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NO LONGER PLAYING *NEVILS* ADVOCATE: THE NINTH CIRCUIT CONSTRICTS APPELLATE REVIEW FOR INSUFFICIENCY OF EVIDENCE CLAIMS

Abstract: On March 19, 2010, the U.S. Court of Appeals for the Ninth Circuit in *United States v. Nevils* held that a reviewing court hearing criminal appeals on the grounds of insufficient evidence must resolve all factual conflicts in favor of the prosecution and ask only if any rational juror could have found the defendant guilty beyond a reasonable doubt. This decision makes it more difficult for the Ninth Circuit to reverse criminal convictions and ultimately preserves the jury's proper role as the trier of fact.

INTRODUCTION

Earl Nevils was convicted of being a felon in possession of firearms and ammunition, and he appealed his conviction to the U.S. Court of Appeals for the Ninth Circuit.¹ He argued that the government did not present enough evidence that he knowingly possessed firearms and ammunition.² Agreeing with Nevils, a divided panel found that there was insufficient evidence that he had possessed the weapons knowingly, and it reversed the judgment and remanded the case for a judgment of acquittal (*Nevils I*).³ Shortly after the panel's decision, the U.S. Supreme Court heard arguments in *McDaniel v. Brown*, a case in which the Ninth Circuit had affirmed the granting of a habeas petition due to insufficient evidence.⁴ Finding "ample" evidence of guilt, the Court in *McDaniel* reversed the Ninth Circuit in January 2010.⁵ After the Supreme Court heard arguments in *McDaniel*, the Ninth Circuit reheard Nevils's case en banc, and then following the Court's decision in *McDaniel*, the en banc court ruled in Nevils's case that the government presented sufficient evidence and affirmed his conviction (*Nevils II*).⁶ The conflicting conclusions of the panel and en banc court stem from

¹ *United States v. Nevils (Nevils I)*, 548 F.3d 802, 805 (9th Cir. 2008).

² *Id.*

³ *Id.* at 811.

⁴ 130 S. Ct. 665, 675 (2010).

⁵ *Id.* at 665, 675.

⁶ *United States v. Nevils (Nevils II)*, 598 F.3d 1158, 1158, 1170 (9th Cir. 2010).

different applications of the same legal standard for insufficiency of evidence.⁷ Which application a court chooses will drastically impact the roles for juries and appellate courts in future appeals.⁸

Part I of this Comment narrates Nevils's crime and follows its journey through the legal system.⁹ Part II examines how the Ninth Circuit panel and en banc court reached different conclusions from supposedly the same legal standard and examines the divergent effects of each.¹⁰ Finally, Part III explores the policy interests in this debate and argues that for reasons philosophical, practical, and constitutional, it is wise to limit an appellate court's role in evaluating the sufficiency of evidence.¹¹

I. NEVILS'S ARREST AND APPEALS

The *Nevils I* panel and the *Nevils II* en banc court both stated essentially the same facts.¹² On the night of April 14, 2003, Officers Jason De La Cova and Jason Clauss of the Los Angeles Police Department followed a suspect into an apartment complex in a high-crime neighborhood of south Los Angeles.¹³ Upon entering the complex, the officers encountered an unlocked apartment, which the man whom they were pursuing had considered entering.¹⁴

Inside, the officers saw, alone and asleep on a couch, the defendant Earl Nevils.¹⁵ A loaded Tec-9 semi-automatic weapon with a round chambered sat on his lap, and a .40-caliber handgun, also loaded, also with a round chambered, leaned against his right leg.¹⁶ Only a foot from the couch was "a coffee table, laden with marijuana packaged for sale, ecstasy, over \$500 in cash, and a cell-phone."¹⁷ Weapons drawn, Officers De La Cova and Clauss swept the room and approached Nevils.¹⁸ As they drew near, he awoke and, according to the testimony of Officer Clauss, "appeared like he was going to, you know, grab towards his lap and then he stopped and put his hands up."¹⁹ Officer De

⁷ See *id.* at 1170; *Nevils I*, 548 F.3d at 811.

