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Notes

HUNG OUT TO TRY: A RULE 29 REVISION TO STOP HUNG JURY RETRIALS

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ABSTRACT—How many times can a defendant be retried? For those facing hung jury retrials, it's as many times as the government pleases. Double jeopardy prohibitions do not apply when juries fail to reach a verdict.

There is, theoretically, a built-in procedural solution to stop the government from endlessly retrying defendants. Rule 29 of the Federal Rules of Criminal Procedure allows judges to acquit defendants when "the evidence is insufficient to sustain a conviction." Considering that a hung jury indicates the jurors could not agree on the sufficiency of the evidence, defendants facing hung jury retrials are prime candidates for this Rule's application. Yet Rule 29 has not been applied to prevent hung jury retrials. Instead, the Supreme Court has given a government-biased standard for deciding whether there is insufficient evidence to convict, stating that a judge must consider the evidence in the "light most favorable" to the government. This standard, which can force judges to nonsensically conduct the same analysis in perpetuity when juries repeatedly indicate that evidence is insufficient to convict, is not a functional standard.

This Note proposes a new post-hung jury Rule 29 standard. Rather than viewing the evidence in the light most favorable to the government, a judge should view the evidence in the light it was actually viewed by the hung jury, with no bias toward the government. Doing so allows a judge to consider a jury's inability to reach a verdict as proof that the evidence is insufficient, preventing the government from unduly retrying cases where multiple juries have failed to convict. Moreover, a Rule 29 acquittal cannot be appealed, meaning this new standard can be applied today even without the approval of appellate courts.

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INTRODUCTION

"[L]ook me in the eye and explain to me why the government is going to retry this case."[1] An exasperated Judge Phillip Brimmer demanded an answer upon hearing that the government planned to retry *United States v. Penn*, a case in which broiler chicken industry executives were charged with conspiring to fix prices.[2] The case had already been tried two times. Two times, the juries hung.[3] Judge Brimmer was doubtful that the government

[1] Greg Henderson, *Second Mistrial in Poultry Price-Fixing Case*, DROVERS (Mar. 30, 2022), https://www.drovers.com/news/industry/second-mistrial-poultry-price-fixing-case [https://perma.cc/S64A-MRLX].

[2] *Id.*

[3] *Id.*

could secure any convictions in a third trial: "[T]he evidence couldn't persuade 12 people . . . . We've seen it happen twice."[4]

Despite Judge Brimmer's hesitance to try the case again, a third trial commenced.[5] Following the deliberations, the jury found the defendants not guilty.[6] It took three trials and twenty-one weeks of total trial time[7] for the justice system to officially conclude what two juries had already indicated: there was insufficient evidence to convict.[8]

Could the clearly skeptical Judge Brimmer have stopped this third, meaningless trial? Currently, no. While the Constitution prevents a defendant from being "twice put in jeopardy" for the same offense,[9] the Supreme Court long ago concluded that hung jury retrials do not violate the Double Jeopardy Clause.[10] Without this double jeopardy protection, defendants facing multiple retrials post-hung jury are at the whim of a government that can choose to retry the case as many times as the jury hangs.[11]

The Federal Rules of Criminal Procedure contain a solution to stop the government from endlessly retrying frivolous cases: Rule 29. This Rule allows the judge to acquit a defendant "for which the evidence is insufficient

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[4] Greg Henderson, *"Not Guilty"—Chicken Price-Fixing Trial Ends*, DROVERS (July 8, 2022), https://www.drovers.com/news/industry/not-guilty-chicken-price-fixing-trial-ends [https://perma.cc/8UU3-GRAJ].

[5] *Id.*

[6] *Id.*

[7] Rich Kornfeld, *Playing Chicken: DOJ Presses On with High-Profile Antitrust Cases Despite Series of Defeats*, CORP. COMPLIANCE INSIGHTS (Aug. 31, 2022), https://www.corporatecomplianceinsights.com/antitrust-doj-chicken-price/ [https://perma.cc/7RU7-LJ9Z].

[8] The government's insistence on retrying the case a third time was "virtually unprecedented." Matthew Perlman & Bryan Koenig, *Despite 2 Mistrials, DOJ Won't Say Chicken Case Is Done*, LAW360 (Mar. 31, 2022, 7:31 PM), https://www-law360-com.turing.library.northwestern.edu/articles/1479309/despite-2-mistrials-doj-won-t-say-chicken-case-is-done [https://perma.cc/N27E-5SZC] ("I'm not aware of any precedent for a third attempted trial in a criminal antitrust case—ever."). This is because federal principles of federal prosecution require "prosecutors to have a good-faith belief they have at least a 50% chance of winning if they go to trial." *Id.* Yet these principles, geared at ensuring success at trial, have taken a backseat to political considerations. *See* Ankush Khadori, *Is the Justice Department Incompetent?*, N.Y. MAG. (May 19, 2022), https://nymag.com/intelligencer/2022/05/is-the-justice-department-incompetent.html [https://perma.cc/W3R2-UMBL] ("The antitrust losses all seem to have involved prosecutions with conspicuously thin factual evidence . . . . [T]his may be the result of a poorly conceived effort to use criminal prosecutions to send a message to alter behavior throughout the labor market or the growing pains of a new enforcement regime with dubious ideological and perhaps even political underpinnings."); Kornfeld, *supra* note 7 ("[T]he DOJ antitrust focus appears to be informed as much by political considerations as legal ones.").

[9] U.S. CONST. amend. V.

[10] *See* United States v. Perez, 22 U.S. 579, 580 (1824).

[11] FED. R. CRIM. P. 31(b)(3) ("The government may retry any defendant on any count on which the jury could not agree.").

to sustain a conviction."[12] While hung juries could be considered probative in determining that the evidence is insufficient to convict, the current insufficient evidence standard only allows judges to consider evidence from a perspective that markedly favors the government—that is, in the "light most favorable to the government."[13] Putting a thumb on the scale in the government's favor significantly blunts the impact of a rule designed to address fairness and efficiency concerns.[14] Thus, even Rule 29's built-in solution has been foreclosed to defendants facing retrial after a hung jury.

This government-biased standard is not only present in the federal courts. Several states have adopted substantially similar insufficient evidence rules and the federal "light most favorable" standard.[15] Considering that the vast majority of criminal trials occur in state court, a less government-favored insufficient evidence standard would provide even more relief to state defendants caught in hung jury retrials.[16]

This Note argues for a new Rule 29 standard in the wake of a hung jury. Part I explains how the current Double Jeopardy Clause doctrine fails to prevent hung jury retrials and considers the pitfalls in two previously proposed solutions. Part II introduces Rule 29 and explains why the current insufficient evidence standard fails to stop hung jury retrials. Part III proposes a new Rule 29 insufficient evidence standard that provides judges with more power to stop retrials after a hung jury. Part IV considers how this new standard could be applied in state courts, and Part V addresses critiques of this proposed standard.

I. THE DOUBLE JEOPARDY ROADBLOCK

This Part's examination of the current law concerning defendants facing hung jury retrials proceeds in two sections. First, it analyzes the Supreme Court's Double Jeopardy Clause jurisprudence and how it fails to protect defendants facing retrials after a hung jury. Second, it considers two previous proposals that have attempted to provide greater protections to post-hung jury defendants: reinterpreting the Double Jeopardy Clause precedent and utilizing judges' inherent authority to stop retrials.

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[12] *Id.* R. 29.

[13] *See* 26 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE—CRIMINAL PROCEDURE § 629.05 (3d ed. 2022).

[14] *See* Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal*, 44 AM. U. L. REV. 433, 441 (1994). These ascribed policy purposes of Rule 29 can only be inferred from historical context; the drafters of the Federal Rules of Criminal Procedure failed to write down any rationale for adopting the rule. *Id.* at 440–41.

[15] *See infra* Part IV.

[16] Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 757 (2004).

A. The Cemented Doctrine

Since 1824, the Supreme Court has consistently held that retrials after a hung jury do not violate the Double Jeopardy Clause. The foundational case is *United States v. Perez*, in which Justice Joseph Story declared that a hung jury implicates the "manifest necessity" to discharge the jury, declare a mistrial, and retry the defendant to achieve "the ends of public justice."[17] The single paragraph, 444-word opinion failed to elaborate on what this "manifest necessity" standard entailed, nor did it explain why the "ends of public justice" warranted circumventing the Double Jeopardy Clause. Despite this dearth of analysis, *Perez*'s holding went unquestioned by the Court for the next 160 years.[18] Citations to *Perez* became routine; it had been upheld so many times that the Court never felt the need to justify its holding.[19]

This changed in 1984 with *Richardson v. United States*.[20] The Court found itself in a doctrinal bind. Six years prior to *Richardson*, a unanimous Supreme Court held in *Burks v. United States* that the Double Jeopardy Clause barred retrials if a judge deemed the evidence insufficient to convict.[21] The implications of *Burks* on hung jury retrials were obvious: if a judge's determination that there was insufficient evidence prohibited retrials, why wouldn't a hung jury's inability to find the evidence sufficient to convict also implicate the Double Jeopardy Clause? This was the question the Court was forced to answer in *Richardson*. To shore up *Perez*'s holding in the face of *Burks*, Justice William Rehnquist gave a novel explanation for why hung juries do not implicate the Double Jeopardy Clause: a hung jury is not a verdict that "terminates the original jeopardy."[22] Yet even this new reasoning turned on old logic. When pushed to explain *why* a hung jury failed to terminate jeopardy, Justice Rehnquist's only response was that holding

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[17] 22 U.S. 579, 580 (1824).

