PROSECUTOR APPEALS AFTER ACQUITTAL AND THE OSCAR PISTORIUS CASE

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"In a criminal case the Court of Appeals doesn't have the power to review anything I do on a clearly erroneous standard or otherwise."[1]
– U.S. District Court Judge Sprizzo, Southern District of New York

I. INTRODUCTION

Ask almost anyone on the street what "double jeopardy" means and most will tell you that it means: A person is tried for a crime but the jury acquits them, so the government cannot prosecute them again.[2] This principle

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1. United States v. Lynch, 181 F.3d 330, 337 n.10 (2d. Cir. 1999) (Cabranes, J., dissenting) (citing United States v. Lynch, 162 F.3d 732, 746 (2d. Cir. 1998) (Feinburg, J., dissenting) (quoting from transcript)).

2. Since this Article was written during the age of COVID-19 and social distancing, the Author had to take a "virtual" poll.

falls in line with what parents teach their children: I decide whether you are guilty, and if I find you guilty based on the evidence presented, you will be punished. Once you are punished, the lesson has been learned, and we can move on. Or, after such inquiry, if I find you not guilty, we'll move on, and the matter has ended. There's a similar finality to the process of crime and punishment as described in the following English poem and nursery rhyme:

> The Queen of Hearts, she made some tarts,
> All on a summer's day;
> The knave of Hearts, he stole the tarts,
> And took them clean away.
> The King of Hearts
> Called for the tarts,
> And beat the Knave full sore;
> The Knave of Hearts
> Brought back the tarts,
> And vowed he'd steal no more.[3]

In this story, the Knave was caught; he was determined to have stolen the tarts and was subsequently punished by the King.[4] The Knave will not be tried again—in fact, he has vowed to steal no more.[5] Now change the facts. The Knave is caught and charged with theft for stealing the tarts. The King finds that the Knave took the tarts; however, the King erroneously believes he cannot punish the Knave without proving an additional element, i.e., it must be proven the Knave knew the tarts belonged to the Queen.[6] The King cannot prove this second element of the offense, so the King concludes the Knave cannot be punished. The Queen, knowing the King has erred, wishes to appeal. Can the Queen appeal, or is the King's decision final?

The United States criminal justice system is founded on double jeopardy principles, and in this area of the law, has consistently valued finality over accuracy and truth at trial. A prosecutor cannot appeal after a jury, or a judge in a bench trial, finds the defendant "not guilty" even if the judge made a legal error during the trial.[7] South Africa, along with other countries such as Canada, India, New Zealand, and Sri Lanka, allow for such prosecutor appeals.[8] This Article will evaluate the current status of prosecutor appeals after an acquittal or finding of guilt at the trial level and contrast this policy to the one in South Africa by evaluating the case of *State v. Oscar Leonard*

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3. *Queen of Hearts*, LIT2GO: NURSERY RHYMES AND TRADITIONAL POEMS, https://etc.usf.edu/lit2go/74/nursery-rhymes-and-traditional-poems/5335/the-queen-of-hearts/ (last visited Nov. 14, 2020).

4. *See id.*

5. *See id.*

6. *See id.*

7. *E.g.*, Green v. United States, 355 U.S. 184, 187 (1957).

8. *See, e.g.*, R. v. B. (G.), [1990] 2 S.C.R. 57 (Can. S.C.); Matteo Rizzolli, Why Public Prosecutors Cannot Appeal Acquittals (Feb. 13, 2008) (unpublished manuscript), https://ssrn.com/abstract=1092885.

Carl Pistorius.[9] Part II of this Article examines double jeopardy principles in the United States, in particular the history of prosecutor appeals in various scenarios to include both acquittal and conviction.[10] Part III will contrast the United States' view of prosecutor appeals with South Africa's and identify how these differences played out in the *Pistorius* case.[11] Lastly, Part IV will advocate for a re-examination of the United States' double jeopardy principles as it pertains to the overall prohibition of prosecutor appeals in the acquittal context.[12]