⁸ See *Nevils II*, 598 F.3d at 1170; *Nevils I*, 548 F.3d at 811.

⁹ See *infra* notes 12–47 and accompanying text.

¹⁰ See *infra* notes 48–99 and accompanying text.

¹¹ See *infra* notes 100–118 and accompanying text.

¹² See *infra* notes 13–25 and accompanying text.

¹³ *United States v. Nevils (Nevils II)*, 598 F.3d 1158, 1161–62 (9th Cir. 2010).

¹⁴ *Id.* at 1162.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *United States v. Nevils (Nevils I)*, 548 F.3d 802, 804 (9th Cir. 2008).

¹⁹ *Nevils II*, 598 F.3d at 1162.

La Cova, however, mentioned no such pause, instead testifying that the events were “almost immediate” and that Nevils “jumped up as a startled jump and rolled over onto the ground.”²⁰ After his arrest, Nevils told a police sergeant: “I don’t believe this shit. Those motherfuckers left me sleeping and didn’t wake me.”²¹

Although Nevils was only booked on the charge of possession of marijuana for sale, he was eventually charged, tried and convicted in federal court on a single count of being a felon in possession of firearms and ammunition.²² The crime has three elements: “(1) that the defendant was a convicted felon; (2) that the defendant was in knowing possession of a firearm; and (3) that the firearm was in or affecting interstate commerce.”²³ Nevils twice sought acquittal due to insufficient evidence under Federal Rule of Criminal Procedure 29.²⁴ Both motions were denied.²⁵

Following his conviction, Nevils appealed to the Ninth Circuit.²⁶ The *Nevils I* panel stated, “We review the entire record, ‘[v]iewing the evidence in the light most favorable to the government,’ and ‘must determine whether any rational jury could have found [the defendant] guilty of each element of the crime beyond a reasonable doubt.’”²⁷ The panel acknowledged that it “must presume that the trier of fact resolved any conflicting inferences in favor of the prosecution.”²⁸

Nevils argued that he could not have knowingly possessed the weapons for three reasons: (1) he was asleep when the police arrived; (2) he had become drunk earlier in the day; and (3) there was no evidence tying him to the firearms or other items in the apartment besides his presence in the room.²⁹ In contrast, the government emphasized: (1) Nevils was in “actual possession” of the firearms because they were touching him; (2) a prior arrest in the same apartment shortly before this incident tied him to the location; (3) his gang affiliation supported the jury’s finding; (4) one officer testified that Nevils had reached for

²⁰ *Nevils I*, 548 F.3d at 804.

²¹ *Id.*

²² *Id.* at 804–05; see 18 U.S.C. § 922(g)(1) (2006).

²³ 18 U.S.C. § 922(g)(1); *Nevils I*, 548 F.3d at 805.

²⁴ *Nevils I*, 548 F.3d at 805. Rule 29 provides for a motion for acquittal if the court believes that the evidence is insufficient to sustain a conviction; the defendant can move for acquittal before or after submission to the jury. FED. R. CRIM. P. 29.

²⁵ *Nevils I*, 548 F.3d at 805.

²⁶ *Id.* at 803.

²⁷ *Id.* at 805 (quoting *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1224 (9th Cir. 2007)).

²⁸ *Id.* (quoting *United States v. Johnson*, 229 F.3d 891, 894 (9th Cir. 2000)).