[18] *See, e.g.*, Dreyer v. Illinois, 187 U.S. 71, 85–86 (1902) ("[W]hat was said in *United States v. Perez* is applicable to this case . . . and is adverse to the contention of the accused that he was put twice in jeopardy."); Wade v. Hunter, 336 U.S. 684, 688 (1949) ("Past cases have decided that a defendant, put to trial before a jury, may be subjected to the kind of 'jeopardy' that bars a second trial for the same offense even though his trial is discontinued without a verdict."); Arizona v. Washington, 434 U.S. 497, 509 (1978) ("[W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial.").

[19] *See* Janet E. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV. 701, 701 (1981) ("[The] Court has held that the double jeopardy clause . . . does not bar retrial following a hung jury. It has done so consistently, without discussion of the issue, by peremptory citation to . . . *Perez*.").

[20] *See* 468 U.S. 317, 325 (1984).

[21] Burks v. United States, 437 U.S. 1, 18 (1978).

[22] *Richardson*, 468 U.S. at 325.

otherwise would contradict previous cases such as *Perez*.[23] Rehnquist was not shy in admitting that his majority opinion relied more on precedent than reasoning. Rather, he embraced it, stating that "a page of history is worth a volume of logic."[24]

This continued reliance on the authoritativeness of *Perez*, devoid of critical analysis, has given the now two-century-old case a life of its own.[25] Hung juries are no longer just the first example of the manifest necessity to discharge a jury; they are now the "prototypical example" of the manifest necessity that allows for retrials.[26] In its current state, the Double Jeopardy Clause doctrine provides no relief for defendants facing retrials after a hung jury.

B. Alternative Ways Around

Legal scholars have proposed multiple ways to circumvent this ossified Double Jeopardy Clause doctrine and prevent undue retrials. I survey two proposals here: rejecting *Perez* and leveraging the inherent authority vested in judges.

1. Reinterpreting Perez

One suggestion is for the Supreme Court to outright reject *Perez*'s manifest necessity exception to the Double Jeopardy Clause.[27] Despite the Court's continued reliance on *Perez*, its holding is incongruent with the purpose of the Double Jeopardy Clause. First, retrials after a hung jury pose the same ordeals the Double Jeopardy Clause is meant to protect defendants from. Justice Hugo Black described the purpose of the Double Jeopardy Clause as follows:

> [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

[23] *Id.* ("[T]his proposition [that a hung jury terminates jeopardy] is irreconcilable with cases such as *Perez* . . . and we hold on the authority of these cases that the failure of the jury to reach a verdict is not an event which terminates jeopardy.").

[24] *Id.* at 325–26 (quoting N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921)).

[25] *Perez* continues to be authoritatively cited into the twenty-first century. *See, e.g.*, Yeager v. United States, 557 U.S. 110, 118 (2009) (citing *Perez* to support the proposition that "a jury's inability to reach a decision . . . permits the declaration of a mistrial and the continuation of the initial jeopardy"); Blueford v. Arkansas, 566 U.S. 599, 609 (2012) (citing *Perez* to support the proposition that "a trial can be discontinued without barring a subsequent one for the same offense" under some circumstances).

[26] Oregon v. Kennedy, 456 U.S. 667, 672 (1982).

[27] Findlater, *supra* note 19, at 736–37.

> live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[28]

The "embarrassment," "expense," "ordeal," "anxiety," and "insecurity" all continue when a defendant is retried after a hung jury.[29] The possibility of a wrongful conviction also increases with further trials, as each subsequent retrial drains the defendant's resources.[30] Defendants under pretrial detention can be forced to remain in detention after a hung jury until a retrial results in a verdict.[31] As Professor Carrie Leonetti documents, these defendants incur the further immense costs of prolonged detention despite being potentially innocent: "[S]tigma; the isolation of being cut off from friends and family; loss of employment; loss of liberty; the impairment of the ability to mount an effective defense; the degradations of imprisonment; and threats from other inmates, violence, or even rape."[32] *Perez*'s manifest necessity exception ignores all of these burdens.

Second, *Perez*'s holding is so far outside the bounds of the Double Jeopardy Clause that scholars have questioned its precedential value. Justice Story's opinion never mentioned the Double Jeopardy Clause nor the Constitution, calling into question whether *Perez* really was about the Double Jeopardy Clause.[33] Professor Janet E. Findlater argues that *Perez* is better read as deciding whether a judge could discharge a jury prior to a verdict *at all*, as discharging juries before they reached a verdict had been controversial at common law.[34] If *Perez* were to be reinterpreted as solely addressing the issue of discharging a jury, then this foundational case would no longer support the conclusion that hung juries do not violate the Double Jeopardy Clause. The manifest necessity exception would no longer make retrials after hung juries immune to double jeopardy protection.

Unsurprisingly, the Supreme Court has not been willing to disturb such a bedrock Double Jeopardy Clause principle. The Court has acknowledged that *Perez* is likely not a Double Jeopardy Clause case and shrugged off the

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

[29] *See* Findlater, *supra* note 19, at 713 ("The emotional, physical, psychological and economic harm visited by a repetition of trials is obvious.").

[30] *Id.* at 713–14; Carrie Leonetti, *When the Emperor Has No Clothes II: A Proposal for a More Serious Look at "The Weight of the Evidence,"* 7 N.Y.U. J.L. & LIBERTY 84, 120–22 (2013).

[31] Leonetti, *supra* note 30, at 120–24.

[32] *Id.* at 122–24.

[33] Findlater, *supra* note 19, at 709 ("*Perez* did not involve application of the double jeopardy clause . . . ."); Crist v. Bretz, 437 U.S. 28, 34 n.10 (1978) ("[A] close reading of the short opinion in [*Perez*] could support the view that the Court was not purporting to decide a constitutional question . . . .").

[34] Findlater, *supra* note 19, at 705–06 ("At common law it was a rule of practice that a jury once sworn could not be discharged before a verdict was returned.").

insight as insignificant: "[T]o cast such a new light on *Perez* at this later date would be of academic interest only."[35]

Even if the Supreme Court's precedents are faulty, the Court has good reason to avoid ruling that hung jury retrials violate the Double Jeopardy Clause. If a retrial after a hung jury implicated double jeopardy, a blanket rule would be established that would make any hung jury retrial unconstitutional. One oft-cited risk of such a rule is that it would allow one unreasonable juror to hang a jury and prevent future retrials, robbing the government and public of justice.[36] While the concept that juries often hang because of one intransigent juror has been contested,[37] the public still has an "interest in fair trials designed to end in just judgments."[38] For these reasons, this Note does not argue for a blanket prohibition against retrials after hung juries. The current Double Jeopardy Clause standard may unduly ignore the interests of defendants, but a solution that ignores government and public interests is not a true improvement.

2. Inherent Authority

Another suggestion is for judges to exercise their inherent authority to stop undue retrials after several hung juries.[39] The theory that judges have inherent supervisory authority over criminal justice was popularized by the Supreme Court in *McNabb v. United States*.[40] *McNabb* held that the Supreme Court has "supervisory authority over the administration of criminal justice in the federal courts," allowing it to create restrictions on criminal justice beyond what the Constitution provides.[41] While *McNabb* only confirmed the Supreme Court's inherent authority, lower courts have followed suit and

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[35] *Crist*, 437 U.S. at 34 n.10; *see also* Richardson v. United States, 468 U.S. 317, 324 (1984) ("We are entirely unwilling to uproot this settled line of cases . . . .").

[36] Michael A. Berch & Rebecca White Berch, *The Power of the Judiciary to Dismiss Criminal Charges After Several Hung Juries: A Proposed Rule to Control Judicial Discretion*, 30 LOY. L.A. L. REV. 535, 541 (1997); *see also* Jeffrey Rosen, *After 'One Angry Woman,'* 1998 U. CHI. LEGAL F. 179, 180 ("[P]rosecutors suggested that they had observed a rise in hung juries, in which a lone hold out . . . refused to convict . . . .").

[37] *See* PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, NAT'L CTR. FOR STATE CTS., ARE HUNG JURIES A PROBLEM? 67 (2002), https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0018/6138/hung-jury-final-report.pdf [https://perma.cc/XF6Y-4B8H] (finding in their empirical study of four state courts that the majority of hung juries have more than two holdout jurors).

[38] *Richardson*, 468 U.S. at 325 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

[39] Berch & Berch, *supra* note 36, at 563–64.

