged. See notes 5 & 6 *infra*. It may be the case, however, that even when there is some evidence on all material elements, the evidence may be so weak that, as a matter of law, it cannot be said that guilt was established by proof beyond a reasonable doubt, a second requirement of due process of law. See note 4 *infra*. Although the concept of proof beyond a reasonable doubt traditionally has played a minor role in the evaluation of evidence at the appellate level, it is now an element of due process and should not be excluded from appellate consideration. Moreover, the concept that appellate courts are unsuited for evaluation of demeanor and credibility, because their review is limited to a cold paper record, may no longer be valid, at least in those trial courts where the proceedings are recorded by videotape process. In light of these considerations, as well as others, the Indiana courts may be compelled to modify the present restrictive standard of appellate review of the evidence.

[3]It may be noted that the trial court has greater power than the court of appeals. Trial Rule 59(A)(4) of the Indiana Rules of Trial Procedure specifies as a ground for relief in the motion to correct errors that the verdict or decision is "contrary to the evidence." Trial Rule 59(E)(7) provides that, in reviewing the evidence, the court shall grant a new trial if the decision is found to be against the weight of the evidence. In civil cases the rule has been construed to afford the trial court broad powers to sit as the "thirteenth juror." Davis v. Lee, 292 N.E.2d 263 (Ind. Ct. App. 1973). Trial Rule 59 is incorporated into criminal practice by Rule 16 of the Indiana Rules of Criminal Procedure. Although the double jeopardy provisions clearly would prohibit a new trial for the State following a verdict of acquittal by the jury, the trial court may weigh the evidence and award the defendant such relief.

Notwithstanding this restrictive standard of review, appellate courts do reverse judgments of conviction because of the insufficiency of the evidence. It is only when the evidence at trial is conflicting that the findings of fact are not reviewable on appeal, for it is only in this context that the reviewing court is asked to "weigh" the evidence. It is quite a different matter when there has been a total failure of proof as to one or more of the essential elements of the crime charged. Here the reviewing court is not asked to weigh the evidence but to decide a question of law, for, as a matter of law, the State must present some evidence on each and every material element of the crime charged. In the absence of such evidence the State could not have proved the accused guilty beyond a reasonable doubt, and different considerations come into play.[4] Whether the evidence is sufficient with respect to each of the material elements of the crime is a question of law and is reviewable on appeal. While the courts might prefer to avoid the issue, it is, nonetheless, one that must be faced and decided. In the absence of some evidence on each material element, the issue assumes constitutional proportions. The Supreme Court of the United States recently reaffirmed the principle that it is "beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process."[5] The Indiana courts are not reluctant to meet their constitutional obligations. Upon a showing of such insufficiency, judgments of conviction are reversed.[6]

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[4]In *In re* Winship, 397 U.S. 358 (1970), the Court held that the requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt is a requirement of due process. It should follow that when the record on appeal demonstrates a failure of proof as a matter of law, the convicted person has been denied due process.

[5]Vachon v. New Hampshire, 414 U.S. 478, 480 (1974), *quoting from* Harris v. United States, 404 U.S. 1232, 1233 (1971). *See generally* Thompson v. Louisville, 362 U.S. 199 (1960).

[6]*E.g.*, Melvin v. State, 249 Ind. 351, 232 N.E.2d 606 (1968) (entering to commit a felony); Goodloe v. State, 248 Ind. 411, 229 N.E.2d 626 (1967) (entering to commit a felony); Leitner v. State, 248 Ind. 381, 229 N.E.2d 459 (1967) (entering to commit a felony); Underhill v. State, 247 Ind. 388, 216 N.E.2d 344 (1966) (second degree burglary); Baker v. State, 236 Ind. 55, 138 N.E.2d 641 (1956) (robbery); Mattingly v. State, 230 Ind. 431, 104 N.E.2d 721 (1952) (theft); McAdams v. State, 226 Ind. 403, 81 N.E.2d 671 (1948) (burglary); Steinbarger v. State, 226 Ind. 598, 82 N.E.2d 519 (1948) (possessing burglary tools); Wood v. State, 207 Ind. 235, 192 N.E. 257 (1934) (violation of liquor law). In a few cases the conviction was reversed when the failure of proof related to just one element of the offense, such as the mens rea. *See, e.g.*, Lawson v. State, 257 Ind. 539, 276 N.E.2d 514 (1971) (no evidence of intent in a prosecution for theft on a theory of larceny by finders). More common are those cases in which the failure of proof goes to the entire complex of elements, including both the objective

Reversal of the judgment itself is but a prelude to the problem. The remaining question, one that has not been resolved adequately in Indiana, is the proper disposition of the accused following the reversal for insufficient evidence. Should the appellate court reverse and remand the case for a new trial, or should it enter a judgment of acquittal and order the defendant discharged from further prosecution? Does the appellate reversal for insufficient evidence constitute a judgment of acquittal that can be pleaded in bar of a subsequent prosecution for the same offense? Whether retrial is barred by the constitutional protections against double jeopardy depends upon the answers to these questions.[7]

The arguments favoring application of the double jeopardy clause to appellate reversals for insufficient evidence are compelling. At the first trial the State exercised its opportunity to convict the accused and, as a matter of law, the evidence failed to establish guilt. Should the State be given the opportunity to buttress its case at a second trial or, for harassment only, seek a second guilty verdict on the same insufficient evidence?[8] By

conduct and subjective intent. *See* Buchanan v. State, 279 N.E.2d 576 (Ind. 1972); Scott v. State, 257 Ind. 643, 277 N.E.2d 790 (1972); Isaac v. State, 257 Ind. 319, 274 N.E.2d 231 (1971); Bond v. State, 257 Ind. 95, 272 N.E.2d 460 (1971); Lloyd v. State, 256 Ind. 414, 269 N.E.2d 389 (1971); Lipscomb v. State, 254 Ind. 642, 261 N.E.2d 860 (1970); Seats v. State, 254 Ind. 457, 260 N.E.2d 796 (1970); Sharp v. State, 254 Ind. 435, 260 N.E.2d 593 (1970); Amaro v. State, 251 Ind. 88, 239 N.E.2d 394 (1968); Pace v. State, 248 Ind. 146, 224 N.E.2d 312 (1967); Robertson v. State, 231 Ind. 368, 108 N.E.2d 711 (1952); Wheat v. State, 195 Ind. 660, 146 N.E. 581 (1925); Cavender v. State, 126 Ind. 47, 25 N.E. 875 (1890).

[7]The plural is used to emphasize the fact that the accused may look to both the Constitution of the United States and the Constitution of Indiana. The double jeopardy provision of the fifth amendment to the United States Constitution applies to state prosecution. Benton v. Maryland, 395 U.S. 784 (1969). Double jeopardy is also proscribed by Article 1, section 14 of the Indiana Constitution.