II. DOUBLE JEOPARDY AND PROSECUTOR APPEALS IN THE UNITED STATES

In the United States, the prosecution can only appeal a criminal judgment if such appeal complies with the Double Jeopardy Clause, and the prosecution is granted statutory authority to appeal in that particular circumstance.[13] Congress has provided authority for federal government appeals in criminal cases and describes such authority in the Criminal Appeals Act.[14] The Act allows for courts of appeals to have jurisdiction over appeals "from a decision, judgment, or order of a district court dismissing an indictment or information . . . except that no appeal shall lie where the [D]ouble [J]eopardy [C]lause of the United States Constitution prohibits further prosecution."[15]

A prosecutor cannot appeal an acquittal if the jury deliberated on the evidence presented at trial and found the defendant not guilty.[16]

A. A Jury Deliberates After a Jury Trial and Acquits the Defendant

The basic double jeopardy principle is that a defendant who is acquitted of an offense may not be prosecuted again for the same offense.[17] Specifically, the bar on re-prosecution after an acquittal applies to a not guilty verdict[18] or an "implied acquittal" by the jury.[19] According to *Green v. United*

9. *See supra* Part I (summarizing the current status of prosecutor appeals after an acquittal); State v. Pistorius 2014 (42) ZAGPPHC 3280 (SA), http://www.saflii.org/za/cases/ZAGPPHC/2014/793.pdf.

10. *See infra* Part II (summarizing double jeopardy principles in the United States).

11. *See infra* Part III (contrasting the United States' view of prosecutor appeals with South Africa's view).

12. *See infra* Part IV (advocating for a reexamination of the United States' double jeopardy principles).

13. United States v. Scott, 437 U.S. 82, 84–85, 94 (1978).

14. *Id.* at 85; Criminal Appeals Act, ch. 2564, 34 Stat. 1246 (current version at 18 U.S.C. § 3731).

15. 18 U.S.C. § 3731.

16. *Scott*, 437 U.S. at 91.

17. Ball v. United States, 163 U.S. 662, 669 (1896). "[W]e are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing." *Id.*

18. *Id.*

19. Green v. United States, 355 U.S. 184, 190 (1957).

States, an implied acquittal occurs when a defendant is charged with the greater offense of first-degree murder (killing while perpetrating a felony, like arson), and the jury convicts him of the lesser offense of second-degree murder (killing with malice aforethought).[20] The conviction of second-degree murder implies that the jury acquitted him of the greater offense of murder.[21] In that circumstance, if the defendant appeals the second-degree murder conviction, the prosecutor can reprosecute him only on second-degree murder and not first-degree murder.[22] Therefore, the constitutional prohibition against double jeopardy protects the defendant in this instance, and the prosecution cannot appeal the jury's decision to remain silent and impliedly acquit the defendant of the first-degree murder charge.[23]

B. A Judge Deliberates After a Bench Trial and Acquits the Defendant

Similarly, a prosecutor cannot appeal an acquittal if the judge deliberated on the evidence presented at trial and found the defendant not guilty.[24]

In *United States v. Lynch*, the defendants were tried after being charged with criminal contempt.[25] The defendants were aware of a court injunction that prohibited them from impeding or obstructing traffic at the Women's Medical Pavilion in Dobbs Ferry, New York.[26] When warned by a police officer that they were in violation of the court injunction, they remained seated (thereby blocking traffic) and were arrested.[27] The trial judge held a trial, heard testimony from both defendants, and watched a video of the defendants' actions on the day in question.[28] The trial judge found that the

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20. *Id.* at 189–90.
21. *Id.* at 190.
22. *Id.* at 198.
23. *Id.* Contrast the majority's thoughts about the jury's silence on the first-degree murder charge with the dissent's opinion:

> Surely the silence of the jury is not, contrary to the Court's suggestion, to be interpreted as an express finding that the defendant is not guilty of the greater offense. All that can with confidence be said is that the jury was in fact silent. Every trial lawyer and every trial judge knows that jury verdicts are not logical products, and are due to considerations that preclude accurate guessing or logical deduction. Insofar as state cases speak of the jury's silence as an "acquittal," they give a fictional description of a legal result: that when a defendant is found guilty of a lesser offense under an indictment charging a more serious one, and he is content to accept this conviction, the State may not again prosecute him for the greater offense. A very different situation is presented, with considerations persuasive of a different legal result, when the defendant is not content with his conviction, but appeals and obtains a reversal. Due regard for these additional considerations is not met by stating, as though it were a self-evident proposition, that the jury's silence has, for all purposes, "acquitted" the defendant.