²⁹ *Id.*

his lap; and (5) his statements to the sergeant after his arrest showed “consciousness of guilt.”³⁰

The *Nevils I* panel focused on Nevils’s first argument.³¹ Rejecting the “tenuous distinction between ‘actual’ and ‘constructive’ possession,” the panel vigorously asserted that knowing possession cannot be proved by “mere proximity.”³² Thus the panel’s inquiry into possession “require[d] a showing that Nevils had knowledge of the firearms and the ability and intention to control them.”³³ The fact that the two firearms, each loaded, each with a round chambered, were touching him became less significant.³⁴ The “close physical proximity of the guns to Nevils” was disregarded as “the special circumstance” of Nevils’s case.³⁵ The panel decided that “the pivotal circumstance” was that “*Nevils was asleep*.”³⁶

Because the inquiry focused on his *knowing* possession and whether he could “control” the firearms, the panel held, “[T]he fact that the firearms were physically touching him is not sufficient to show that he was conscious of their presence”³⁷ The physical contact tended “to make knowing possession more likely, but without evidence that Nevils was aware of [the weapons’] presence, this fact [was] not enough.”³⁸ Consequently, the *Nevils I* panel reversed Nevils’s conviction due to insufficient evidence as to his knowing possession.³⁹

The U.S. Supreme Court’s per curiam opinion in *McDaniel v. Brown* on January 11, 2010 cast doubt upon the soundness of *Nevils I*.⁴⁰ Regarding the Ninth Circuit’s application of the *Jackson* standard, discussed more fully in Part II, the Supreme Court in *McDaniel* wrote, “The Court of Appeals acknowledged that it must review the evidence in the light most favorable to the prosecution, but the court’s recitation of inconsistencies in the testimony shows it failed to do that.”⁴¹ An open approach to the evidence, like the one criticized in *McDaniel*, ex-

³⁰ *Id.* at 805, 808, 808–09.

³¹ *Nevils I*, 548 F.3d at 807.

³² *Id.* at 806; *see also* United States v. Chambers, 918 F.2d 1455, 1459 (9th Cir. 1990) (holding that mere proximity, presence and association are insufficient to prove possession).

³³ *Nevils I*, 548 F.3d at 806.

³⁴ *See Nevils II*, 598 F.3d at 1162; *Nevils I*, 548 F.3d at 806.

³⁵ *See Nevils I*, 548 F.3d at 808.

³⁶ *Id.* at 807.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 811.

⁴⁰ *See* 130 S. Ct. 665, 667, 673 (2010); *Nevils II*, 598 F.3d at 1167.

⁴¹ 130 S. Ct. at 673. For an introduction to the *Jackson* standard, *see infra* notes 49–63 and accompanying text.

pands an appellate court's role because it will inevitably cause the appellate court to consider questions traditionally reserved for the trier of fact, such as "resolv[ing] conflicts in the testimony, . . . weigh[ing] the evidence, and . . . draw[ing] reasonable inferences from basic facts to ultimate facts."⁴² The *Nevils I* panel attempted to expand the appellate court's role in a fashion similar to the Ninth Circuit decision reversed in *McDaniel*.⁴³ Although the Court in *McDaniel* referred to a different Ninth Circuit decision and a separate set of facts, there is little doubt that the *McDaniel* decision strongly influenced the en banc rehearing of Nevils's case, decided only two months later on March 19, 2010.⁴⁴

On rehearing, the en banc court went through a short and straightforward narrative of the evidence, as the government had argued it in *Nevils I*.⁴⁵ The court then held that "[t]his evidence, construed in favor of the government, raises the reasonable inference that Nevils was stationed in Apartment 6 and armed with two loaded firearms in order to protect the drugs and cash in the apartment when he fell asleep on his watch."⁴⁶ Having made this inference, the court concluded that "a rational juror could find beyond a reasonable doubt that Nevils had knowledge of the weapons in his possession."⁴⁷

II. THE CONFLICTING APPLICATIONS OF JACKSON IN *NEVILS I* AND *NEVILS II*

The key difference between the *Nevils I* panel and the *Nevils II* court lies in their application of the standard of appellate review.⁴⁸ Both agreed that the standard laid down by the U.S. Supreme Court's 1979 decision in *Jackson v. Virginia* governed Nevils's insufficiency of evidence claim.⁴⁹ Thus the troubling question is how the *Nevils I* panel examined essentially the same facts and employed the same legal standard as the *Nevils II* court, but reached an entirely different result.⁵⁰

⁴² See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

⁴³ Compare *Brown v. Farwell*, 525 F.3d 787, 796–98 (9th Cir. 2008) (finding inconsistencies in the trial record and reversing conviction), with *Nevils I*, 548 F.3d at 806–10, 811 (considering alternative inferences from the evidence and reversing conviction).