[8]Avoiding the harassment and expense of multiple prosecutions is as much a part of the unindulging policy against double jeopardy as is the threat of multiple convictions. Mr. Justice Black described the policy of the double jeopardy clause:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, 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.

Green v. United States, 355 U.S. 184, 187-88 (1957). Of course, the State is not limited, in the event of a new trial, to the same evidence adduced at the former proceeding. New evidence my be presented and new offenses arising out of the same transaction may be charged. *See* United States v. Ewell, 383 U.S. 116 (1966).

reason of the insufficiency the judgment of conviction was reversed. Clearly, the defendant should have been acquitted in the trial court, and that acquittal would have barred a second trial for the same offense. Logic would dictate a similar result when the acquittal comes at the appellate level, for it is a miscarriage of justice that the defendant was not acquitted at trial. The traditional view, however, permits a second trial for the same offense following reversal on appeal for insufficient evidence. Such cases have been remanded for retrial in a majority of jurisdictions, including Indiana. But the tides of change are moving. A growing number of states are accepting the argument that retrial is barred by the double jeopardy clause.

II. Historical Development

A review of early English common law affords little enlightenment on the historical development of the doctrine of appellate acquittal in the United States. Although by the time of Blackstone it was a "universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offense,"[9] it was also true that the right to appeal from a conviction in a criminal case was severely limited. According to Blackstone, writs of error generally were available in misdemeanor cases, but only rarely in felony cases punishable by death. More frequently an appeal of a felony conviction was granted to the personal representative of the defendant after his execution, in which case the issue of retrial was moot.[10] Moreover, the writ of error was a rigid common law form pursuant to which only limited issues could be raised in support of reversal.[11]

In the rare case in which the judgment of conviction was reversed, it is not clear that the English courts of appeal were empowered to order a retrial. Some authorities take the position the retrial was not permitted. In *Green v. United States*,[12] Mr. Justice Black declared that, under present English law, appellate courts could order a new trial after an appeal only when the first trial was a complete "nullity" for reasons such as lack of personal

[9]4 W. Blackstone, Commentaries * 335. It was from this maxim that the special pleas in bar were developed, including the pleas of *autrefoits acquit* and *autrefoits convict*, which became a part of the common law of Indiana. The special pleas of former attainder and pardon allowed at common law in England were never recognized in this state. Clem v. State, 42 Ind. 420, 431-32 (1873).

[10]4 W. Blackstone, Commentaries * 391.

[11]1 J. Stephen, History of the Criminal Law of England ch. 10 (1883).

[12]355 U.S. 184 (1957).

or subject-matter jurisdiction.[13] This analysis is supported by language of the House of Lords in 1964 to the effect that retrial is not allowed "in respect of the same offense after the verdict of guilty has been quashed *on any ground* by the Court of Criminal Appeal."[14]

Whatever the present state of the English law, it is by no means clear that the courts of appeal in earlier times were without power to remand for retrial. According to Blackstone, the general rule was that if a judgment of conviction were reversed on a writ of error, the accused was subject to being tried again on the theory that "he still remains liable to another prosecution for the same offense; for the first being erroneous he never was in jeopardy thereby."[15] Moreover, the rule was applied to cases in which the reversal was on the ground of insufficient evidence as well as when the judgment was reversed for other reasons. Blackstone reported that:

> [I]n many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside *and a new trial granted* by the court of kings bench . . . .[16]

Whatever the English common law rule may have been, it seems not to have survived the journey across the Atlantic; the courts on this continent regularly reversed criminal convictions and remanded cases for new trial without resort to English common law authority. In the earlier decisions remand orders were issued without consideration of the potential constitutional double jeopardy question.[17]

The relationship of the double jeopardy clause and retrial after appellate reversal began to develop in 1896 with the decision

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[13]*Id.* at 189 n.7. He further noted, however, that English appellate courts did have the power to substitute a finding of guilt of a lesser offense if warranted by the evidence. *Id.*

The Illinois Court of Appeals in People v. Brown, 99 Ill. App. 2d 281, 299 n.6, 241 N.E.2d 653, 662 n.6 (1968), similarly concluded that English appellate courts could order a new trial only when the first was a complete nullity. It is apparent, however, that the Court was relying primarily on Mr. Justice Black's historical analysis in *Green*.

[14]Connelly v. Director of Public Prosecutions, 2 All E.R. 401, 406 (1964) (emphasis added). In *Connelly*, the House of Lords seemed to accept as a firmly established principle that double jeopardy prohibits retrial in the event of reversal. The precise issue of the case, however, was whether the defendant could be charged in a second prosecution with a different offense arising out of the same criminal transaction as his original conviction and reversal.

[15]4 W. BLACKSTONE, COMMENTARIES * 393.

[16]*Id.* at 361 (emphasis added).

[17]*E.g.*, Hopt v. Utah, 104 U.S. 631 (1882).

in *Ball v. United States.*[18] With little more than a paraphrase of Blackstone,[19] the Court concluded that the defendant could be retried

> because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment or upon another indictment, for the same offence of which he had been convicted.[20]

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[18]163 U.S. 662 (1896).

[19]*See* note 15 *supra* & accompanying text.

[20]163 U.S. at 672. The underlying theory of *Ball* is that the defendant waived his double jeopardy defense to a second trial by taking affirmative action to have the judgment of conviction set aside. All of the states, including Indiana, have adopted this waiver concept. *See generally* Morgan v. State, 13 Ind. 215 (1859). Thus, the act of taking a direct appeal and obtaining a reversal of the judgment is a waiver of the defense. *E.g.*, United States v. Tateo, 377 U.S. 463 (1964); Louisana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Layton v. State, 251 Ind. 205, 240 N.E.2d 489 (1968); State v. Balsley, 159 Ind. 395, 65 N.E. 185 (1902); Joy v. State, 14 Ind. 139 (1860). *See also* Malone v. State, 179 Ind. 184, 100 N.E. 567 (1913) (appeal from justice of the peace court). Similarly, if the trial court sustains the defendant's motion to correct errors and orders a new trial, the defense is waived. *See* Eskridge v. State, 281 N.E.2d 490 (Ind. 1972). The defense is waived when the defendant successfully attacks the judgment in a collateral post-conviction proceeding in state court. *See* McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947); State *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931). Also, retrial is permitted on a waiver theory when the conviction is set aside in a federal habeas corpus action. Todd v. State, 229 Ind. 664, 101 N.E.2d 45 (1951). Jeopardy has attached when the court accepts a guilty plea from the accused and a second prosecution is barred. Ledgerwood v. State, 134 Ind. 81, 33 N.E. 631 (1893); Boswell v. State, 111 Ind. 47, 11 N.E. 788 (1887). But if the defendant successfully moves to withdraw the plea, the defense is waived. Ledgerwood v. State, *supra. See also* Joy v. State, 14 Ind. 139 (1860) (defense waived when the defendant's motion in arrest of judgment is sustained).