Id. at 214 (Frankfurter, J., dissenting).
24. *Id.* at 192.
25. *See* United States v. Lynch, 952 F. Supp. 167 (S.D.N.Y. 1997).
26. *Id.*
27. *Id.* at 168.
28. *Id.*

government had not proved beyond a reasonable doubt the willfulness element as required in a criminal contempt charge.[29]

> In this case, the Court finds as a matter of fact that Lynch's and Moscinski's sincere, genuine, objectively based and, indeed, conscience-driven religious belief, precludes a finding of willfulness. Willful conduct, when used in the criminal context, generally means deliberate conduct done with a bad purpose either to disobey or to disregard the law. That kind of conduct is not present here. . . . Not only does their sincere religious belief render their conduct lacking in the willfulness which criminal contempt requires, but also, the nature of that conduct, which is purely passive as the videotape shows, and which is at the outermost limits of expressive conduct that is not constitutionally protected, is so minimally obstructive as to justify the exercise of the prerogative of leniency. The charge is therefore dismissed.[30]

The prosecutor appealed the trial judge's finding of not guilty, arguing that the district court erred in deciding there was no willfulness on the part of the defendants because they held sincere religious beliefs, and alternatively, that the trial judge could not exercise a prerogative of leniency to acquit if the government had proved its case beyond a reasonable doubt.[31] The defendants argued that, regardless of any error the trial judge might have made in deciding not guilty, the prosecution cannot appeal based upon the Fifth Amendment's Double Jeopardy Clause.[32]

In response to the defendants' claim that the prosecutor could not appeal the judge's not guilty verdict, the government argued that the judgment of acquittal was based solely on a legal error—the trial judge erroneously believed the government had to prove bad intent or malice, which is not a required element of criminal contempt.[33] Moreover, the Double Jeopardy Clause does not bar appellate review in such situations when there has been an error of law.[34]

The Second Circuit Court of Appeals felt they lacked appellate jurisdiction to review the case and dismissed the appeal due to double jeopardy concerns.[35] The appellate court believed the trial judge did not find that the fourth element of criminal contempt (willfulness) had been proven beyond a reasonable doubt.[36] Moreover, the appellate court agreed that the trial judge had erred in defining willfulness as requiring bad intent.[37]

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29. *Id.* at 170.
30. *Id.* at 171–72 (citation omitted).
31. United States v. Lynch, 162 F.3d 732, 733 (2d. Cir. 1998).
32. *Id.*
33. *Id.* at 734.
34. *Id.*
35. *Id.* at 736.
36. *Id.* at 734.
37. *Id.* at 735.

However, while the court identified the trial judge's error, the court was unwilling to permit the prosecutor's appeal.[38]

> Having decided that the aspect of the judgment challenged by the government is in its essential nature factual rather than legal, we must conclude (contrary to the government's third argument) that the Double Jeopardy Clause bars this appeal. We lack jurisdiction over the prosecution's appeal if "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." Here, the factual element is willfulness, and the district court explicitly resolved it in favor of Lynch and Moscinski. It does not matter that this factual finding was arrived at under the influence of an erroneous view of the law. "[T]he fact that the acquittal may result from . . . erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character." . . . We therefore conclude that we lack jurisdiction to consider this appeal under 18 U.S.C. § 3731 and the Double Jeopardy Clause.[39]

The prosecution asked for a rehearing en banc, and the petition for rehearing was denied.[40]

> The case before us, then, is an archetypal one for reliance on the Double Jeopardy Clause, demanding the most punctilious regard for the Fifth Amendment rights of these defendants. Since I have concluded that the government did not have the ability under the Constitution to have a second chance to convict Lynch and Moscinski, I believe all the more that we are wise in not giving the government a third opportunity to try to convict them upon rehearing en banc.[41]

What makes *Lynch* so unique is how the trial judge prepared a special finding of fact and "stated that it was resolving an element of the offense—willfulness—in favor of the defendants," which made it possible for the prosecution to identify the error of law.[42] In this situation, an appellate court arguably could have reviewed the case and found that, had the trial judge properly defined "willfulness" and not mistakenly relied on the absence of bad purpose, the appellate court could have reversed the "no willfulness" determination and found the defendants guilty of criminal contempt without having to remand for a retrial.[43]

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38. *Id.*
39. *Id.* (alteration in original) (citations omitted).
40. United States v. Lynch, 181 F.3d 330, 330 (2d Cir. 1999).
41. *Id.* at 332 (Sac, J., concurring in the denial of rehearing en banc).
42. *Id.* at 334 (citing United States v. Lynch, 952 F. Supp. 167, 170 (S.D.N.Y. 1997)).
43. *Id.* at 337 (Cabranes, J., dissenting).