⁴⁴ See *McDaniel*, 130 S. Ct. at 673; *Nevils II*, 598 F.3d at 1158, 1167.

⁴⁵ See *Nevils II*, 598 F.3d at 1169; *Nevils I*, 548 F.3d at 805.

⁴⁶ *Nevils II*, 598 F.3d at 1169.

⁴⁷ *Id.*

⁴⁸ See *United States v. Nevils (Nevils II)*, 598 F.3d 1158, 1170 (9th Cir. 2010); *United States v. Nevils (Nevils I)*, 548 F.3d 802, 805 (9th Cir. 2008).

⁴⁹ See 443 U.S. 307, 319 (1979); *Nevils II*, 598 F.3d at 1161; *Nevils I*, 548 F.3d at 805.

⁵⁰ See *Nevils II*, 598 F.3d at 1170; *Nevils I*, 548 F.3d at 811. Technically, *Nevils I* quoted not *Jackson*, but *United States v. Esquivel-Ortega* and *United States v. Johnson*. *United States v.*

Both cases are governed by the standard set forth in *Jackson*.⁵¹ In *Jackson*, the Supreme Court held that when reviewing an insufficiency of evidence claim, “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.”⁵² Embedded within that holding are two critical steps.⁵³ First, the court must resolve all conflicts in the evidence in favor of the government.⁵⁴ Second, the court must ask whether “*any* rational trier of fact” with such a view of the evidence could have found the defendant guilty beyond a reasonable doubt.⁵⁵ A court does not ask “whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.”⁵⁶ Even if certain inferences are possible and even if the prosecution’s inference does not affirmatively appear in the record, a reviewing court must assume that the “trier of fact resolved any such conflicts in favor of the prosecution.”⁵⁷ The test is designed to place the responsibility for determining all facts in the hands of the trier of fact.⁵⁸

Before *Jackson*, the standard set forth in *Thompson v. Louisville*, a 1960 U.S. Supreme Court case, governed insufficiency of evidence claims.⁵⁹ In *Thompson*, the Court held that a conviction based on no evidence whatsoever would be constitutionally problematic.⁶⁰ Eighteen years later in *Jackson*, the Court found that this “‘no evidence’ rule” was “simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt” because even a “mere modicum” of relevant evidence could uphold a conviction.⁶¹ If any amount of evidence, no matter how small, could satisfy the *Thompson* standard, it was obviously divorced from any relation to reasonable doubt.⁶² Although the *Jackson* standard may seem to favor the government disproportion-

Esquivel-Ortega, 484 F.3d 1221, 1225 (9th Cir. 2007); *United States v. Johnson*, 229 F.3d 891, 894 (9th Cir. 2000). The language quoted from these cases, however, was almost identical to *Jackson*, and for the reader’s ease, the “*Jackson* standard” is referred to when discussing the legal standard used in *Nevels I. Jackson*, 443 U.S. at 319.

⁵¹ *Nevels II*, 598 F.3d at 1164; *Nevels I*, 548 F.3d at 805.

⁵² 443 U.S. at 319.

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* (citation omitted).

⁵⁷ *Id.* at 326.

⁵⁸ *See Jackson*, 443 U.S. at 319.

⁵⁹ *Id.* at 314; *Thompson v. Louisville*, 362 U.S. 199, 199, 206 (1960).

⁶⁰ 362 U.S. at 206.

⁶¹ *Jackson*, 443 U.S. at 320 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 202 (1964) (Warren, C.J., dissenting)).