[40] *See* 318 U.S. 332, 341 (1943).

[41] *Id.*

invoked their inherent authority over criminal justice as well.[42] In the context of hung juries, the Supreme Court in *Arizona v. Washington* hinted at a court's inherent authority to stop retrials even if the Double Jeopardy Clause permits them.[43] Justice John Paul Stevens stated that "[e]ven if the first trial is not completed, a second prosecution may be grossly unfair" due to it implicating the same issues the Double Jeopardy Clause is meant to protect against: "[A second prosecution] increases the financial and emotional burden on the accused, prolongs the period in which [the defendant] is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted."[44]

Some district courts have found an inherent authority to stop "grossly unfair" retrials after multiple hung juries. In *United States v. Ingram*, the D.C. District Court sua sponte dismissed an indictment with prejudice after two trials resulted in hung juries.[45] When the government challenged the court's power to dismiss the indictment on reconsideration, the district court rejected the challenge, stating that their "intervention [was] required in the interests of justice" and it was "simply a matter of fair play" that the government receive no more chances to convict.[46] In *United States v. Rossoff*, a court in the Central District of Illinois was faced with a similar situation; two trials resulted in hung juries on five of the thirteen criminal counts.[47] Citing *Ingram*, the court sua sponte dismissed with prejudice the remaining five counts, stating that the defendant had "been under great physical and emotional strain as the result of these repeated trials" and that the government "should not be given continued bites at the apple."[48] Finally, in *United States v. Wright*, a court in the Western District of Pennsylvania was tasked with deciding whether to allow the government to try a defendant a third time after two hung jury retrials.[49] After an analysis of both *Ingram* and *Rossoff*, the court concluded it had "the inherent authority . . . to dismiss an indictment following multiple mistrials" and dismissed the indictment with prejudice due to it violating "fundamental fairness."[50]

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[42] Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1433 (1984) (noting that, following *McNabb*, "lower federal courts . . . employed supervisory power in hundreds of cases").

[43] *See* 434 U.S. 497, 503–04 (1978).

[44] *Id.*

[45] 412 F. Supp. 384, 385 (D.D.C. 1976).

[46] *Id.*

[47] 806 F. Supp. 200, 201–02 (C.D. Ill. 1992).

[48] *Id.* at 203.

[49] No. 14-292, 2017 WL 1179006, at *1 (W.D. Pa. Mar. 30, 2017), *rev'd and remanded*, 913 F.3d 364 (3d Cir. 2019).

[50] *Id.* at *2–4.

Despite these examples, cases in which federal judges have invoked their inherent authority to stop retrials after a hung jury are exceedingly rare.[51] A recent Supreme Court ruling on district court judges' inherent authority will only make them rarer. In *Dietz v. Bouldin*, the Supreme Court clarified "certain limits" on a district court's inherent authority.[52] Justice Sonia Sotomayor listed two requirements for invoking inherent authority: first, it "must be a 'reasonable response to the problems and needs' confronting the court's fair administration of justice," and second, it "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[53] These principles spell doom for the usage of inherent authority to dismiss indictments after a hung jury, as Federal Rule of Criminal Procedure 31(b)(3) gives the government the right to retry a defendant after a hung jury mistrial: "If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. *The government may retry any defendant on any count on which the jury could not agree*."[54] Even if Rule 31(b)(3) is not considered an express limitation on a district court judge's power, the Rule seems to give the government full authority to retry defendants after a hung jury mistrial, thus creating a presumption against the use of inherent authority.

The Third Circuit's reversal of the previously mentioned *Wright* case illustrates how the current inherent authority doctrine is hostile to indictment dismissals after a hung jury.[55] The court began its analysis by remarking that there is "nothing in the text [of Rule 31] that empowers a court to prohibit the Government from retrying a case."[56] It then went on to consider the *Dietz* principles, starting with the first requirement that inherent authority "must be a reasonable response to the problems and needs confronting the court's fair administration of justice."[57] On its face, this requirement appears to favor

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[51] The only other case I could find that involved a district court judge dismissing indictments with prejudice after a hung jury mistrial is excerpted in a Ninth Circuit case. In *United States v. Miller*, the district court judge dismissed remaining counts at a status conference, stating, "I don't think it is fair to retry those counts." 4 F.3d 792, 794 (9th Cir. 1993). It is noteworthy that one other district judge has dismissed an indictment *without* prejudice "to allow a cooling-off period and promote . . . fundamental fairness." United States v. Khan, No. 2:10-CR-0175, 2014 WL 1330681, at *3 (E.D. Cal. Apr. 1, 2014).

[52] 136 S. Ct. 1885, 1891 (2016).

[53] *Id.* at 1892 (quoting Degen v. United States, 517 U.S. 820, 823–24 (1996)).

[54] FED. R. CRIM. P. 31(b)(3) (emphasis added). While the government has had the right to retry a defendant after a hung jury since the Federal Rules of Criminal Procedure were adopted, *see* 18 U.S.C. § 566 (1946), it does not appear that district courts had viewed the rule as a limitation on their inherent authority before *Dietz*. *See, e.g.*, *Wright*, 2017 WL 1179006, at *4 ("[T]here is nothing in Rule 31(b)(3) that limits a court's inherent supervisory authority to dismiss an indictment in the interests of fundamental fairness.").

[55] *See* United States v. Wright, 913 F.3d 364, 375 (3d Cir. 2019).

[56] *Id.* at 370–71.

[57] *Id.* at 371 (quoting *Dietz*, 136 S. Ct. at 1892).

the use of inherent authority in post-hung jury retrials; *Arizona v. Washington* already described how a retrial can be immensely burdensome on the defendant to the point of being "grossly unfair."[58] Yet the court limited the first *Dietz* requirement to only allow the use of inherent authority if "the Government engaged in misconduct, the defendant was prejudiced, and no less severe remedy was available to address the prejudice."[59] It then *further* limited prejudice to "actions that place a defendant at a disadvantage in addressing the charges," stating that "there is no prejudice to a defendant simply because [the defendant] faces the anxiety . . . of undergoing a trial."[60] Writing off the burdens a defendant faces due to retrials as inconsequential, the court found the first *Dietz* requirement had not been met.[61]

Next, the Third Circuit moved onto the second *Dietz* requirement: the exercise of inherent authority "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[62] Asserting that "the decision to try or retry a case is at the discretion of the prosecutor" and that there is an "absence of power of the district court to dismiss an indictment in Rule 31(b)," the court concluded that not only was the inherent authority to dismiss indictments after a hung jury mistrial not statutorily supported, it was also directly limited by the Constitution's separation of powers.[63] Thus, the second *Dietz* requirement was also found to be unfulfilled.[64] Finding both *Dietz* requirements unsatisfied, the court reversed the indictment dismissals and remanded.[65]

The Third Circuit is currently the only federal appellate court post-*Dietz* that has ruled on the use of inherent authority to dismiss indictments after a hung jury mistrial. The only other circuit that addressed this use of inherent authority prior to *Dietz* was the Ninth Circuit, and it too held that inherent authority could not be used to dismiss indictments.[66] It is unclear how a defendant facing multiple hung jury retrials could overcome the *Dietz* test, especially under the Third Circuit's restrictive interpretation, which has

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[58] 434 U.S. 497, 503–04 (1978).

[59] *Wright*, 913 F.3d at 371.

[60] *Id.* at 372.

[61] *Id.* at 372–73.

[62] *Id.* at 371 (quoting *Dietz*, 136 S. Ct. at 1892).

[63] *Id.* at 373–75.

[64] *Id.* at 375.

[65] *Id.*

[66] United States v. Miller, 4 F.3d 792, 796 (9th Cir. 1993) ("We conclude that the fact that the jury was hung by a six to six vote, or by one even more favorable to the defendant, is not an adequate basis for dismissal under the court's supervisory power.").

already been adopted by district courts.[67] Considering the sparse number of cases supporting the use of inherent authority to stop retrials, the currently unfavorable Supreme Court inherent authority doctrine, and the circuit courts' unwillingness to prohibit retrials, it seems unlikely that the inherent authority of district courts can provide relief to defendants facing retrials after a hung jury.

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The proposals discussed above each have their pitfalls. Establishing that hung juries implicate the Double Jeopardy Clause would require the Supreme Court to overturn two centuries of precedent, and it would ignore the interests of the government and public. Similarly, while the inherent authority doctrine allows judges to prevent retrials following a hung jury on a case-by-case level, the current Supreme Court and appellate circuit precedent have diminished the already sparse usage of this doctrine. A better solution for defendants suffering from the burdens of multiple hung jury retrials will need to avoid contrary precedent and address the competing interests involved in deciding to retry a defendant. Enter: Rule 29.

II. RULE 29

Part II introduces Rule 29 as a potential solution to prevent undue retrials after a hung jury. First, it explains the mechanics of the rule based on its plain text. Second, it analyzes how the rule is currently applied by courts.