But the waiver doctrine is not without its limitations. Retrial is limited to those counts upon which the defendant was convicted in the prior proceeding. Thus, when the original charge is in two or more counts and the verdict is on one count only, the silence of the verdict on the other counts is an implicit acquittal precluding a second prosecution. *See* Smith v. State, 229 Ind. 546, 99 N.E.2d 417 (1951); Lucas v. State, 173 Ind. 302, 90 N.E. 305 (1910). In Selvester v. United States, 170 U.S. 262 (1898), the Court recognized the general rule that a silent verdict is an implicit acquittal but held that when the jury returned a verdict on some counts and could not agree as to others, the trial court may accept the partial verdict and the defendant would remain subject to a second prosecution on the counts with respect to which the jury could not agree. Of course, an express acquittal on some counts in the prior proceeding remains a bar to a subsequent prosecution even though a successful appeal is taken with respect to other counts. Benton v. Maryland, 395 U.S. 784 (1969). A second limitation is applied when at the first trial the defendant was convicted of a lesser included offense of

But *Ball* was not a case of insufficient evidence. The basis for appellate reversal was a defect in the sufficiency of the indictment, an error in the nature of a procedural defect.[21] Presumably, the proof at trial was more than sufficient to support the guilty verdict; the appellant did not contend that he should have been acquitted at trial on the merits of the evidence. To the extent that the accused was not entitled to acquittal in the trial court, the *Ball* rationale is defensible. The procedural error merely acted to deny the defendant a fair trial. Accordingly, retrial was an appropriate remedy to correct the error. It is a different matter, however, when the cause for reversal is insufficient evidence since such a reversal is tantamount to a determination that the defendant should have been acquitted at trial.

Nonetheless, in *Bryan v. United States*,[22] the *Ball* rationale was extended to a case in which the judgment was reversed for insufficient evidence. At the close of the Government's case in *Bryan* and at the conclusion of all the evidence, the defendant moved for a judgment of acquittal. These motions were denied, and the defendant was convicted of income tax evasion. The judgment was reversed by the Fifth Circuit Court of Appeals because the evidence was insufficient to support the verdict. The case was then remanded to the district court with instructions to order a new trial. Upon appeal to the Supreme Court the defendant contended that the case should have been remanded with instructions to enter a judgment of acquittal. The Court, however, disagreed. While a major portion of the Court's opinion was concerned with the power granted federal appellate courts by statute and court rules which allowed them to remand for a new trial, short shrift was made of the petitioning defendant's double jeopardy argument:

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the crime charged. If the conviction is set aside on appeal, the defendant may not again be charged with the offense alleged in the first indictment or information. He may only be charged with the lesser offense. Price v. Georgia, 398 U.S. 323 (1970); Causey v. State, 256 Ind. 19, 266 N.E.2d 795 (1971).

[21] *See also* United States v. Tateo, 377 U.S. 463, 465 (1964). In *Tateo* the Court concluded that double jeopardy protection does not preclude retrial when the conviction is set aside because of an error in the proceedings leading to conviction. The qualitative difference between an error in the proceedings and a failure of proof is apparent.

[22] 338 U.S. 552 (1950). The issue could not have been stated more succinctly:

> The important question presented upon this record is whether the Court of Appeals, when it reverses the District Court because the evidence is not sufficient to sustain a conviction, may direct a new trial where a defendant had made all proper and timely motions for acquittal in the District Court.

Id. at 553.

> Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal. ". . . [W]here the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial."[23]

In further support of its conclusion that the new trial order was a "just and appropriate judgment," the Court noted that a majority of the Fifth Circuit judges were of the opinion that the defect in the evidence could be corrected on retrial. Moreover, one of the judges had dissented "vigorously" upon the ground that the evidence amply supported the defendant's conviction.

The Court in *Bryan* failed to note that the earlier cases upon which it relied involved reversals for procedural irregularities, and the evidence in those cases was sufficient to sustain the judgments.[24] Without considering this distinction, the Court summarily

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[23] *Id.* at 560, *quoting from* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947). It is interesting that the *Ball* decision was not cited by the Court; rather, the opinion cited only the *Ball* progeny, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), and Trono v. United States, 199 U.S. 521 (1905). It should also be noted that Mr. Justice Douglas took no part in the consideration or decision of the case.

[24] 338 U.S. at 560. It could well be argued that retrial should be barred even when the reversal is grounded upon a procedural irregularity. The question of the guilt or innocence of the accused has never been a relevant consideration in the application of the double jeopardy defense, so why should the defense only be available in reversals for insufficient evidence when the defendant argues that he should have been acquitted at trial? The underlying policy of the double jeopardy clause is to preclude multiple prosecutions for the same offense without regard to the question of guilt. If it is indeed true that in a criminal prosecution the Government assumes the risks of all the errors of the prosecuting attorney and the trial judge, the ground for reversal would be immaterial. *See* United States v. Sisson, 399 U.S. 267, 289 (1970). Certainly, the Government does assume the risk of all errors favorable to the accused. Thus, if an erroneous judgment of acquittal is entered in favor of the defendant, the prosecution may not appeal. Fong Foo v. United States, 369 U.S. 141 (1962). Why should not the Government also assume the risk of errors that are prejudicial to the accused? If such a rule were adopted, retrial would be precluded in any case in which there is a reversal on appeal. Even those who would not adopt an absolutist approach might be comfortable with a rule that would bar a second trial when the trial judge or prosecutor committed a flagrant error prejudicial to the defendant upon an issue clearly defined by law. In such a case, the accused is put to the expense and ordeal of a second trial solely because of the conduct of the court or prosecutor in clear and obvious disregard of the law. Both the judge and the prosecutor may be viewed as functionaries of the State for whom the system, rather than the accused, should assume responsibility.

applied the rule of *Ball* that a defendant who secures an appellate reversal of his conviction may not claim double jeopardy as a defense to retrial—regardless of the reason for reversal. This decision, however, was not surprising. Although the Court in *Bryan* did not rely upon state court authority to support its decision, all of the state courts which had considered the question by 1950 had found no constitutional infirmity in ordering retrial after appellate determination of evidentiary insufficiency.[25] It was predicted as late as 1964 that most states would continue to follow the *Bryan* rationale.[26]

III. The Erosion of Bryan

In 1955 the *Bryan* rationale came under frontal attack and arguably was overruled. In *Sapir v. United States*[27] the Tenth Circuit Court of Appeals reversed a conviction entered by the trial court and ordered the prosecution dismissed on the ground that the evidence was insufficient to support a conviction. The Government subsequently petitioned the court of appeals to amend its judgment and grant a new trial because of newly discovered evidence. The court granted the petition and ordered a new trial. The defendant argued before the Supreme Court that permitting the Government to obtain a new trial after the appellate order of discharge was a violation of his constitutional protection against double jeopardy. The Solicitor General relied upon *Bryan* and argued that the defendant had waived his double jeopardy protection by seeking reversal of his conviction. Accordingly, he urged that the proper standard governing the grant of new trials was whether a new trial would be "just and appropriate" under the circumstances.