⁶² *See id.*

ately, it in fact increased protection from convictions based on insufficient evidence by focusing the inquiry on reasonable doubt.⁶³

The court in *Nevils I* did not exactly apply the *Jackson* standard, but rather a modified version of *Jackson* found in the 1992 Ninth Circuit case *United States v. Vasquez-Chan*.⁶⁴ In *Vasquez-Chan*, the Ninth Circuit reversed the defendants' convictions for conspiracy to possess with intent to distribute five kilograms or more of cocaine because the court determined that the proof was "based in large part on their mere proximity to the drugs," which was a "legally insufficient basis for a rational jury to conclude beyond a reasonable doubt that they were guilty"⁶⁵ Although *Vasquez-Chan* used the language of *Jackson*, the *Nevils I* panel used *Vasquez-Chan* to create a different standard than that set forth in *Jackson*: "When there is an innocent explanation for a defendant's conduct as well as one that suggests that the defendant was engaged in wrongdoing, the government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one."⁶⁶ Using this standard, the *Nevils I* panel, without giving a possible innocent explanation, held that Nevils's "'mere presence' and gang affiliation" did not constitute sufficient evidence for a rational jury to infer knowing possession beyond a reasonable doubt.⁶⁷ This ultimate conclusion did not rely on language from *Jackson*, which is mostly deferential to the government, but rather on the "innocent explanation" rule of *Vasquez-Chan*, which imposed a new burden on the government not found in *Jackson*.⁶⁸

Judge Jay Bybee's spirited dissent in *Nevils I* attacked the majority's problematic approach to *Jackson*.⁶⁹ He emphasized that the burden imposed by *Jackson* is "extraordinarily high," that "ample circumstantial evidence" supported the jury's verdict beyond a reasonable doubt, and that any explanation other than guilt was "extraordinarily implausible."⁷⁰ Judge Bybee posited two possible "innocent explanations" implied by the court's decision.⁷¹ The first was that Nevils, drunk and

⁶³ See *id.* at 319.

⁶⁴ See *Nevils I*, 548 F.3d at 810, 811; *United States v. Vasquez-Chan*, 978 F.2d 546, 549 (9th Cir. 1992).

⁶⁵ 978 F.2d at 546, 553.

⁶⁶ See *Jackson*, 443 U.S. at 319; *Nevils I*, 548 F.3d at 810 (quoting *Vasquez-Chan*, 978 F.2d at 549).

⁶⁷ 548 F.3d at 811.

⁶⁸ See *Jackson*, 443 U.S. at 319; *Nevils I*, 548 F.3d at 810, 811.

⁶⁹ See *Nevils I*, 548 F.3d at 811–15 (Bybee, J., dissenting).

⁷⁰ *Id.* at 812.

⁷¹ See *id.* at 812–13.

asleep, was brought into Apartment 6.⁷² Then, somehow without waking Nevils, one or more unknown persons entered Apartment 6 with cash, drugs packaged for sale, a cell phone and two loaded firearms, each with a round chambered.⁷³ The persons decided to leave the firearms on top of and against the still-sleeping, still-drunk Nevils, along with items of enormous value next to him.⁷⁴ The second theory is that the drug dealers abandoned all of these items on purpose.⁷⁵ As Bybee described it: “[T]hey set up a scarecrow of sorts—arming the unconscious Nevils and propping him up on the couch to look menacing. This plan, of course, was foiled by the arrival of the police, who weren’t impressed with the sleeping Nevils.”⁷⁶ Because the majority did not specify any possible innocent explanations, it could not directly answer the dissent’s characterization of the possibilities.⁷⁷ For Bybee, the absurdity of these innocent explanations demonstrated that a reasonable juror in fact could have found Nevils guilty beyond a reasonable doubt.⁷⁸ That conclusion would mean that the government had satisfied the *Jackson* standard and that the *Nevils I* panel should have affirmed the conviction.⁷⁹ Bybee’s dissent proved prescient because he criticized the same misapplication of *Jackson* corrected by *McDaniel v. Brown* and *Nevils II*.⁸⁰