The chances of this occurring in the United States are limited. Defendants generally choose jury trials over bench trials, and juries tend to issue general guilty/not guilty verdicts.[44] Rarely does the public—or at least those interested in the findings of fact that led to the verdict—have the opportunity to view how jurors arrived at their decision and whether they erroneously applied the law to the facts.[45]

C. A Judge Dismisses Charges at the Close of the Prosecution's Case-in-Chief and Acquits the Defendant

In *Smalis v. Pennsylvania*, the defendants chose a bench trial and challenged the sufficiency of the evidence at the close of the government's case.[46] The Supreme Court interpreted the defendants' motion/demurrer as asking the trial judge to determine whether there was sufficient evidence to establish the defendants' factual guilt.[47] The trial judge's ruling that insufficient evidence existed to establish the defendants' guilt was considered an acquittal, and the prosecution was unable to appeal.[48] "[T]he Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'"[49]

D. A Judge Makes an Erroneous Legal Ruling and the Jury Acquits the Defendant

Double jeopardy principles are followed even when a trial judge erroneously instructs the jury to acquit. In *Fong Foo v. United States*, the trial judge interrupted the government's case and directed the jury to return verdicts of acquittal.[50] The judge believed the prosecutor had improperly spoken to one of his witnesses during a recess and refreshed the witness's memory despite the fact that the witness was midway through direct examination.[51] The judge also felt the government's witnesses lacked credibility.[52] Despite the judge's lack of power to direct a verdict of acquittal

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44. *See supra* notes 17–19 and accompanying text (discussing the basics of the double jeopardy principle).

45. *See supra* note 23 and accompanying text (comparing the Court's thoughts on the jury's silence for the first-degree murder charge with the opinion of the dissent).

46. Smalis v. Pennsylvania, 476 U.S. 140, 141 (1986). The defendants filed a demurrer under Pennsylvania Rule of Criminal Procedure 1124(a)(1). *Id.* at 140.

47. *Id.* at 144.

48. *Id.*

49. *Id.* at 145–46 (citing United States v. Martin Linen Supply Co., 430 U.S. 564, 570 (1977)).

50. Fong Foo v. United States, 369 U.S. 141, 142 (1962).

51. *Id.* at 142.

52. *Id.*

or to enter a judgment for these reasons, the judge brought the jury into the courtroom and directed the verdict of acquittal.[53] The Supreme Court found, despite the erroneous instruction, "the verdict of acquittal was final, and could not be reviewed without putting [the defendant] twice in jeopardy, and thereby violating the [C]onstitution."[54]

Despite the Supreme Court's decision in *Fong Foo*, some states permit the prosecution to appeal in these situations, typically to obtain "advisory rulings limited to future cases."[55] The states argue that an advisory opinion is not a retrial, and the Supreme Court in *Fong Foo* did not hold that the Double Jeopardy Clause bars a prosecutor from appealing if the only effect would be an advisory opinion.[56]

In *Sanabria v. United States*, several defendants were charged with 18 U.S.C. § 1955, which makes it a federal offense for five or more persons to conduct an illegal gambling business in violation of the law where the business is located.[57] The indictment alleged that the defendants' gambling business involved betting on both numbers and horse races in violation of a Massachusetts statute.[58] All defendants proceeded to trial.[59] After the defense rested its case, the trial judge erroneously ruled on a motion to exclude evidence based on its interpretation of the indictment, and granted one of the defendant's motion for judgment of acquittal.[60] The trial judge found there was no evidence of that defendant's connection to horse betting.[61] The remaining defendants went before the jury, which found them all guilty.[62] The government appealed the one defendant's acquittal, and the court of appeals vacated the judgment of acquittal and remanded for a new trial.[63] The Supreme Court reversed, finding that even though the legal rulings underlying the acquittal were erroneous, the judgment of acquittal "bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error."[64] A retrial would subject the defendant "to a second trial on the 'same offense' of which he has been acquitted."[65]

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53. *Id.* at 145.