In a brief per curiam opinion the Supreme Court vacated the new trial order and ordered the prosecution dismissed. The majority opinion was nothing more than an order and contained no citation of authorities or discussion of the law. Accordingly, it is impossible to determine the legal rationale for the Court's decision. It is an open question as to whether the Court overruled *Bryan* and

[25]The states that had decided the issue prior to 1950 all permitted retrial. A survey in 1964 found all but one of the eleven states with reported decisions in accord with *Bryan*. *See* Comment, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. Chi. L. Rev. 365, 372 n.31 (1964). The sole exception noted was New Mexico which prohibited retrial. State v. Moreno, 69 N.M. 113, 364 P.2d 594 (1961). In those states in which the question had not been expressly decided, it was assumed that the courts were regularly ordering new trials after reversals for insufficient evidence.

[26]*See* Comment, *supra* note 25, at 372 n.31.

[27]348 U.S. 373 (1955).

determined that retrial after appellate reversal for insufficient evidence was violative of the constitutional prohibition of double jeopardy, or whether retrial under the circumstances and facts of *Sapir* was found by the Court not to be "just and appropriate." In a separate concurring opinion, Mr. Justice Douglas, who had not participated in the *Bryan* decision, flatly stated that:

> The granting of a new trial after a judgment of acquittal for lack of evidence violates the command of the Fifth Amendment that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[28]

Under this view, no distinction can be drawn between a defendant who is acquitted by a trial court for lack of evidence and a defendant whose conviction is reversed by an appellate court for lack of evidence. Neither defendant can be compelled to "run the gauntlet" a second time.[29]

In 1957 the Supreme Court was given an opportunity to clarify the meaning of *Sapir*. In *Yates v. United States*,[30] a Smith Act prosecution, the Court reversed the trial court's decision and ordered that five of the fourteen defendants be discharged because the evidence was "clearly insufficient." The cases of the other nine defendants, however, were remanded for a new trial. In so holding, the Court reaffirmed the *Bryan* doctrine:

> [W]e would no doubt be justified in refusing to order acquittal 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.[31]

More confusion resulted from the Court's opinion in *Forman v. United States*,[32] in which the defendant was tried for income tax evasion and convicted on the basis of an improper jury instruction. Upon appeal to the Ninth Circuit Court of Appeals, the defendant's conviction was reversed with instructions to enter a

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[28] *Id.* at 374.

[29] Two facts should be noted about *Sapir*. All appropriate motions for judgment of acquittal were made. Accordingly, the defendant could not be held to have waived his right to such a judgment by nonaction at the trial court level. Additionally, he did not request a new trial in his prayer for relief on appeal. This seemed to be a significant factor to Mr. Justice Douglas who noted that "if petitioner had asked for a new trial, different considerations would come into play." *Id.*

[30] 354 U.S. 298 (1957).

[31] *Id.* at 328. The majority opinion cited *Bryan* but did not cite *Sapir*. Mr. Justice Black, joined by Mr. Justice Douglas, dissented in part on grounds of double jeopardy. The dissent did not cite *Sapir*. It might also be noted here that in a very real sense the petitioners did not ask for a new trial as alternative relief. It was their lawyer who made the request. See note 67 *infra* & accompanying text.

[32] 361 U.S. 416 (1960).

judgment of acquittal. The apparent basis for this decision was the mistaken notion that the facts shown at the trial were insufficient to support a conviction under any criminal statute. Upon rehearing the court of appeals modified its order of reversal and directed a new trial on the ground that the evidence would have been sufficient had the case been tried upon a different theory. Accordingly, the impropriety of the jury instructions rather than insufficiency of the evidence was the ground for reversal. The Supreme Court affirmed the court of appeals' order granting a new trial and attempted to reconcile the inconsistencies of *Bryan* and *Sapir*. Citing *Ball* and *Bryan* for the general proposition that a person can be tried a second time for an offense when his conviction is set aside on appeal, the Court implicitly recognized the validity of *Sapir* but factually distinguished it from *Forman*. The Court noted that *Forman* involved the propriety of jury instructions and the insufficiency of the evidence was not considered. Moreover, in *Forman* the defendant specifically requested new trial relief.[33]

As a consequence of the Court's decisions in *Yates* and *Forman*, the impact of *Sapir* in the federal courts remains obscured. For the most part, the lower federal courts have continued to apply *Bryan* and have remanded cases for new trial after appellate reversal for insufficient evidence.[34] A growing number of state courts, however, are accepting the rationale of the concurring opinion in *Sapir* as an unequivocal bar to retrial. Beginning with the New Mexico Supreme Court in 1961,[35] the doctrine of appellate acquittal has been adopted in other states[36] and

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[33]

> While petitioner contends that here the action of the Court of Appeals on rehearing was based on new evidence, as in *Sapir*, this is incorrect. Here there was no lack of evidence in the record. As the Court of Appeals pointed out, "The jury was simply not properly instructed." 264 F2d at 956. On the other hand, the order to dismiss in *Sapir* was based on the insufficiency of the evidence, which could be cured only by the introduction of new evidence, which the Government assured the court was available. Moreover, Sapir made no motion for a new trial in the District Court, while here petitioner filed such a motion. That was a decisive factor in Sapir's case.

Id. at 425-26.

[34]*E.g.*, United States v. Koonce, 485 F.2d 374 (8th Cir. 1973).

[35]State v. Moreno, 69 N.M. 113, 364 P.2d 594 (1961). The court states the rationale as follows: "The effect of a reversal for lack of sufficient evidence to support a conviction is not different from an acquittal by the jury and requires that the defendant be discharged." *Id.* at 115, 364 P.2d at 596.