In the Ninth Circuit’s en banc rehearing of Nevils’s case, the penitent court recited facts almost identical to those of *Nevils I*, though it mentioned the chambered round, a detail that had only appeared in Judge Bybee’s dissent in *Nevils I*.⁸¹ The *Jackson* standard was quoted again, but gone was the emphasis on “mere proximity” and the new duty from *Vasquez-Chan* that an innocent explanation required the government to prove that the guilty, and not the innocent, explanation was correct.⁸² In fact, the court emphasized that the government did not need to “rule out every hypothesis except that of guilt beyond a reasonable doubt.”⁸³ Unlike the *Nevils I* panel, the *Nevils II* court would not second-guess the jury’s assessment of the testimony of Nevils’s

⁷² *Id.*

⁷³ *Id.* at 813.

⁷⁴ *Id.*

⁷⁵ *Nevils I*, 548 F.3d at 813 (Bybee, J., dissenting).

⁷⁶ *See id.*

⁷⁷ *See id.* at 804–11 (majority opinion).

⁷⁸ *See id.* at 814 (Bybee, J., dissenting).

⁷⁹ *See id.*

⁸⁰ *See* *McDaniel v. Brown*, 130 S. Ct. 665, 673 (2010); *Nevils II*, 598 F.3d at 1167; *Nevils I*, 548 F.3d at 811–15 (Bybee, J., dissenting).

⁸¹ *Nevils II*, 598 F.3d at 1162; *Nevils I*, 548 F.3d at 804, 811.

⁸² *See Nevils II*, 598 F.3d at 1161; *Nevils I*, 548 F.3d at 806, 810.

⁸³ *Nevils II*, 598 F.3d at 1164.

companion that he had entered the apartment without any firearms and was asleep until the police arrived.⁸⁴ Although the government presented no evidence that contradicted that claim, the jury was free to disbelieve the witness, and *Jackson* forbade the appellate court from assessing a witness's credibility.⁸⁵ Thus on rehearing, the *Nevils II* court did not examine her credibility and assumed that the jury did not believe her testimony.⁸⁶ This deferential approach demonstrates the court's embrace of *McDaniel* and rejection of the *Nevils I* panel's application of *Jackson*.⁸⁷

To support its interpretation of the *Jackson* standard, the *Nevils II* court cited the policy proposition in *Jackson* that "a court of appeals may not usurp the role of the finder of fact."⁸⁸ Additionally, the court emphasized that the reviewing court "may not ask whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt."⁸⁹ The court plainly expressed that it now understood *Jackson* to impose a high standard and that the court ought not grapple in the dark for possible holes in the government's proof.⁹⁰

The *Nevils II* court recognized that the Ninth Circuit "[has] struggled with the correct approach to construing evidence at trial."⁹¹ Indeed, the court said it had "strayed from [its] obligation under step one of the *Jackson* standard to construe the evidence at trial in the light most favorable to the prosecution."⁹² The *Nevils II* court traced this mutation of the *Jackson* standard back to *United States v. Bishop*, in which the Ninth Circuit in 1992 considered "the evidence in favor of an innocent explanation" and then determined whether that explanation was "equally or more reasonable than the government's incriminating explanation."⁹³ In light of *McDaniel*, the *Nevils II* court then reviewed other cases that followed *Bishop* and overruled all cases, including *Vasquez-Chan*, that construed evidence in favor of innocence rather than in fa-

⁸⁴ *Id.* at 1169–70; see *Nevils I*, 548 F.3d at 804–05, 807.

⁸⁵ *Nevils II*, 598 F.3d at 1170.

⁸⁶ See *id.* at 1169–70.

⁸⁷ See *id.* at 1168–69; *Nevils I*, 548 F.3d at 811.