A. The Plain Text

Rule 29 of the Federal Rules of Criminal Procedure—"Motion for a Judgment of Acquittal"[68]—has three parts relevant to hung juries:

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[67] Since *Dietz*, two district courts have already refused to invoke inherent authority after two hung jury mistrials, citing the Third Circuit in *Wright*. United States v. Harvey, No. 2:16CR109, 2022 WL 1224313, at *2 (N.D. Ind. Apr. 25, 2022) ("[N]o federal appeals court has approved such an exercise by a district court, and two have held in the contrary."); United States v. Martinez, No. 15-00031, 2019 WL 943377, at *3 (D. Guam Feb. 25, 2019) ("Applying the *Wright* standard to the present case reveals that dismissal with prejudice is not warranted.").

[68] FED. R. CRIM. P. 29. The relevant parts of Rule 29 to hung juries are as follows:

> (a) BEFORE SUBMISSION TO THE JURY. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.
>
> (b) RESERVING DECISION. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and

29(a)–(c).[69] 29(a) allows the defendant to move for acquittal after the government closes its evidence or after the close of all the evidence;[70] 29(b) allows a district court judge to delay ruling on an acquittal motion until after the jury is discharged even if the motion was made before the discharge;[71] and 29(c) allows an acquittal motion to be made before or after a jury discharge.[72] The Rule states a judge "*must* enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."[73] If a district court judge finds insufficient evidence to sustain a conviction, the judge has no choice but to acquit.

On its face, this standard appears to give relief to defendants facing retrial after a hung jury mistrial. A hung jury is indicative of insufficient evidence to sustain a conviction because the evidence was *already insufficient* to sustain a conviction at trial by failing to convince all jury

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> 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. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.
>
> (c) AFTER JURY VERDICT OR DISCHARGE.
>
> (1) *Time for a Motion.* A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.
>
> (2) *Ruling on the Motion.* If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.
>
> (3) *No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

Id. R. 29(a)–(c).

[69] Rule 29(d), "Conditional Ruling on a Motion for a New Trial," is only relevant when the judge acquits the defendant after a guilty verdict and is thus not applicable to hung jury mistrials. *See id.* R. 29(d).

[70] *Id.* R. 29(a).

[71] *Id.* R. 29(b). In ruling on a Rule 29 motion, the evidence a judge can consider differs based on whether the motion was made after the government closed its evidence or after the close of *all* the evidence. A ruling on a Rule 29 motion made after the government closes its evidence may only consider the evidence the government proffered, while a ruling made after the close of *all* the evidence may consider any evidence presented in the case. *Id.* R. 29 advisory committee's notes to 1994 amendment. This difference remains true even if the judge reserves ruling on the motion pursuant to Rule 29(b). *Id.* R. 29(b) ("If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved."). Thus, a judge reserving ruling on a Rule 29 motion made at the close of the government's evidence may only consider the government's proffered evidence even if the ruling is made after further evidence was provided by the defendant. *Id.* The purpose of this restriction is to prevent the judge's reservation of the motion from inadvertently pressuring the defendant to not present more evidence in fear of accidentally bolstering the government's case. *Id.* R. 29 advisory committee's notes to 1994 amendment.

[72] *Id.* R. 29(c)(1)–(3).

[73] *Id.* R. 29(a) (emphasis added).

members that conviction was warranted. Yet this is not how the insufficient evidence standard has been applied.

B. The Current Insufficient Evidence Standard

Rule 29 gives a judge no guidance in determining whether there is insufficient evidence to sustain a conviction.[74] Thus, the standard is a judicial creation first articulated in *Jackson v. Virginia*.[75] Justice Potter Stewart stated that to determine whether evidence is insufficient, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[76] What once looked like a favorable standard for defendants facing retrial post-hung jury was given a pro-prosecutor facelift, tilting the balance of evidence in "the light most favorable" for the government. As if this deference was not difficult enough to overcome, federal courts have also unanimously decided to apply the same standard regardless of the jury's verdict (or lack thereof),[77] meaning a hung jury has no bearing on the standard whatsoever.[78] Thus, even if the jury fails to agree on whether the evidence is sufficient to convict (as is required to sustain a conviction), the court is not allowed to view that failure to convict as indicative of insufficient evidence.

The *Jackson* standard is particularly harmful when applied to cases that result in hung juries, as it creates an unbridgeable mismatch between how the jury and judge analyze the evidence. A jury can only convict a defendant if *each and every* juror finds the defendant guilty beyond a reasonable doubt.[79] Yet the *Jackson* standard emphasizes that a judge must deem the evidence sufficient to convict if "*any* rational trier of fact" could find the defendant guilty beyond a reasonable doubt when viewing the evidence in the "light most favorable" to the government.[80] The gulf between how *any* rational trier of fact could view the evidence when forced to look at it in government-biased light and how a jury of *twelve* rational triers of fact actually views the evidence in an unbiased light can be enormous. This creates a hole in the Rule 29 acquittal process when applied to hung jury

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[74] 26 MOORE ET AL., *supra* note 13, § 629.05.

[75] *See* 443 U.S. 307, 319 (1979).

[76] *Id.* Federal district courts have universally adopted the *Jackson* standard. 26 MOORE ET AL., *supra* note 13, § 629.05.

[77] 26 MOORE ET AL., *supra* note 13, § 629.05.

[78] *See* United States v. Nimapoo, No. 1:05-CR-0316-13, 2008 WL 11384038, at *1 (N.D. Ga. Apr. 11, 2008) (collecting cases all stating that the standard of insufficient evidence does not change whether the trial court is ruling on the motion before or after a hung jury).

[79] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).

[80] *Jackson*, 443 U.S. at 319.

cases, as evidence in the "light most favorable" to the government may appear sufficient for any single juror to convict, but in reality is too weak to convince any group of twelve jurors to ever convict, theoretically allowing endless hung jury retrials.[81] Since the *Jackson* standard does not change no matter how many times a jury hangs, defendants trapped in this legal hole of endless retrials have no means to dig themselves out.

United States v. Penn, the subject of this Note's introduction, exemplifies how insuperable the current insufficient evidence standard really is—even after multiple hung juries. As stated previously, the first two trials of broiler chicken industry executives accused of price-fixing resulted in hung juries.[82] Recall that when the government stated they were going to try the defendants a third time, presiding Judge Brimmer was not shy in expressing skepticism.[83] Judge Brimmer seemed unconvinced that there was sufficient evidence to convict after two sets of twelve-person juries failed to do so, as a conviction requires a unanimous verdict[84] of a twelve-person jury.[85]

Yet when it came to applying Rule 29's insufficient evidence standard, these concerns about the hung juries not-so-mysteriously vanished. Judge Brimmer started his Rule 29 analysis with the standard every district court applies: "[V]iewing the evidence in the light most favorable to the government, a reasonable jury could have found the defendant guilty beyond a reasonable doubt."[86] He then went through the charges against the defendants, never mentioning the past two hung juries when considering whether the evidence was sufficient.[87] Viewing the evidence in the "light most favorable" to the government, Judge Brimmer found sufficient evidence for all the charges.[88] This decision should be unsurprising—it was inevitable.

Why was this result preordained? *Because the judge had already concluded the evidence was sufficient four months prior*.[89] The defendants

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[81] *See* Leonetti, *supra* note 30, at 87–88 ("In these situations . . . a mid-trial motion for judgment of acquittal[] could not dispose of the case—the evidence is legally sufficient—and the Double Jeopardy Clause does not generally prohibit a retrial so long as the previous mistrial was declared for manifest necessity, a standard that almost any 'hung jury' case will meet.").

[82] United States v. Penn, No. 20-cr-00152, 2022 WL 1773812, at *1 (D. Colo. June 1, 2022).

[83] Henderson, *supra* note 4 ("We know that the evidence couldn't persuade 12 people . . . . We've seen it happen twice.").

[84] FED. R. CRIM. P. 31(a).

[85] *Id.* R. 23(b)(1).

[86] *Penn*, 2022 WL 1773812, at *2 (quoting United States v. Tennison, 13 F.4th 1049, 1059 (10th Cir. 2021)).

[87] *Id.* at *5–8.

[88] *Id.* at *9.

[89] United States v. Penn, No. 20-cr-00152, 2022 WL 124755, at *13 (D. Colo. Jan. 13, 2022).

had previously moved for a Rule 29 acquittal when the first trial resulted in a hung jury, and Judge Brimmer, undertaking the same analysis he would later conduct in response to the second motion, found sufficient evidence.[90] The current standard, which forces the judge not to consider past hung juries as indicative of insufficient evidence, essentially forced Judge Brimmer to repeat the same analysis on the same evidence.[91] It was a meaningless exercise. It is absurd to think that the government would somehow produce less sufficient evidence in a retrial they had more time to prepare for, especially when their evidence was already deemed sufficient in the first trial. A Rule 29 standard that forces judges to ignore hung juries as indicative of insufficient evidence and nonsensically repeat the same analysis every time a jury hangs is not functional. It is time to fill the hole in Rule 29.