[36]State v. Torres, 109 Ariz. 421, 510 P.2d 737 (1973) (retrial for the same offense barred although the accused may be charged with a different offense arising out of the same transaction); Hervey v. People, 495 P.2d

a new judicial trend has been established.[37] Of course, all of the cases from *Ball* through *Forman* arose from federal criminal prosecutions and were decided before the double jeopardy clause of the fifth amendment was made applicable to the states through the fourteenth,[38] and the extent to which they might be binding upon state courts has not been determined.[39] Nonetheless, the state courts that have precluded retrial following appellate reversal for insufficient evidence have relied upon *Sapir* as persuasive authority if not as a constitutional mandate. Moreover, if the Court were faced with the issue again, it is doubtful, at least in a federal case, whether it would continue to follow the *Bryan* rationale. The logic of the state court decisions and the emerging doctrine of appellate acquittal which has developed after the decision in *Forman* is irrefutable. And the Court has not been reluctant in recent years to expand the application of the double jeopardy protection.[40]

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204 (Colo. 1972); People v. Brown, 99 Ill. App. 2d 281, 241 N.E.2d 653 (1968). In Florida, the court will reverse and permit retrial in cases in which the evidence is legally sufficient but very weak. If, however, the evidence is legally insufficient retrial is barred. Sosa v. Maxwell, 234 So. 2d 690 (Fla. Ct. App. 1970); Smith v. State, 239 So. 2d 284 (Fla. Ct. App. 1970). In those states which have not explicitly decided the issue, the courts regularly reverse and order the defendant discharged without discussion of the double jeopardy issue. *See* People v. Hubbard, 19 Mich. App. 407, 172 N.W.2d 831 (1969).

[37]The trend is recognized even by those courts refusing to adopt it. In Gray v. State, 254 Md. 385, 388, 255 A.2d 5, 9 (1969), *cert. denied*, 397 U.S. 944 (1970), the court, although refusing to indorse the new principle, observed:

> We perceive, however, some judicial tendency or trend towards recognition of the logic of appellate direction for the entry of a judgment of acquittal if the state fails to prove its case in the trial court.

[38]The double jeopardy clause was made applicable to the states in Benton v. Maryland, 395 U.S. 784 (1969).

[39]The mere fact that the fourteenth amendment prohibits double jeopardy does not necessarily mean that the requirements of fourteenth amendment due process are coextensive in scope with fifth amendment double jeopardy. In Johnson v. Louisiana, 406 U.S. 356, 366 (1972), Mr. Justice Powell in his concurring opinion argued that the sixth amendment jury trial right was not fully applicable to the states through the fourteenth amendment in all of its essential attributes even though the basic rudiments of a jury trial could not be denied. It is possible that a similar result could be reached with respect to the fifth amendment double jeopardy clause.

[40]*See, e.g.*, United States v. Jorn, 400 U.S. 470 (1971); Moon v. Maryland, 398 U.S. 319 (1970); Ashe v. Swenson, 397 U.S. 436 (1970); Waller v. Florida, 397 U.S. 387 (1970); Benton v. Maryland, 395 U.S. 784 (1969); North Carolina v. Pearce, 395 U.S. 711 (1969). It might also be noted that Mr. Chief Justice Burger authored the majority opinions in both Price v. Georgia, 398 U.S. 323 (1970), and Waller v. Florida, *supra*.

IV. Problems of Waiver

The essence of the *Bryan* rationale is waiver. Because the defendant has chosen to seek and obtain a reversal of his conviction, the right to object to retrial is waived. In addition, at least two other waiver problems exist in the context of reversals for insufficient evidence. The first is suggested by those Indiana decisions which indicate that the right to appellate acquittal may be waived by failure to request a directed verdict at the trial. In addition, the concurring opinion in *Sapir* suggests that appellate acquittal may be waived if the appellant seeks a new trial as alternative relief on appeal. Although some courts have relied on these concepts of waiver to justify retrial, none is properly applicable to the appellate acquittal situation. Like the *Bryan* rationale, these waiver problems should disappear with the passage of time and the refinement of judicial logic.

The Indiana Supreme Court has not decided that the double jeopardy clause bars retrial after an appellate court determination of insufficient evidence,[41] although in a concurring opinion Justice DeBruler has argued that "successive trials of this nature may well violate the rights of this defendant granted to him by the double jeopardy clause of the Fifth Amendment to the United States Constitution."[42] But a majority of the court is not in accord, and the practice of remanding cases for retrial continues.

Nonetheless, a review of the Indiana cases reveals a puzzling inconsistency. In some cases in which appellate courts have found the evidence insufficient, the defendant's case has been remanded for a new trial. In others the appellants were ordered discharged from further prosecution. A close reading of these cases suggests that an appellate order of discharge may be contingent upon whether a proper motion for a directed verdict of acquittal was made in the trial court. In many decisions in which it is disclosed that such a motion was made at trial, the defendants were ordered discharged.[43] In other decisions reversed for insufficient

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Several years after *Sapir* the Court held in Fong Foo v. United States, 369 U.S. 141 (1962), that a judgment of acquittal erroneously entered by the trial court bars retrial even though the court on appeal finds the evidence more than sufficient to support a conviction.

[41]The only statement that could be viewed as an enunciation of a standard to determine retrial is contained in Banks v. State, 257 Ind. 530, 539, 276 N.E.2d 155, 160 (1971), in which the court stated that "there being nothing in the record to indicate that the evidential deficiency might be supplied upon a retrial, we direct that the defendant be discharged."

[42]Lloyd v. State, 256 Ind. 414, 417, 269 N.E.2d 389, 390 (1971).

[43]In Pace v. State, 248 Ind. 146, 224 N.E.2d 312 (1967), the judgment was reversed without remand upon the determination that the defendant's motion for a directed verdict should have been sustained. Similarly, in Wood

evidence, in which it does not appear that the defendant requested a directed verdict, the cases were remanded for retrial.[44] Despite the existence of decisions in which discharge was ordered even though on the face of the opinion a motion for a directed verdict of acquittal was not made,[45] it is reasonable to assume that the Indiana Supreme Court considers a timely motion for directed verdict a precondition to discharge.[46]

If a timely motion for a directed verdict is a condition to discharge by an appellate court, it is hardly fair to defendants in the criminal courts that this condition has not been articulated by the Indiana Supreme Court. Clearly, the enunciation of such rules is a basic function of the appellate process.[47] Moreover, the soundness of this principle is subject to serious question. The only basis for differential treatment of appellants who have failed to request a peremptory instruction for directed verdict is that such failure constitutes a waiver of their right to an acquittal at the trial court level.[48] It is difficult to justify this rationale because its effect would be to impose a waiver of appellate relief at a point in the proceeding at which the right to relief in the trial court remains open. By failing to request a directed verdict, the accused has not waived his right to relief in the trial court. Indiana Rule of Trial Procedure 59(A) clearly specifies that insufficent evidence is a ground for a motion to correct errors pur-

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v. State, 207 Ind. 235, 192 N.E. 257 (1934), there was no remand order when the trial court granted the codefendant's request for a directed verdict but erroneously denied the appellant's motion.

[44]*E.g.*, Buchanan v. State, 279 N.E.2d 576 (Ind. 1972); Lloyd v. State, 256 Ind. 414, 269 N.E.2d 389 (1971). It is assumed that no motion for directed verdict was made in these cases.