⁸⁸ *Nevils II*, 598 F.3d at 1164.

⁸⁹ *Id.* (internal quotation marks omitted).

⁹⁰ See *id.* at 1165–67.

⁹¹ *Id.* at 1165.

⁹² *Id.*

⁹³ *Id.* at 1166; see *United States v. Bishop*, 959 F.2d 820, 830 (9th Cir. 1992).

vor of the prosecution, and ordered reversal if the innocent construction was as likely as the government's.⁹⁴

Despite purporting to apply the same legal standard, the *Nevils I* panel and *Nevils II* court substantively applied two different readings of *Jackson*.⁹⁵ On the one hand, the *Nevils I* panel had loosely interpreted *Jackson*'s requirement to construe evidence in favor of the prosecution, continuing to question pieces of evidence and look for alternate possibilities that favored innocence instead of guilt.⁹⁶ On the other hand, the *Nevils II* court insisted that *Jackson* forbade them from such an exploration of the evidence.⁹⁷ The narrowed inquiry of the *Nevils II* court favored the government because it increased the burden on Nevils to identify "evidence so supportive of innocence that no rational trier of fact could find guilt beyond a reasonable doubt."⁹⁸ The court's deferential approach to the jury's conviction of Nevils demonstrates a new reading of *Jackson* for the Ninth Circuit, which restricts the appellate court's role and makes reversals of convictions for insufficiency of evidence much more difficult.⁹⁹

III. INSUFFICIENT EVIDENCE CLAIMS AND THE TRIER OF FACT'S ROLE IN THE CRIMINAL JUSTICE SYSTEM

Appeals on the grounds of insufficient evidence demand that the reviewing court determine its proper role.¹⁰⁰ Between conviction and appeal, the burden of proof effectively shifts from the government to the convicted defendant, and this recalibration largely shapes the reviewing court's role.¹⁰¹ The meaning of "reasonable doubt" does not change from trial to appeal, but the *Jackson* standard, which controls appellate judges, constricts their ability to find reasonable doubt and reverse a conviction.¹⁰² If all evidence is viewed in favor of the prosecution, no room remains for considering alternative evidentiary interpretations or information not in the trial record.¹⁰³ The Supreme Court's

⁹⁴ *Nevils II*, 598 F.3d at 1167; see, e.g. *United States v. Corral-Gastelum*, 240 F.3d 1181, 1184–85 (9th Cir. 2001); *United States v. Wiseman*, 25 F.3d 862, 866–67 (9th Cir. 1994); *Vasquez-Chan*, 978 F.2d at 551.

⁹⁵ See *Nevils II*, 598 F.3d at 1170; *Nevils I*, 548 F.3d at 811.

⁹⁶ See *Nevils I*, 548 F.3d at 810–11.

⁹⁷ See *Nevils II*, 598 F.3d at 1164.

⁹⁸ See *id.* at 1169.

⁹⁹ See *id.*

¹⁰⁰ See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¹⁰¹ See *McDaniel v. Brown*, 130 S. Ct. 665, 673 (2010).

¹⁰² See *Jackson*, 443 U.S. at 319.

¹⁰³ See *McDaniel*, 130 S. Ct. at 672, 673.

own emphasis on “any rational trier of fact” demonstrates that this was not a process intended to allow frequent reversals.¹⁰⁴ Practically, to encourage finality and efficiency in the judicial system, the application of *Jackson* in *Nevils II* should result in fewer reversals and less time spent reviewing appeals in the Ninth Circuit.¹⁰⁵

Beyond practical considerations, there is also a jurisprudential rationale for narrowly reviewing appeals for insufficient evidence.¹⁰⁶ The determination of guilt is made by a jury.¹⁰⁷ The Constitution guarantees the right to a jury for all criminal trials.¹⁰⁸ There is still a role for appellate courts, but the trier of fact, the trial judge, and the appellate court each perform only the task for which each is best suited.¹⁰⁹ The trier of fact determines guilt or innocence and their anterior questions of fact, like weighing evidence or determining a witness’s credibility, and the appellate court stands ready to correct any errors of law that may have been made at trial.¹¹⁰