III. A NEW RULE 29 STANDARD

This Note argues for a new Rule 29 standard that allows judges to consider a hung jury as indicative of the government's inability to provide sufficient evidence to sustain a conviction. The proposed revision to the standard is simple: after a jury fails to convict, the judge should use the same *Jackson* standard for determining sufficiency of the evidence except the judge will no longer be required to view the evidence in "the light most favorable" to the government. Thus, the only inquiry the judge would make in determining the sufficiency of the evidence after a hung jury is whether "a reasonable jury could have found the defendant guilty beyond a reasonable doubt."

The main benefit of this new standard is that it allows the judge to consider all the evidence it has at its disposal when determining whether the evidence was insufficient to convict.[92] First, the judge can consider a hung

[90] *Id.* at *1, *13.

[91] This is not to say the opinions were identical to each other. The second trial certainly led to different emphasis on evidence, which in turn led to slightly different opinions. However, the opinions are also eerily similar, reusing much of the same wording with minor alterations. *Compare Penn*, 2022 WL 124755, at *3 (D. Colo. Jan. 13, 2022) ("The testimony of government witness *Robbie* Bryant, a Pilgrim's Pride ('Pilgrim's') employee, is sufficient to support a finding beyond a reasonable doubt that a conspiracy existed between [the defendants] to rig bids and fix prices." (emphasis added)), *with Penn*, 2022 WL 1773812, at *4 (D. Colo. June 1, 2022) ("The testimony of government witness *Robert* Bryant, a Pilgrim's Pride ('Pilgrim's') employee, is sufficient to support a finding beyond a reasonable doubt that a conspiracy existed between [the defendants] to rig bids and fix prices." (emphasis added)).

[92] Recall, however, that Rule 29 requires a judge to only review the evidence presented when the motion was made. FED. R. CRIM. P. 29(b); *supra* note 71. This prohibition would prevent a judge from considering a hung jury as indicative of insufficient evidence if the motion was made before the jury was discharged. *See* FED. R. CRIM. P. 29(b). Yet this restriction poses a nonexistent problem in practice; a defendant can avoid the restriction by simply making a new Rule 29 motion after the jury is discharged. *Id.* R. 29(c)(3) ("A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.").

jury as probative evidence that a reasonable jury could not have found the defendant guilty.[93] This is not to say the judge is forced to consider the hung jury as definitive proof of insufficient evidence. If the judge has reason to believe the jury was not reasonable, the judge has full discretion to allow a retrial. Yet even in this scenario where the judge disregards the hung jury entirely, the new standard at least allows the judge to make that determination, rather than forcing the judge to turn a blind eye to the possible suggestion of insufficient evidence that a hung jury provides.

Second, by not limiting the judge to view the evidence in the "light most favorable" to the government, the new standard allows the judge to balance the parties' interests when deciding Rule 29 acquittals. In determining whether "a reasonable jury could have found the defendant guilty beyond a reasonable doubt," the judge could balance the chance a new jury will find the defendant guilty, the government's interest in a retrial, and the burden a retrial has on the defendant. This balancing accounts for the interests of the public and the defendant when deciding whether to acquit, interests that

[93] A judge under this proposed new Rule 29 standard could also consider the numerical split of the hung jurors when deciding whether to acquit a defendant, though the process to do so is a bit complicated. A judge may not inquire into the jurors' division on the merits of the case before a verdict is rendered, as the inquiry is seen as overly coercive on the jury. Brasfield v. United States, 272 U.S. 448, 449–50 (1926) ("[T]his court condemned the practice of inquiring of a jury unable to agree, the extent of its numerical division . . . . We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal."). However, judges can get around this prohibition in two ways. First, while a judge cannot ask the jury about the merits of the case, a judge can inquire into whether individual jurors believe further deliberations will resolve the jury's inability to come to a verdict. Lowenfield v. Phelps, 484 U.S. 231, 239 (1988) (holding that *Brasfield*'s prohibition on inquiries into jury division does not apply to "inquir[ies] as to the numerical division of the jury . . . on the question of whether further deliberations might assist them in returning a verdict"). While this approach gives judges a sense of how deadlocked the jury is, its usefulness is limited by the fact that the inquiry says nothing about how split the jury is on the merits (e.g., jurors facing an 11–1 split may still all respond to a *Lowenfield* inquiry by saying that more deliberation will not help if the one holdout juror is clearly unwilling to change their mind). Second, a judge may allow the parties' counsel to interview the jurors after a hung jury mistrial is declared. Edd Peyton & Escarlet Escobar, *What Do Jurors Think? Using Post-Trial Jury Interviews to Find What Is Important in Trial*, ABA (Aug. 23, 2018), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2018/what-do-jurors-think-using-post-trial-jury-interviews-to-find-what-is-important-in-trial/ [https://perma.cc/RG3Z-S42K]. Counsel can then interview the jurors about the merits and report their findings to the judge through briefs before a retrial occurs. *See, e.g.*, United States v. Wright, 913 F.3d 364, 378 n.3 (3d Cir. 2019) ("The Government asserted that in the first trial, jurors voted 7–5 for acquittal, and in the second trial, voted 8–4 for conviction. . . . [T]he Government said it obtained [these numbers] by speaking with the jurors."). Still, since the judge must rely on counsel to obtain this information, it is prone to being unreliable. *See, e.g.*, United States v. Wright, No. 14-292, 2017 WL 1179006, at *5 (W.D. Pa. Mar. 30, 2017) ("[A]lthough the parties have made representations regarding the breakdown of jury votes in the two trials in this case, the Court will not rely on those representations in its analysis. The Court finds that counsels' post-trial discussions with jurors are unreliable, as evidenced by the disagreement between counsel in this case regarding the final jury counts.").

are not given appropriate weight under the current Rule 29 insufficient evidence standard.

While a significant shift on paper, this balancing already seems to be happening behind the scenes. Once more, *Penn* is illustrative. Before conducting the third trial, Judge Brimmer summoned Assistant Attorney General Johnathan Kanter, head of the DOJ's Antitrust Division, to have him explain to the court why the government thought they could still win convictions after two hung juries.[94] A clearly annoyed Judge Brimmer emphasized how burdensome a third trial would be:

> If the government thinks that the 10 defendants and their attorneys and my staff and another group of jurors should spend six weeks retrying this case after the government has failed in two attempts to convict even one defendant, then certainly Mr. Kanter has the time to come to Denver and explain to me why the Department of Justice thinks that that is an appropriate thing to do.[95]

The government, not wanting to annoy the judge any further, subsequently dropped charges on five of the ten original defendants.[96] This simplification of the case likely increased the probability of a conviction and likely made Judge Brimmer more comfortable proceeding with the case.

Of course, much of this is speculation. None of these comments or weighing of the burdens and benefits of a retrial made it into Judge Brimmer's Rule 29 ruling, as the standard prohibits any such weighing of evidence that would not be in the "light most favorable" to the government. Yet, despite the standard prohibiting such balancing, it is hard to imagine that these concerns did not factor into Judge Brimmer's analysis, and it is interesting to wonder whether he would have miraculously shifted his perspective on the sufficiency of the evidence had Kanter refused to meet with him or if five of the ten defendants were not dropped from the case. Whether or not these DOJ concessions played a part in Judge Brimmer's ruling, it is clear that the current standard does not allow a judge to overtly balance all of the benefits and burdens of a retrial. The proposed new Rule 29 standard avoids this smoke-and-mirrors act. Instead, a judge may explore all the evidence openly when deciding whether it is appropriate to allow a retrial after a hung jury.

IV. APPLICATION TO STATES

While this Note has focused on federal courts, the proposed new Rule 29 standard could apply to state courts as well. Currently, at least twenty-

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[94] Henderson, *supra* note 4.

[95] Henderson, *supra* note 1.

[96] Henderson, *supra* note 4.

eight states[97] explicitly allow judges to acquit defendants after a hung jury mistrial.[98] All twenty-eight of these states use an insufficient evidence

[97] ALA. R. CRIM. P. 20.3(b)(1); ALASKA R. CRIM. 29(b); COLO. R. CRIM. P. 29(c); CONN. PRACTICE BOOK § 42-50; DEL. SUPER. CT. CRIM. R. P. 29(c); FLA. R. CRIM. P. 3.380(c); HAW. R. PENAL P. 29(c); IDAHO CRIM. R. 29(c)(1)–(2); IND. R. TRIAL P. 50(A)(6), (B); IOWA R. CRIM. P. 2.19(7)(c); KAN. STAT. ANN. § 22-3419(3); KY. R. CRIM. P. 10.24; ME. R. UNIFIED CRIM. P. 29(b); MASS. R. CRIM. P. 25(b)(1); MINN. CT. R. 26.03 subd. 18(3)(a), (d); MO. SUP. CT. R. 27.07(c); N.J. CT. R. 3:18-2; N.Y. CRIM. PROC. LAW § 290.10(1); N.C. GEN. STAT. § 15A-1227(a)(4); N.D. R. CRIM. P. 29(c)(1); OHIO CRIM. R. 29(C); 234 PA. R. CRIM. P. 606(A)(3); R.I. SUPER. CT. R. CRIM. P. 29(a)(2) (allowing motions for judgment of acquittal only before submission to jury, but also allowing ruling on those motions to be reserved and decided after jury discharge); TENN. R. CRIM. P. 29(e)(1); VT. R. CRIM. P. 29(c); VA. SUP. CT. R. 3A:15(a); W. VA. R. CRIM. P. 29(c); WYO. R. CRIM. P. 29(c).