54. *Id.* at 143 (citing United States v. Ball, 163 U.S. 662, 671 (1896)).

55. James A. Strazzella, *The Relationship of Double Jeopardy to Prosecution Appeals*, 73 NOTRE DAME L. REV. 1, 15 (1997). Wyoming is a "leading example"—in addition to Colorado, Connecticut, Indiana, Iowa, Nevada, and Oklahoma. *Id.* at 15, 19.

56. Finch v. United States, 433 U.S. 676, 676 (1977).

57. *See* Sanabria v. United States, 437 U.S. 54 (1978).

58. *Id.* at 57.

59. *Id.*

60. *Id.* at 58–59.

61. *Id.* at 60.

62. *Id.* at 54.

63. *Id.* at 60.

64. *Id.* at 69 (citing United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

65. *Id.* (footnote omitted).

E. A Jury Deadlocks and the Judge Acquits the Defendant

In *United States v. Martin Linen Supply Co.*, the jury deadlocked and could not agree on a verdict.[66] The district court entered judgments of acquittal after the defendant filed its Rule 29(c) motion asking for such acquittal.[67] The trial judge determined the government had not proven all the elements of criminal contempt beyond a reasonable doubt.[68] Since a successful government appeal would reverse the judgments of acquittal and the case would have to be retried, the Supreme Court found the lower court's decision unappealable and final.[69] The Supreme Court determined that the trial judge had truly "acquitted" the defendant, and the trial judge's decision represented "a resolution, correct or not, of some or all of the factual elements of the offense charged."[70]

In these types of cases where the trial judge made an erroneous ruling which led to a jury's finding of acquittal, or the trial judge made an erroneous ruling which led to his or her finding of acquittal in a bench trial, might a legislature permit a prosecutor to appeal the trial court's rulings that led to such an acquittal? And, if the trial judge were overruled at the appellate level, might the prosecution be permitted to retry the acquitted defendant with a correct set of legal rulings or allow the appellate court to overturn the acquittal and find the defendant guilty? Would the Double Jeopardy Clause permit this process if its focus is to eliminate multiple prosecutions rather than limit government appeals—at least those appeals that would not require a new trial?[71]

F. A Jury Deliberates and Finds the Defendant Guilty and the Judge Grants a Judgment of Acquittal

A prosecutor can appeal an acquittal if the jury found the defendant guilty, but the judge reversed the jury's verdict and granted the judgment of acquittal.[72]

The Double Jeopardy Clause does not prohibit the government from appealing an acquittal if the defendant would not be exposed to a second trial if the appeal were successful.[73] The primary purpose of the Double Jeopardy

66. *Martin Linen*, 430 U.S. at 566.
67. *Id.* at 567.
68. *Id.* at 572.
69. *Id.* at 570–71.
70. *Id.* at 571.
71. *See* GEORGE THOMAS, DOUBLE JEOPARDY: THE HISTORY, THE LAW 216 (N.Y.U. Press eds., 1998).
72. United States v. Ching Tang Lo, 447 F.3d 1212, 1220 (9th Cir. 2006) ("[W]e do have jurisdiction when a district court grants an acquittal after a jury reaches a guilty verdict.").
73. United States v. Wilson, 420 U.S. 332, 345 (1975).

Clause is to prevent multiple trials, not government appeals.[74] If a court later dismisses a guilty verdict, the Double Jeopardy Clause does not bar the appeal because a court can later reinstate the guilty verdict without the need for a second trial.[75] The Advisory Committee Notes to Federal Rules of Criminal Procedure Rule 29 recognize:

> [T]he government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. Thus, the government's right to appeal a Rule 29 motion is only preserved where the ruling is reserved until after the verdict.[76]