The *Nevils I* panel likely did not believe it was usurping the role of the trier of fact.¹¹¹ One could argue that the court actually made a decision of law because it only applied the legal standard to the established facts.¹¹² That argument would be sophistic, however, because the application of the legal standard to the facts implies the weighing of evidence and the creation of a narrative.¹¹³ Applying the legal standard, given to the jury by the trial judge, to those factual conclusions is essentially the jury’s key duty.¹¹⁴ Any interference with that process disrupts the jury’s role in the criminal justice system. Therefore, the standard to reverse a conviction due to insufficient evidence should be difficult to satisfy.¹¹⁵

When the reviewing court attempts to sort out the facts of an entire trial, it can only look at strands of evidence and cannot easily interpret the evidence as a whole or determine the importance and credibil-

¹⁰⁴ See *Jackson*, 443 U.S. at 319.

¹⁰⁵ See *United States v. Nevils (Nevils II)*, 598 F.3d 1158, 1164–65 (9th Cir. 2010).

¹⁰⁶ See *Jackson*, 443 U.S. at 319.

¹⁰⁷ U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

¹⁰⁸ *Id.* amend. VI. The Sixth Amendment provides for trial “by an impartial jury of the State and district wherein the crime shall have been committed.” *Id.* amend. VI.

¹⁰⁹ See *Jackson*, 443 U.S. at 319.

¹¹⁰ See *id.*; *Nevils II*, 598 F.3d at 1167.

¹¹¹ See *United States v. Nevils (Nevils I)*, 548 F.3d 802, 805 (9th Cir. 2008).

¹¹² See *id.* at 807.

¹¹³ See *Jackson*, 443 U.S. at 319; *Nevils I*, 548 F.3d at 807.

¹¹⁴ See *Jackson*, 443 U.S. at 319.

¹¹⁵ See *id.*

ity of testimony.¹¹⁶ For example, the majority in *Nevils I* became so fixated on Nevils's slumber and the testimony of a single witness of dubious credibility that it ignored the tremendous amounts of circumstantial and direct evidence tying Nevils to the crime.¹¹⁷ In contrast, by properly applying *Jackson* in *Nevils II*, the Ninth Circuit removed itself from territory traditionally reserved for the jury and, as a result, allowed the jury to make inferences from the evidence.¹¹⁸

CONCLUSION

The *Nevils I* panel and the en banc court that reheard the case in *Nevils II* both considered the sufficiency of evidence of the petitioner's conviction for being a felon in possession of firearms and ammunition. Both cases employed the same test from *Jackson v. Virginia*, which called for the court to view all evidence in the light most favorable to the government and then ask whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. After the first hearing of the petitioner's case, the *Nevils I* panel decided that the evidence could not survive such an inquiry because an innocent explanation was possible, but the en banc rehearing determined that there had been sufficient evidence. The majority in *Nevils I* erred because it usurped the role of the trier of fact. By selectively examining the evidence and positing alternate scenarios, the panel not only failed to follow *Jackson* but also abandoned its duty to correct only errors of law and encroached upon the jury's role as trier of fact. Fortunately, the en banc court fixed this error. Although a deferential review of the evidence may cause an occasional injustice, it will, on the whole, preserve the principle that those in the best possible position to judge the evidence, the triers of fact, should make decisions of guilt and innocence.

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¹¹⁶ See *Nevils II*, 598 F.3d at 1165 (discussing *United States v. Nelson*, 419 F.2d 1237, 1245 (9th Cir. 1969)).

¹¹⁷ See *Nevils I*, 548 F.3d at 812 (Bybee, J., dissenting).

¹¹⁸ See *Nevils II*, 598 F.3d at 1170.