For an analysis and compilation of the various motion for judgment of acquittal procedures used by states with a focus on *pre-verdict* judgments of acquittal, see generally MARIE LEARY & LAURAL L. HOOPER, FED. JUD. CTR., STATE COURT PROCEDURES REGARDING PRE-VERDICT JUDGMENTS OF ACQUITTAL AND THE STATE'S RIGHT TO APPEAL THOSE JUDGMENTS 27–44 (2003), which compiles states' motion for judgment of acquittal statutes. Be wary that some of the statutes have been amended since the report's publication.

[98] There is great variety in states that do not allow motions for judgment of acquittal after a hung jury mistrial. Louisiana does not allow motions for judgment of acquittal in jury trials at all. LA. CODE CRIM. P. 778. Oklahoma does not allow motions for judgment of acquittal in jury trials but does allow the judge to advise the jury to acquit after the close of evidence on either side. OKLA. STAT. tit. 22, § 850. Nevada only allows motions for judgment of acquittal after a guilty verdict. NEV. REV. STAT. § 175.381. Arkansas, California, Georgia, Illinois, Maryland, Mississippi, Montana, Oregon, South Carolina, South Dakota, Texas, and Utah allow motions for acquittal at the close of evidence on either side but before the case is submitted to the jury. ARK. R. CRIM. P. 33.1; CAL. PENAL CODE § 1118.1; GA. CODE ANN. § 17-9-1; 725 ILL. COMP. STAT. 5/115-4(k); MD. CODE ANN., CRIM. PROC. § 6-104(a)(1), (b)(1); MISS. R. CRIM. P. 21(a)–(b); MONT. CODE ANN. § 46-16-403; OR. REV. STAT. § 136.445; S.C. R. CRIM. P. 143(a); S.D. CODIFIED LAWS § 23A-23-1; TEX. CODE CRIM. PROC. ANN. art. 45.032; UTAH R. CRIM. P. 17(o). Arizona, Michigan, Nebraska, New Hampshire, New Mexico, Washington, and Wisconsin allow motions for judgment of acquittal after the close of evidence on either side or after a verdict. ARIZ. R. CRIM. P. 20(a), (b); MICH. CT. R. 6.419(A), (C); State v. Combs, 900 N.W.2d 473, 480–81 (Neb. 2017); State v. Spinale, 937 A.2d 938, 945 (N.H. 2007); State v. Martinez, 503 P.3d 313, 317 (N.M. 2021); State v. Beckwith, No. 75962-1-I, 2018 WL 2203297, at *2 (Wash. Ct. App. May 14, 2018); WIS. STAT. § 805.14(3)–(5). The use of the term "verdict" in these immediately preceding statutes, rules, and cases implicitly prohibits a judge from unilaterally acquitting a defendant after a hung jury mistrial due to a hung jury not being a verdict. *Hung Jury*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see, e.g.*, *Combs*, 900 N.W.2d at 481 ("Because a motion for judgment of acquittal is a motion for a directed *verdict* [in Nebraska], such a motion logically cannot be made after a trial has ended in a mistrial." (emphasis added)); State v. Breest, 155 A.3d 541, 550 (N.H. 2017) ("[A] hung jury cannot be considered a verdict."); *cf.* FED. R. CRIM. P. 29(c)(1) (distinguishing a verdict and jury discharge after a hung jury mistrial by stating that "[a] defendant may move for a judgment of acquittal . . . after a guilty *verdict or after the court discharges the jury*" (emphasis added)).

Still, as stated in Part V, acquittals are unappealable. *See* Evans v. Michigan, 568 U.S. 313, 329 (2013). Could judges in these states that do not allow motions for judgment of acquittal after a hung jury mistrial ignore legal procedures and acquit anyway? The Supreme Court in *Evans v. Michigan* seemed to imply that no legal error is large enough to make an acquittal appealable: "If the concern is that there is no limit to the magnitude of the error that could yield an acquittal, the response is that we have long held as much." *Id.* at 325. Taken to its extreme, the holding could be read as meaning that even statutorily invalid acquittals cannot be appealed. At least one state court has applied this interpretation and denied

standard that is identical, or functionally equivalent to, the standard in Rule 29.[99] And courts in all these states apply the *Jackson* "light most favorable" to the government standard,[100] meaning adopting the new proposed insufficient evidence standard could greatly benefit defendants in these states.

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review of a procedurally dubious acquittal, though the part of the opinion doing so went unpublished. *See, e.g.*, State v. Gearhard, No. 36046-6-III, ¶¶ 25–33 (Wash. Ct. App. June 4, 2020) (holding that while ruling on a directed verdict after a hung jury mistrial may be impermissible under Washington law, the state still cannot appeal the acquittal as it would violate the Supreme Court's jurisprudence on the Double Jeopardy Clause). While one could read the current Double Jeopardy Clause doctrine as allowing a judge to ignore procedural limits on their acquittal power, interpreting *Evans* this way is likely an overstatement, as the Court implies that a state could eliminate faulty acquittals by procedurally limiting when acquittals can be made. 568 U.S. at 329 ("Nothing obligates a jurisdiction to afford its trial courts the power to grant a midtrial acquittal, and at least two States disallow the practice.").

[99] ALA. R. CRIM. P. 20.3 committee comments; ALASKA R. CRIM. 29(a); COLO. R. CRIM. P. 29(a); CONN. PRACTICE BOOK § 42-50; DEL. SUPER. CT. CRIM. R. P. 29(a); FLA. R. CRIM. P. 3.380(a); HAW. R. PENAL P. 29(a); IDAHO CRIM. R. 29(a); IND. R. TRIAL P. 50(A); IOWA R. CRIM. P. 2.19(8)(a); KAN. STAT. ANN. § 22-3419(1); KY. R. CRIM. P. 10.24; ME. R. UNIFIED CRIM. P. 29(a); MASS. R. CRIM. P. 25(a); MINN. CT. R. 26.03 subd. 18(1)(a); MO. SUP. CT. R. 27.07(a); N.J. CT. R. 3:18-1; N.Y. CRIM. PROC. LAW § 290.10(1); N.C. GEN. STAT. ANN. § 15A-1227(a); N.D. R. CRIM. P. 29(a); OHIO CRIM. R. 29(A); PA. R. CRIM. P. 606(A); R.I. SUPER. CT. R. CRIM. P. 29(a)(1); TENN. R. CRIM. P. 29(b); VT. R. CRIM. P. 29(a); VA. SUP. CT. R. 3A:15(a); W. VA. R. CRIM. P. 29(a); WYO. R. CRIM. P. 29(a).

[100] *See, e.g.*, *Ex parte* Burton, 783 So. 2d 887, 891 (Ala. 2000); Hentzner v. State, 613 P.2d 821, 823 (Alaska 1980); McCoy v. People, 442 P.3d 379, 392 (Colo. 2019); State v. Perkins, 856 A.2d 917, 938 (Conn. 2004); Cline v. State, 720 A.2d 891, 892 (Del. 1998); Sievers v. State, 355 So. 3d 871, 883 (Fla. 2022); State v. Hicks, 148 P.3d 493, 502 (Haw. 2006); State v. Goggin, 333 P.3d 112, 116 (Idaho 2014); State v. Williams, 695 N.W.2d 23, 28 (Iowa 2005); State v. Dinh Loc Ta, 290 P.3d 652, 657 (Kan. 2012); Commonwealth v. Sawhill, 660 S.W.2d 3, 4 (Ky. 1983); State v. Stinson, 751 A.2d 1011, 1013 (Me. 2000); Commonwealth v. Chhim, 851 N.E.2d 422, 429 (Mass. 2006); State v. Slaughter, 691 N.W.2d 70, 75 (Minn. 2005); State v. Thompson, 147 S.W.3d 150, 155 (Mo. Ct. App. 2004); State v. Lodzinski, 265 A.3d 36, 52 (N.J. 2021); People v. Phillips, 256 A.D.2d 733, 735 (N.Y. App. Div. 1998); State v. Shelly, 638 S.E.2d 516, 523 (N.C. Ct. App. 2007); State v. Hafner, 587 N.W.2d 177, 182 (N.D. 1998); State v. Spaulding, 89 N.E.3d 554, 585 (Ohio 2016); Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000); State v. Valdez, 267 A.3d 638, 643 (R.I. 2022); State v. Collier, 411 S.W.3d 886, 893 (Tenn. 2013); State v. O'Keefe, 208 A.3d 249, 252 (Vt. 2019); Wagoner v. Commonwealth, 756 S.E.2d 165, 174 (Va. Ct. App. 2014); State v. Vilela, 792 S.E.2d 22, 32 (W. Va. 2016); Bean v. State, 373 P.3d 372, 386 (Wyo. 2016).