If a jury returns a guilty verdict, after which the judge grants a defendant's motion for a judgment of acquittal notwithstanding the verdict, the government may appeal the judicial acquittal.[77] In *United States v. Wilson*, the jury listened to the evidence presented at trial and found the defendant guilty.[78] The judge then dismissed the indictment on a post-verdict motion due to unreasonable pre-indictment delay, and the Supreme Court found that the government could appeal.[79] "[T]he constitutional protection against [g]overnment appeals attaches only where there is a danger of subjecting the defendant to a second trial for the same offense . . . ."[80] Therefore, the Supreme Court agreed with the government that since a new trial would not be necessary in this case because the trier of fact had already returned a guilty verdict, the prosecutor should be permitted to appeal any adverse ruling.[81] If the Court was to reverse the judge's decision on appeal, it would merely reinstate the jury's verdict; therefore, the prosecutor's appeal would not offend any foundational double jeopardy principle.[82]

> Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.[83]

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74. Sanabria v. United States, 437 U.S. 54, 63 (citing *Wilson*, 420 U.S. at 332).

75. *Id.*

76. FED. R. CRIM. P. 29 cmt. 1994 Amendments (citing United States v. Martin Linen Supply Co., 430 U.S. 564 (1977)).

77. *Wilson*, 420 U.S. at 336 (noting the rule applies to any post-conviction motion favorable to the defendant, including an acquittal); Smith v. Massachusetts, 543 U.S. 462, 467 (2005).

78. *Wilson*, 420 U.S. at 334.

79. *Id.* at 356.

80. *Id.*

81. *Id.* at 335.

82. *Id.* at 345.

83. *Id.* (citation omitted).

III. DOUBLE JEOPARDY AND PROSECUTOR APPEALS IN SOUTH AFRICA

On February 13, 2013, Oscar Pistorius, a famous Olympic and Paralympic athlete, spent the evening at home with his girlfriend, Reeva Steenkamp.[84] In the early hours of February 14th, Pistorius, a double amputee, shot and killed his girlfriend through the bathroom door.[85] Pistorius was later charged with murder and three firearm offenses before a judge and two assessors.[86] In South Africa, serious criminal cases, such as murder, are tried in the High Court by one judge "with many years of practical experience," and sometimes two assessors, described as experienced people in law, such as "advocates or Magistrates who have retired."[87] The assessors assist the judge in making a decision regarding the defendant's guilt or innocence.[88]

During the trial, the judge and assessors reviewed exhibits, such as phone records, and heard testimony from various witnesses, including neighbors in Pistorius's complex describing what they heard at the time of the incident, expert witnesses who reconstructed the scene, an acoustic engineer, a postmortem examiner, and a doctor who testified that the defendant suffered from a general anxiety disorder.[89]

The trial judge framed the main issue of the case as "whether at the time the accused shot and killed the deceased he had the requisite intention, and if so, whether there was any premeditation."[90] The judge agreed with the defendant's version of events that, while on his stumps, Pistorius fired four shots at the toilet door, then screamed when he realized his girlfriend was not in the bedroom.[91] He then proceeded to break down the bathroom door with a cricket bat, immediately called a friend (Johan Stander), and then called 911 and the complex security.[92] Pistorius testified that he heard what sounded like the bathroom window sliding open and thought it was an intruder.[93] He armed himself with a firearm, told his girlfriend to call the police, and shouted to the intruder to get out.[94] He heard a door slam and could see that the bathroom window was open while the toilet door was closed.[95] He did not know whether the intruder was outside the bathroom window or inside the

84. State v. Pistorius 2014 (42) ZAGPPHC 3280 (SA) at 3281 (S. Afr.), http://www.saflii.org/za/cases/ZAGPPHC/2014/793.pdf.

85. *Id.*

86. *Id.* at 3281–84.

87. *High Court*, THE S. AFR. JUDICIARY, https://www.judiciary.org.za/index.php/about-us/100-high-court (last visited Nov. 14, 2020).

88. *Id.*

89. *Pistorius*, (42) ZAGPPHC at 3290, 3294–96, 3309.

90. *Id.* at 3289.

91. *Id.* at 3287–88, 3296.

92. *Id.* at 3284–85, 3296–3301.

93. *Id.* at 3308.