[45]*See* Hochman v. State, 300 N.E.2d 373 (Ind. Ct. App. 1973); Lawson v. State, 257 Ind. 539, 276 N.E.2d 514 (1971). However, a review of the transcript of these cases might well reveal the fact that a directed verdict request was made, or discharge may have been the result of a finding that the evidential deficiency could not be cured on retrial. *See* note 41 *supra*.

[46]An appropriate motion for judgment of acquittal, the federal equivalent of a directed verdict, was made in *Sapir*. See note 29 *supra*. This may have been a factor in the disposition of that case.

[47]IND. CODE § 35-1-47-12 (IND. ANN. STAT. § 9-2323, Burns 1956).

[48]The present rules of procedure impose significant waiver limitations on appeal. Issues not included in the motion to correct errors are waived pursuant to Trial Rule 59(G). *See, e.g.*, McAfee v. State *ex rel.* Stodola, 284 N.E.2d 778 (Ind. 1972); Smitley v. Egley, 294 N.E.2d 640 (Ind. Ct. App. 1973). Moreover, the issue is waived on appeal if not stated with specificity in the motion. *E.g.*, Goshen City Court v. State *ex rel.* Carlin, 287 N.E.2d 591 (Ind. Ct. App. 1972); Matthew v. State, 289 N.E.2d 336 (Ind. Ct. App. 1972). Trial Rule 59 is applicable to criminal cases through Criminal Rule 16. *See* Cansler v. State, 281 N.E.2d 881 (Ind. 1972).

suant to which the trial court may enter a judgment of acquittal.[49] Failure to request a directed verdict also does not constitute a waiver of the sufficiency issue for purposes of including it in the motion. Moreover, Trial Rule 59(G) contemplates appellate review of every issue included in the motion to correct errors. Application of the waiver doctrine would result in an anomaly: a trial court could enter judgment of acquittal pursuant to a motion to correct errors, but an appellate court could not do so.

The waiver doctrine is also in direct conflict with Indiana statutory law which requires that a defendant be discharged when the judgment is reversed for insufficient evidence:

> When a judgment against the defendant is reversed, and it appears that no offense whatever has been committed, the court rendering such decision on appeal must direct that the defendant be discharged . . . .[50]

It is clear that appellate courts are empowered to grant any appropriate relief, including the entry of a final judgment of acquittal.[51]

There is no substantial difference between a defendant who requests a directed verdict and one who raises the issue for the first time in the motion to correct errors. Both are calling the attention of the trial court to the legal insufficiency of the evidence and are requesting appropriate relief. In either case the trial court is empowered to acquit the accused. A review of the policies underlying the double jeopardy provisions reveals no basis upon which such differential treatment could be grounded. Fundamentally, the State is given one opportunity, and one only, to convict a citizen of a crime.[52] The purpose of the double jeopardy clause is to protect the individual from the hazards of repeated trials and possible conviction for the same offense:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, 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.[53]

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[49]Trial Rule 59(E)(2) authorizes the trial court to enter a final judgment of acquittal.

[50]IND. CODE § 35-1-47-13 (IND. ANN. STAT. § 9-2324, Burns 1956).

[51]IND. R. APP. P. 15(M).

[52]The prosecution may not treat a first trial as a "dry run" to test the sufficiency of its case. *See* Ashe v. Swenson, 397 U.S. 436, 447 (1970).

[53]Green v. United States, 355 U.S. 184, 187-88 (1957).

This principle finds expression in a variety of circumstances. For example, when a defendant is acquitted by the trial court because of insufficient evidence, which finding is later found on appeal to have been erroneous, it is axiomatic that the State cannot obtain a new trial.[54] Accordingly, a defendant who was improperly acquitted in the trial court is free from further prosecution. Yet a defendant who was entitled to acquittal in the trial court but was compelled to appeal from an improper conviction may be subjected to retrial. No justification for such disparate treatment exists.[55] This injustice is especially pervasive when an appellant, who was wrongfully convicted, remains in-

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> Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.

Id. at 188.

The acquittal may result from the verdict of the jury or a directed verdict of acquittal. Where the evidence is insufficient as a matter of law to support a conviction, a directed verdict is proper. *E.g.*, Hardin v. State, 246 Ind. 23, 201 N.E.2d 333 (1964); State v. Overholser, 69 Ind. 144 (1879); State v. Banks, 48 Ind. 197 (1874); State v. Trove, 1 Ind. App. 553, 27 N.E. 878 (1891). Although the State may appeal from a directed verdict of acquittal as a reserved question of law, the judgment of acquittal is not reversed even though the appeal is sustained. *See* State v. Patsel, 240 Ind. 240, 163 N.E.2d 602 (1960); State v. Torphy, 217 Ind. 383, 28 N.E.2d 70 (1940); State v. Kubiak, 210 Ind. 479, 4 N.E.2d 193 (1936); State v. McCaffrey, 181 Ind. 200, 103 N.E. 801 (1914); State v. Overmyer, 294 N.E.2d 172 (Ind. Ct. App. 1973).

In Fong Foo v. United States, 369 U.S. 141 (1962), the district court erroneously entered a final judgment of acquittal and the court of appeals reversed and remanded for a new trial. The Supreme Court vacated the remand order, holding that the judgment of acquittal, once entered, can never be set aside regardless of error, because to do so would put the defendant twice in jeopardy in violation of the Constitution.

Apparently, in Indiana, the State has never contended that it could obtain a new trial in an appeal from an erroneously granted directed verdict. In the case of State v. Robbins, 221 Ind. 125, 46 N.E.2d 691 (1943), the State appealed on a reserved question of law from a directed verdict. In its brief filed in the appeal, the State acknowledged that the judgment could not be reversed. The brief assigned several errors to sustain the appeal though "not to secure reversal of the judgment." Brief for Appellant at 10.

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> We can see no essential difference—except one of unfairness—between a defendant who is acquitted at trial and one who has to appeal to obtain reversal on the ground of insufficient evidence. Surely, it would compound the unfairness to require that the latter also submit to a retrial.

People v. Brown, 99 Ill. App. 2d 281, 293 n.2, 241 N.E.2d 653, 659 n.2 (1968). Arguably, this differential treatment also raises substantial equal protection problems although the opinions of the courts do not characterize the issues as presenting anything but double jeopardy problems.

carcerated pending his appeal because of his inability to make bail. Even though the costs of his legal defense may be borne by the county, an impecunious defendant pays for his retrial through loss of liberty.[56]

Moreover, the effect of the present state of the law could be to afford broader constitutional protection to a defendant who is shown to be prima facie guilty. Even if palpably erroneous, a directed verdict of acquittal at the trial level could protect a guilty defendant from the hazards of retrial after a reversal of the conviction upon appeal.[57] On the other hand, a defendant who is not shown to be prima facie guilty, and who in fact may be innocent, could be subjected to a new trial. Thus, the present state of the law in the context of individual cases is calculated to shield the guilty and persecute the innocent.