Despite this uniformity, states are under no constitutional obligation to apply the "light most favorable" standard. *Jackson* simply sets the constitutional minimum, allowing states to adopt more lenient standards. *See, e.g.*, Watson v. State, 204 S.W.3d 404, 412 (Tex. Crim. App. 2006) ("[W]hile *Jackson v. Virginia* does impose upon the states a constitutionally minimum legal sufficiency standard, it does not (and could not, consistent with principles of federalism) prevent the states from applying sufficiency standards that are more solicitous of defendants' rights."). Texas, for example, at one point applied a two-part "sufficiency of the evidence" test. For evidence to be sufficient to convict, it had to not only be (1) legally sufficient under the *Jackson* "light most favorable" test but also (2) factually sufficient, which involved the state court considering all the evidence neutrally to determine whether a guilty verdict would be "so against the great weight and preponderance of the evidence to be manifestly unjust." *See* Clewis v. State, 922 S.W.2d 136, 132–33 (Tex. Crim. App. 1996). Yet Texas later overruled itself, finding that it had been applying the factual sufficiency test so deferentially that it had become redundant to the *Jackson* legal sufficiency test. State v. Brooks, 323 S.W.3d 893, 900–02 (Tex. Crim. App. 2010).

For defendants left in the lurch of undue retrials post-hung jury, the impact of a new insufficient evidence standard could be even greater in state courts than in federal courts. The federal court system only has roughly 3,200 criminal trials per year, while the state court system has roughly 54,000 criminal trials.[101] State courts also have a hung jury rate of 6.2%, more than doubling the federal hung jury rate of 2.1%–3.0%.[102] This means that a new insufficient evidence standard for hung jury mistrials would have far more application in state courts than federal courts, increasing its overall impact.

Beyond the general statistics, application of the proposed insufficient evidence standard in state courts would have an immense impact on individual defendants facing multiple hung jury retrials, as states seem to be much more willing to retry defendants over and over again.[103] The Curtis Flowers saga is a salient example.

Flowers was charged with capital murder in Mississippi.[104] His first trial resulted in a conviction and death sentence but was reversed and remanded by the Mississippi Supreme Court due to several instances of prosecutorial misconduct.[105] Throughout the trial, the prosecutor had impermissibly referenced crimes irrelevant to the case,[106] asked baseless impeaching questions during cross-examination,[107] and alluded to unadmitted evidence in their closing argument,[108] all of which cumulatively prejudiced Flowers's right to a fair trial.[109] His second trial also resulted in a conviction and death sentence but was again reversed due to the same prosecutorial misconduct as in the first trial.[110] The prosecutor again impermissibly referenced other crimes irrelevant to the case,[111] again asked baseless impeaching questions during cross-examination,[112] and again alluded to unadmitted evidence in

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[101] Ostrom et al., *supra* note 16, at 757.

[102] HANNAFORD-AGOR ET AL., *supra* note 37, at 22, 25.

[103] Federal prosecutors are guided by the DOJ's *Justice Manual*, which states that prosecution should commence only if "the admissible evidence will probably be sufficient to obtain and sustain a conviction." DOJ, Just. Manual § 9-27.220 (2023). This has been interpreted as requiring the prosecutor to have a "good-faith belief they have at least a 50% chance of winning if they go to trial." Perlman & Koenig, *supra* note 8. Since multiple hung juries indicate a less than 50% chance of winning at trial, federal cases are rarely tried more than twice. *See id.* State prosecutors need not abide by these federal principles.

[104] Flowers v. State, 773 So. 2d 309, 313 (Miss. 2000).

[105] *Id.* at 318–34.

[106] *Id.* at 318–25.

[107] *Id.* at 326–29.

[108] *Id.* at 329–30.

[109] *Id.* at 333–34.

[110] Flowers v. State, 842 So. 2d 531, 539–56 (Miss. 2003).

[111] *Id.* at 539–50.

[112] *Id.* at 551–53.

their closing argument.[113] Flowers's third trial—again—resulted in a conviction and death sentence and again was reversed and remanded due to prosecutorial misconduct, this time for using peremptory strikes in a racially discriminatory manner.[114] He was then tried a fourth time, resulting in a hung jury.[115] He was tried a fifth time; the jury hung *again*.[116] He was tried a *sixth* and final time, resulting in a conviction and death sentence.[117]

Flowers appealed, arguing that he should be acquitted based on insufficient evidence to convict.[118] Intuitively, one would think the procedural history above should matter, as it shows a string of prosecutorial abuse and jury indecision. The state had previously been given five chances to convict Flowers. Yet it could only secure convictions through manipulating either the jury's perception of the evidence or the composition of the jury itself. When those prosecutorial abuses stopped, so did the convictions, as seen by the two hung juries. All of this indicates that the evidence was insufficient to convict.

Yet the Mississippi Supreme Court ignored it all. Like federal courts, Mississippi courts use the *Jackson* insufficient evidence standard, viewing all "evidence consistent with the defendant's guilt in the light most favorable to the State."[119] Thus, the Mississippi Supreme Court simply reviewed the prosecution's evidence and determined that, in the "light most favorable" to the prosecution, it could support Flowers's conviction.[120] There was no mention of past prosecutorial misconduct. No mention of the past two hung juries. All that mattered under the *Jackson* insufficient evidence standard was whether the state had provided evidence that, when viewed in an isolated, biased light, could support the conviction. Under that deliberately selective analysis, Flowers's conviction and death sentence were upheld.

Or at least upheld for the moment. Flowers appealed to the U.S. Supreme Court, and the Court found that the prosecutor had once again impermissibly used peremptory strikes in a racially discriminatory manner.[121] The conviction was, for the fourth time in six trials, reversed and remanded.[122]

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[113] *Id.* at 553–56.

[114] Flowers v. State, 947 So. 2d 910, 916, 939 (Miss. 2007) (citing Batson v. Kentucky, 476 U.S. 79, 100 (1986)).

[115] Flowers v. State, 158 So. 3d 1009, 1023 (Miss. 2014).

[116] *Id.*

[117] *Id.* at 1022.

[118] Brief of Appellant at 8, *Flowers*, 158 So. 3d 1009 (No. 2010-DP-1348-SCT).

[119] *Flowers*, 158 So. 3d at 1039 (quoting Taylor v. State, 110 So. 3d 776, 782 (Miss. 2013)).

[120] *Id.* at 1042.

[121] Flowers v. Mississippi, 139 S. Ct. 2228, 2251 (2019).

[122] *Id.*

The prosecutor was given full discretion to retry the case again.[123] But rather than subject Flowers to a seventh trial, the state gave up. It dropped the charges, citing a lack of credible witnesses.[124] It took six trials—over twenty-three years—for the state to admit it lacked sufficient evidence to convict. Flowers spent nearly all those years in pretrial custody, awaiting seemingly endless retrials.[125] Yet, despite the continuous prosecutorial misconduct and multiple hung juries, the decision to retry Flowers was never taken out of the prosecutor's hands. The *Jackson* "light most favorable" standard blinded judges from seeing anything outside the evidence the prosecutor presented, allowing a prosecutor who had been found multiple times to have engaged in misconduct and repeatedly failed to convince a full jury of Flowers's guilt to decide his fate.

The *Flowers* case is egregious, but not an anomaly. Professor Leonetti notes that multiple retrials of defendants after hung juries in state courts "happen[] relatively often" due to "the virtually unbridled charging discretion afforded [to] prosecutors."[126] The current "light most favorable" standard does nothing to check this unbridled prosecutorial discretion. Only an insufficient evidence standard that allows a judge to view the evidence in a neutral light, weighing the comprehensive benefits and burdens of a new trial, can counteract this prosecutorial abuse and provide relief to defendants.

V. CRITIQUES AND REBUTTALS

Part V addresses two potential critiques of this newly proposed Rule 29 insufficient evidence standard. First, it considers the counterargument that the proposal goes against past Supreme Court precedent regarding Rule 29. Second, it addresses the concern that because of this past precedent, district courts will lack the power to implement a new Rule 29 standard.

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[123] *Id.* at 2274 (Thomas, J., dissenting) ("The State is perfectly free to convict Curtis Flowers again.").

[124] Jason Slotkin, *After 6 Trials, Prosecutors Drop Charges Against Curtis Flowers*, NPR (Sept. 5, 2020, 5:01 PM), https://www.npr.org/2020/09/05/910061573/after-6-trials-prosecutors-drop-charges-against-curtis-flowers [https://perma.cc/AM52-W4UY].

[125] *Id.* Flowers would later win a wrongful imprisonment suit against Mississippi, receiving the statutory maximum of $500,000. Parker Yesko, *Mississippi to Pay Curtis Flowers $500,000 for His Decades Behind Bars*, APM REPS. (Mar. 2, 2021), https://www.apmreports.org/story/2021/03/02/mississippi-to-pay-curtis-flowers-500000-settlement-for-decades-behind-bars [https://perma.cc/9S3Y-WG5F].