94. *Id.*

95. *Id.*

bathroom.[96] He heard movement inside the bathroom and thought whoever was in the toilet was coming out to attack him, so he fired four shots at the door.[97]

Upon reviewing all the evidence presented at trial, the judge determined that:

> Viewed in its totality[,] the evidence failed to establish that the accused had the requisite intention to kill the deceased, let alone with premeditation. I am here referring to direct intention [*dolus directus*]. The state clearly has not proved beyond reasonable doubt that the accused is guilty of premeditated murder. There are just not enough facts to support such a finding.[98]

An accused can also be convicted of murder in South Africa under a different theory: *dolus eventualis*.[99] This form of murder does not require an intent to kill, but rather the foresight of the possibility of death occurring and a reconciliation with that foreseen possibility.[100] The trial judge evaluated this form of murder by asking whether Pistorius had subjectively foreseen "that it could be the deceased behind the toilet door[,] and [] [n]otwithstanding the foresight[,] did he then fire the shots, thereby reconciling himself to the possibility that it could be the deceased in the toilet."[101] The trial court determined this was not a case of murder *dolus eventualis*:[102]

> How could the accused reasonably have foreseen that the shots he fired would kill the deceased or whoever was behind the door? Clearly he did not subjectively foresee this as a possibility that he would kill the person behind the door, let alone the deceased, as he thought she was in the bedroom at the time. The version of the accused was that had he intended to kill the person behind the door he would have aimed higher at chest level.[103]

Rather than murder, the trial judge found Pistorius guilty of culpable (negligent) homicide:[104]

> On the facts of this case I am not persuaded that a reasonable person with the accused's disabilities in the same circumstances, would have fired four shots into that small toilet cubicle. Having regard to the size of the toilet and the calibre of the ammunition used in the firearm, a reasonable person with

96. *Id.*
97. *Id.*
98. *Id.* at 3324.
99. Gauteng v. Pistorius 2015 ZASCA 204 (SCA) at para. 26 (S. Afr.), http://www.saflii.org/za/cases/ZASCA/2015/204.pdf.
100. *Id.*
101. *Pistorius*, (42) ZAGPPHC at 3329.
102. *Id.*
103. *Id.* at 3330.
104. *Id.* at 3336.

> the accused's disability and in his position, would have foreseen that if he fired shots at the door, the person inside the toilet might be struck and might die as a result.[105]

Pistorius was sentenced to five years imprisonment for the culpable homicide conviction.[106]

The Director of Public Prosecutions appealed the trial judge's decision, arguing that the court incorrectly applied the principles of legal intention, specifically *dolus eventualis*, and that the appropriate conviction was murder.[107] The five appellate judges hearing the appeal recognized that under South African law, when the accused has been acquitted, the government can only appeal questions of law.[108]

The appellate court agreed with the prosecution that the trial judge had improperly interpreted the *dolus eventualis* form of murder.[109]

> What was required in considering the presence or otherwise of *dolus eventualis* was whether he had foreseen the possible death of the person behind the door and reconciled himself with that event. The conclusion of the trial court that the accused had not foreseen the possibility of death occurring as he had not had the direct intent to kill, shows that an incorrect test was applied.[110]

The trial judge focused on what was reasonably foreseeable at the time Pistorius fired at the bathroom door rather than "whether he actually foresaw that death might occur when he did so."[111] Moreover, the trial judge's focus on whether Pistorius knew the person in the bathroom was Reeva during the discussion of *dolus eventualis* demonstrated that the trial judge incorrectly thought the government needed to prove that Pistorius foresaw that his action of shooting inside the bathroom could cause Reeva's death.[112]

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105. *Id.* at 3335.

106. State v. Pistorius, 2014 ZAGPPHC 1 (SA) at 26 (S. Afr.), http://www.saflii.org/za/cases/ZAGPPHC/2014/924.pdf.

107. Gauteng v. Pistorius, 2015 ZASCA 1 (SA) at 12 (S. Afr.), http://www.saflii.org/za/cases/ZASCA/2015/204.pdf.

108. *Id.* at 4–5 (quoting Criminal Procedure Act 51 of 1977 § 319 (S. Afr.)). The government may not appeal against an acquittal based solely on findings of fact. *Id.* at 13.

> This court cannot interfere, for example, with the factual decision made by the trial court rejecting the State's version that there had been a disagreement between the appellant and the deceased that led the deceased to hide herself in the toilet to escape from him, before being shot. The matter must therefore proceed, as was accepted by the State, on the basis both that its rejected version cannot be reconsidered and that it has not been shown that the accused had acted with the direct intention to kill the deceased.