Upon what basis is retrial afforded in any case? The rationale of *Ball* and *Bryan* urges that the defendant has waived the double jeopardy protection by his own act of initiating an appeal and succeeding in having the judgment set aside. Indiana decisions have indorsed this principle.[58] But a coerced waiver of this kind is no more than a fiction which has been rejected explicitly in the context of other cases.

In *Green v. United States*,[59] the Court dealt directly with the question of a coerced waiver of double jeopardy protection. In *Green* the defendant was charged with first degree murder but

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[56]The low income defendant may be detained in jail from the time of his original arrest through the process of appeal, and remain in custody through a second trial following appellate reversal. If he is unable to obtain release on bail, he may spend two or three years incarcerated even though the evidence was insufficient to convict.

[57]Fong Foo v. United States, 369 U.S. 141 (1962), bars retrial following a directed verdict of acquittal even though the evidence was more than sufficient to make out a jury question. The one exception to the general rule occurs when the defendant fraudulently procures a judgment for the purpose of frustrating a legitimate prosecution. In such a case retrial is allowed. *See* Peters v. Koepke, 156 Ind. 35, 59 N.E. 33 (1901); Gresley v. State *ex rel.* Neireiter, 123 Ind. 72, 24 N.E. 332 (1889); Halloran v. State, 80 Ind. 586 (1881). The first prosecution, even though fraudulently procured, may bar a subsequent trial if the defendant received the full penalty authorized by law. *See* Watkins v. State, 68 Ind. 427 (1879).

[58]*See* Layton v. State, 251 Ind. 205, 240 N.E.2d 489 (1968); State v. Balsley, 159 Ind. 395, 65 N.E. 185 (1902); Joy v. State, 14 Ind. 139 (1860). *See also* Malone v. State, 179 Ind. 184, 100 N.E. 567 (1913) (appeal from justice of the peace). Similarly, the defendant is subject to retrial if the judgment of conviction is set aside in a collateral proceeding for post-conviction relief. *See* McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947); State *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931). He may be retried following habeas corpus relief in the federal courts. *See* Todd v. State, 229 Ind. 664, 101 N.E.2d 45 (1951).

[59]355 U.S. 184 (1957).

was convicted by the jury of the lesser included offense of second degree murder. On appeal the second degree murder conviction was set aside because it was not supported by the evidence, and the case was remanded for retrial. On remand Green was charged and convicted of first degree murder. At the second trial Green did not argue that he was entitled to discharge from further prosecution by reason of the appellate finding of insufficient evidence. His only contention was that the prior conviction of second degree murder was an implicit acquittal of first degree murder. Willing to submit to a second trial for second degree murder, he urged that the double jeopardy clause was a bar to retrial for the greater offense of murder in the first degree. The Government took the position that Green had waived his right to object to retrial for first degree murder by successfully appealing the conviction of second degree murder.

Recognizing that a waiver of a constitutional right must be voluntary and knowing, the Court rejected the Government's argument. To apply waiver to this situation would coerce the relinquishment of the double jeopardy defense. It is hardly a voluntary waiver to require the accused to forego his defense as the price of taking an appeal.[60]

A defendant convicted on insufficient evidence is in a similar plight. He could, of course, serve his sentence and be free of a subsequent prosecution, but this is hardly an acceptable alternative. If he appeals on the ground that he should have been acquitted at trial, and the appellate court is in accord, why should he be any more subject to retrial than his counterpart who was acquitted at trial? By imposing a coerced waiver of the double jeopardy defense, courts penalize the accused for successfully attacking an erroneous judgment. The extension of the *Green* rationale to re-

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> "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. . . .
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> . . . Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.

Id. at 191-94 (citations omitted). *See also* Price v. Georgia, 398 U.S. 323 (1970); Benton v. Maryland, 395 U.S. 784 (1969).

versals for insufficient evidence would invalidate *Bryan* as a basis for remand and retrial.[61]

More realistically, some courts have discarded the waiver fiction and, while recognizing that retrial does constitute a second jeopardy, would nonetheless permit it in some instances as a matter of policy. These courts balance a defendant's right to a fair trial against society's need to punish the guilty and conclude that retrial serves both interests well.[62] This rationale, however, is based upon the questionable assumption that society has a legitimate interest in the multiple prosecutions of a defendant against whom a prima facie case was not established at the first trial.

Different considerations are apparent with respect to reversals for reasons other than insufficient evidence. For example, when a reversal is based upon improper jury instructions or some pretrial procedural irregularity, a defendant may have been denied a fair trial even though the evidence of guilt was overwhelming. It is far better that a defendant be given a fair trial upon remand than to extend the harmless error doctrine as a basis for affirmance. In such a case, the accused was not entitled to acquittal in the trial court, nor should such relief be afforded in the appellate court. The security of the community at large may be preserved by a new trial while also securing the defendant's right to a fair trial. The defendant who is not shown to be prima facie

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[61]The Supreme Court has not been called upon to reconcile the *Green* decision with *Bryan*. Since *Bryan* was grounded upon the same waiver concept that was later rejected in *Green*, it is reasonable to assume that *Bryan* would be overruled if challenged.

[62]In United States v. Tateo, 377 U.S. 463, 466 (1964), Mr. Justice Harlan argued that appellate courts would be very reluctant to reverse a conviction if retrial were not available:

> 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 defendant's rights as well as society's interest.

Of course, a literal construction of the Federal and Indiana Constitutions would never permit a second jeopardy regardless of society's interest in punishing the guilty.

guilty, however, in theory, represents no threat to the community. Whether the defendant in such a case is acquitted at trial or upon appeal should make no difference. In either case the accused should not be retried.[63]

Moreover, the security of the community, preserved by the imposition of criminal sanctions, has never been the sole consideration of our criminal justice system. Even though defendants may be guilty, countervailing policies immunize from prosecution those who have been denied their rights to speedy trials or who have not been brought to justice within the statutory period. If public policy requires retrial of defendants acquitted upon appeal, it can also be argued that the same policy requires retrial of defendants acquitted in the trial court. In either case, the State may be able to develop additional evidence sufficient to support a conviction.[64] The double jeopardy bar, however, was explicitly designed to prohibit this kind of continuing persecution of the accused.[65]

A final waiver problem was generated, perhaps inadvertently, by the concurring opinion in *Sapir* in which it was noted that the appellant had not asked for new trial relief. "If petitioner had asked for a new trial, different considerations would come into play, for then the defendant opens the whole record for such disposition as might be just."[66] This language has been construed to mean that a defendant who requests a new trial, even as alternative relief, has waived his right to discharge at the appellate level if the evidence is determined to be insufficient. In *Forman* the Court distinguished *Sapir* in part on the ground that petitioner had made a motion for a new trial, while in *Sapir* no such motion was made.[67] Again, this is hardly a "voluntary" waiver as defined in *Green*. To hold that an appellant must limit his appeal to

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[63]This was the position of the court in People v. Brown, 99 Ill. App. 2d 281, 241 N.E.2d 653 (1968), in which it was held that the reason for the reversal should control the decision as to whether or not there should be a retrial. It is reasonable to argue that the relief properly afforded on appeal is that to which the defendant was entitled at trial. A new trial is appropriate when the accused was denied a fair trial while appellate acquittal is proper when acquittal was erroneously denied below.