[126] Leonetti, *supra* note 30, at 96–100 (giving two more "illustrative cases" in which defendants found themselves continuously retried after a hung jury).

A. Disregard for Precedent

One might argue that this new standard disregards longstanding precedent on how to determine whether evidence supporting a conviction is weak enough to warrant a Rule 29 acquittal. Yet a closer reading of cases where the insufficient evidence standard finds its origin is illuminating. This history shows that the current standard is not only inapplicable to hung juries but also fails to abide by its purpose of preserving the jury's factfinding role.

The standard currently used comes from Justice Stewart's opinion in *Jackson v. Virginia*.[127] Yet Justice Stewart's reason for adopting the standard was based on preserving a jury's *guilty* verdict and is thus wholly inapplicable to the context of a hung jury mistrial. In explaining why a judge must view the government's evidence in the "light most favorable," Justice Stewart stated that "[o]nce a defendant *has been found guilty* of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution."[128] *Glasser v. United States*, the case cited by Justice Stewart as the originator of the "light most favorable" requirement, also emphasized the fact that the jury came to a verdict when establishing the standard: "The *verdict of a jury* must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."[129]

A hung jury is not a verdict. Rather, it is the failure to come to a verdict.[130] This means there is no verdict to "preserve" or "sustain" that requires a court to use such a favorable standard for the government. If courts are truly supposed to preserve the factfinder's role as weigher of the evidence, then they must respect a jury's inability to reach a verdict. As the district court in *Ingram* concluded: "There is great deference shown jury determinations that result in conviction, and the same attitude should prevail when . . . members of a jury disagree so conclusively . . . ."[131] Yet the current standard, in forcing courts to look at the evidence in the "light most favorable" to the government, prevents courts from even acknowledging the jury's inability to reach a verdict. To preserve the jury's factfinding role as *Jackson* demands, the insufficient evidence standard must respect a jury's failure to come to a verdict by considering that failure in its insufficient evidence analysis. Only a standard that drops the "light most favorable"

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[127] 443 U.S. 307, 319 (1979).

[128] *Id.* (first emphasis added) (citing Glasser v. United States, 315 U.S. 60, 80 (1942)).

[129] 315 U.S. at 80 (emphasis added).

[130] *Hung Jury*, *supra* note 98 (defining "hung jury" as "[a] jury that cannot reach a verdict by the required voting margin").

[131] United States v. Ingram, 412 F. Supp. 384, 385–86 (D.D.C. 1976).

requirement allows a judge to preserve the jury's factfinding role in trials that result in a hung jury.

B. Reinterpreting Longstanding Precedent Does Not Work

Another counterargument is that the proposed reinterpretation of Rule 29 will not be accepted by appellate courts. The *Jackson* insufficient evidence standard is longstanding precedent used by every federal circuit and district court after a hung jury.[132] As seen in Part I's discussion about failed attempts to reinterpret the Double Jeopardy Clause's application to hung jury retrials, federal appellate courts are not fond of overturning longstanding precedent even if the original reasoning is faulty.[133] However, a new insufficient evidence standard does not implicate appellate courts whatsoever.

What makes revising the Rule 29 standard different from reinterpreting the Double Jeopardy Clause or inherent authority jurisprudence is that, unlike a Rule 29 acquittal following a conviction, a post-hung jury Rule 29 acquittal cannot be reviewed by an appellate court.[134] The Supreme Court in *United States v. Martin Linen Supply Co.* held that any review of an acquittal after a hung jury mistrial would violate the Double Jeopardy Clause.[135] Furthermore, the Supreme Court has consistently held that this bar on retrial remains in force even if the acquittal was based on legal error.[136] Thus, the

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[132] *See* 26 MOORE ET AL., *supra* note 13, § 629.05.

[133] *See supra* Section I.B.

[134] 26 MOORE ET AL., *supra* note 13, § 629.20. ("[T]here still can be no appeal if the court enters judgment of acquittal when there has been no jury verdict . . . ."). A Rule 29 acquittal was at one point the "only . . . district court ruling that is both absolutely dispositive and entirely unappealable." Sauber & Waldman, *supra* note 14, at 433. This was changed by the Criminal Appeals Act of 1994, which stated that an "order of a district court . . . judgment" could be appealed unless "the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731. Rule 29 was subsequently amended to allow a judge to reserve ruling on a motion for acquittal until after a jury verdict. *See* FED. R. CRIM. P. 29(b). The Advisory Committee of the Federal Rules of Criminal Procedure determined that if the judge granted the motion for acquittal *after* a guilty jury verdict, that acquittal could be appealed without violating the Double Jeopardy Clause as there would be no need for another trial even if the acquittal was reversed. *Id.* R. 29 advisory committee's notes to 1994 amendment. Still, the Advisory Committee was clear that this exception only applies to post-guilty-verdict acquittals, stating, "[T]he government's right to appeal a Rule 29 motion is only preserved where the ruling is reserved *until after the verdict*." *Id.* (emphasis added); *see also* 26 MOORE ET AL., *supra* note 13, § 629.20. ("[T]he United States can appeal if the court grants acquittal *subsequent* to a guilty verdict.").

[135] 430 U.S. 564, 575 (1977) ("[T]he Double Jeopardy Clause bars appeal from an acquittal entered under Rule 29(c) after a jury mistrial . . . .").

[136] Sanabria v. United States, 437 U.S. 54, 78 (1978) ("The trial court's rulings here led to an erroneous resolution in the defendant's favor on the merits of the charge . . . . [T]he Double Jeopardy Clause absolutely bars a second trial in such circumstances."); Evans v. Michigan, 568 U.S. 313, 329 (2013) ("We therefore reiterate: '[A]ny contention that the Double Jeopardy Clause must itself . . . leave

impenetrable Double Jeopardy Clause doctrine that spurns defendants facing hung jury retrials becomes a defendant's greatest weapon under the proposed new Rule 29 standard. If a district court judge acquits a defendant after a hung jury on a Rule 29 motion, appellate courts are powerless to change that acquittal even if they disagree with the insufficient evidence standard used.[137]

CONCLUSION

Legal scholars, judges, and defendants alike have all sought ways to prevent the government from unduly retrying defendants after a hung jury. First, they looked to the Double Jeopardy Clause, but the small and cryptic *Perez* opinion that declared hung jury retrials to not implicate double jeopardy proved too far-reaching and durable to overcome. Then they looked to judges' inherent authority to stop undue retrials. In return, the Supreme Court established a strict test under *Dietz* that made using such inherent authority to stop hung jury retrials all but impossible. Finally, they turned to Rule 29. Despite the promise carried in the Rule to mete out justice to defendants, an insufficient evidence standard that gives no regard to hung juries and is heavily tilted in the government's favor currently stops these efforts.

It does not have to be this way. Rule 29 gives no standard for how to determine the sufficiency of the evidence, the *Jackson* "light most favorable" to the government standard is not applicable to hung jury retrials, and the appellate courts' unwillingness to change this standard is no obstacle due to the unappealable nature of post-hung jury acquittals. Courts need not be at the mercy of the government when deciding whether to conduct a retrial after a hung jury.

We end where we began, with *Penn*. In his hearing with AAG Kanter, Judge Brimmer asked what stops the DOJ from continually trying defendants after a hung jury: "How many times does the department say we believe in

open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a preverdict acquittal that is patently wrong in law.'" (alteration in original) (quoting Smith v. Massachusetts, 543 U.S. 462, 473 (2005))).

[137] State legislatures and courts have tried various means to get around the unappealability of acquittals, such as giving defendants the option to challenge the sufficiency of the evidence but labelling this challenge a "motion for dismissal" and declaring that "dismissal" appealable. *See, e.g.*, N.C. GEN. STAT. § 15A-1227(a), (d) (defining a "motion for dismissal" as a "dismissal for insufficiency of the evidence to sustain a conviction" and claiming that motion may be "reviewable on appeal"). These attempts at procedural wordplay were unanimously rejected by the Supreme Court in *Smalis v. Pennsylvania*, which held that "a judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause" no matter the label. 476 U.S. 140, 142, 144 n.5 (1986) ("[T]he Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.").

our case as opposed to let's look at the evidence?"[138] Kanter responded that he believed "justice will be served" by having another trial.[139]

Though a nice sentiment, this Note contends that an impartial judge—not the government—should decide whether yet another trial will serve "justice." A new Rule 29 insufficient evidence standard that allows judges to review all the evidence in the light in which it was actually seen by the jury—while balancing the benefits and burdens of a new trial—would better ensure justice is served.

[138] Matthew Perlman, *DOJ Told to Think Over 3rd Chicken Price-Fixing Trial*, LAW360 (Apr. 15, 2022, 7:17 PM), https://www.law360.com/articles/1484588/doj-told-to-think-over-3rd-chicken-price-fixing-trial [https://perma.cc/38V5-FEU9].

[139] *Id.*