[64]If retrial is permitted following appellate reversal "the Government is not limited at a new trial to the evidence presented at the first trial," and new evidence may be introduced to buttress the case for the prosecution. United States v. Shotwell Mfg. Co., 355 U.S. 233, 243 (1957). Additionally, the prosecution may charge new or different offenses arising out of the same transaction. *See* United States v. Ewell, 383 U.S. 116 (1966).

[65]The policy against multiple prosecutions is reflected in Downum v. United States, 372 U.S. 734 (1963), in which the jury was discharged at the commencement of trial because the prosecution's key witness was absent.

[66]348 U.S. at 374.

[67]361 U.S. at 426.

the sole issue of sufficiency, or, in the alternative, waive his right to appellate acquittal is to coerce the relinquishment of a constitutional right. It is a rare case indeed in which counsel would not want to argue procedural error on appeal in addition to the question of the sufficiency of the evidence. Moreover, such a waiver would be particularly inconsistent with appellate practice in Indiana. The recently adopted rules of procedure abolish the motion for a new trial and supplant it with the motion to correct errors for the express purpose of permitting the consolidation of every specification of error into a single motion.[68] Even though a new trial may not be the appropriate relief for each specification, Trial Rule 59(E) expressly empowers a court to enter all appropriate relief including both the entry of a final judgment and the grant of a new trial. Moreover, the only court since *Forman* to consider the waiver issue firmly rejected its application when the appellant sought discharge or new trial as alternative relief on appeal.[69]

V. Conclusion

It is anticipated that the doctrine of appellate acquittal will gain widespread acceptance and eventually become the majority view if indeed the Supreme Court does not first overrule *Bryan* and make the doctrine applicable to the states through the fifth and fourteenth amendments. Further litigation, however, will be required to define the full scope and application of the doctrine. When the evidence at trial is insufficient to prove the commission of any crime, it is not difficult to conclude that an appellate court should enter a judgment of acquittal and order the defendant discharged from further prosecution. What should an appellate court do, however, when the evidence in the record is insufficient to prove the crime charged but is more than sufficient to prove a different offense? If the second crime is one that is a lesser included offense of the crime charged, the appellate court may simply modify the judgment and sustain the conviction for the lesser included offense.[70] If it is not a lesser included offense, however, the judgment of conviction may not be modified; it is a violation of due process of law to convict a person of a crime with which he is not charged.[71] Accordingly, an appellate court would be re-

[68]Indiana Civil Code Study Comm'n, Indiana Rules of Civil Procedure Rule 59, Comments (1968) (proposed final draft).

[69]People v. Brown, 99 Ill. App. 2d 281, 298-99, 241 N.E.2d 653, 661-62 (1968). Moreover, if the rule were applied, it could well be argued that the appellant received inadequate representation by his counsel who waived the defense without the client's full knowledge and consent.

[70]*See* Ritchie v. State, 243 Ind. 614, 189 N.E.2d 575 (1963).

[71]*E.g.*, Cole v. Arkansas, 333 U.S. 196 (1948).

quired to reverse the judgment of conviction, and the doctrine of appellate acquittal would preclude retrial of the defendant for the crime with which he was charged. It does not necessarily follow, however, that he could not be retried for the different offense. The traditional view holds that the defendant was never in jeopardy of the different offense because it was not charged and, therefore, the defendant could be subjected to a second trial.[72] This would be a proper result in view of the fact that, with respect to the different offense, the reversal is based upon the inadequacy of the indictment rather than insufficiency of the evidence.

A more serious problem is raised by the case in which the evidence in the record is insufficient, but the trial court erroneously excluded evidence for the State which would have cured the defect. Arguably, the State should be given a second opportunity to convict the accused since he would not have been entitled to appellate acquittal absent the error of the trial judge. Retrial would be, however, contradictory to the underlying purpose of appellate acquittal—to grant the appellant the relief to which he was entitled in the trial court. Since, on the basis of the record evidence, the defendant was entitled to a judgment of acquittal at the conclusion of the trial, the same relief should be made available on appeal. Moreover, an error committed by the trial judge, prejudicial to the prosecution, does not in every case justify a second trial. In *Fong Foo v. United States*,[73] the Supreme Court refused to permit a second trial when the trial judge erroneously granted a motion for judgment of acquittal. A similar result should obtain in the case in which the trial judge erroneously excludes evidence for the State.[74] The defendant should never be subjected to a second trial if, at the conclusion of the first proceeding, he was entitled to acquittal on the basis of the record evidence.

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[72] *Cf.* Fritz v. State, 40 Ind. 18 (1872); Joy v. State, 14 Ind. 139 (1860). These cases enunciate the general rule that when the charge is so defective that a valid judgment of conviction may not be entered under it, the defendant is not put in jeopardy thereby. One of the underlying purposes of requiring specificity in the criminal charge is to insure that a judgment on the charge may be pleaded in bar of a subsequent prosecution for the same offense. *E.g.*, Fletcher v. State, 241 Ind. 409, 172 N.E.2d 853 (1961); Bruce v. State, 230 Ind. 413, 104 N.E.2d 129 (1952); McCloskey v. State, 222 Ind. 514, 53 N.E.2d 1012 (1944); Garrison v. State, 208 Ind. 690, 193 N.E. 587 (1935); State v. Brown, 208 Ind. 562, 196 N.E. 696 (1935); Foust v. State, 200 Ind. 76, 161 N.E. 371 (1928); Brockway v. State, 192 Ind. 656, 138 N.E. 88 (1923); Mayhew v. State, 189 Ind. 545, 128 N.E. 599 (1920); Skelton v. State, 173 Ind. 462, 89 N.E. 860 (1909); McLaughlin v. State, 45 Ind. 338 (1873); State v. Trueblood, 25 Ind. App. 437, 57 N.E. 975 (1900).

[73] 369 U.S. 141 (1962).

[74] *See* United States v. Sisson, 399 U.S. 267, 289 (1970) (State assumes the risk of errors by the prosecuting attorney or the trial court). See also note 24 *supra*.

While these and other questions will be raised in Indiana after adoption of the appellate acquittal doctrine, one must presently await clarification by the Indiana Supreme Court of the underlying double jeopardy issue. One would hope that it will not be long in coming.