Id. at 13–14.

109. *Id.* at 23.

110. *Id.* at 17.

111. *Id.* at 16–17.

112. *Id.* at 17–18.

In addition to holding that the principles of *dolus eventualis* were incorrectly applied to the facts, the appellate court also held that the trial court incorrectly applied the legal principles pertaining to circumstantial evidence.[113] The trial judge failed to take into account the evidence of Captain Mangena, a police forensic expert, who testified that Reeva "must have been standing behind the door when she was first shot and then collapsed down towards the toilet bowl."[114] The trial judge also failed to take into account the fact that the Black Talon ammunition Pistorius used would have caused "devastating wounds to any person who might be hit."[115] The trial judge ignored this circumstantial evidence, and the fact that there was nowhere for Reeva to hide in the tiny bathroom, despite being "crucial to a decision on whether the accused, at the time he fired the fatal four shots, must have foreseen, and therefore did foresee, the potentially fatal consequences of his action."[116]

Therefore, the appellate court held that in the interests of justice, because "the inference has to be drawn that the accused acted with *dolus eventualis* when he fired the fatal shots," the conviction of murder should be substituted for the original conviction of culpable homicide.[117] The case was sent back to the trial court for resentencing, and the trial judge sentenced Pistorius to six years imprisonment.[118] Interestingly enough, the appellate court then set aside the trial court's new sentence and resentenced Pistorius to imprisonment for thirteen years and five months.[119]

IV. APPLYING SOUTH AFRICA'S EXCEPTION TO DOUBLE JEOPARDY ALLOWING FOR PROSECUTOR APPEALS TO REVIEW QUESTIONS OF LAW AFTER AN ACQUITTAL TO THE UNITED STATES

Should the United States consider permitting prosecutor appeals in situations like *Green*, *Sanabria*, and *Lynch* where the judge or jury deliberated and acquitted the defendant, and the prosecution sought to appeal

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> In this regard, it is necessary to stress that although a perpetrator's intention to kill must relate to the person killed, this does not mean that a perpetrator must know or appreciate the identity of the victim. . . . What was in issue, therefore, was not whether the accused had foreseen that Reeva might be in the cubicle when he fired the fatal shots at the toilet door but whether there was a person behind the door who might possibly be killed by his actions.

Id. at 18–19.

113. *Id.* at 24. This inquiry was also considered a question of law "because if the proceedings indicate a lack of appreciation of relevant evidence, it becomes a reviewable question of law as to whether this lack precluded the trial judge from effectively interpreting and applying the law." *Id.* at 22 (quoting R v. Roman, 1987 CanLII 119 (Can. Nfld. S.C.)).

114. *Id.* at 22.

115. *Id.* at 23.

116. *Id.* at 28.

117. *Id.* at 30.

118. State v. Pistorius, 2016 ZAGPPHC 4157 (SA) at 4181 (S. Afr.), http://www.saflii.org/za/cases/ZAGPPHC/2016/724.pdf.

an error of law that occurred at the trial level?[120] According to the *Pistorius* case and the criminal procedure rules in South Africa, Canada, and others, the answer should be yes.[121]

Such a prosecutor appeal is only permitted assuming there has been an error of law.[122] Such distinction between the ability to appeal an error of law compared to an error of fact makes sense. If the prosecution was able to appeal a judge or jury's determination of the facts, no acquittal would be final. The prosecution would simply challenge the jury's perspective on the facts—as they undoubtedly would if the jury believed the facts lent themselves to a not guilty verdict—and ask the appellate court to reconsider the facts and hope they come to a different factual conclusion. The facts would repeatedly be analyzed until the prosecution achieved what they had been hoping for all along—a conviction. In an adversarial system, such as the United States, that would prove to be dangerous. Cases might never end because different jurors might have completely different perspectives on the facts presented, and new trials might lend themselves to a greater chance of conviction.

However, limiting a prosecutor appeal after acquittal to an error of law allows for a defendant not to profit from a mistake made by the trial judge in the case. An error of law that occurs at the trial level has nothing to do with the criminal actions of the defendant or how different jurors might have differing opinions on how a determined set of facts apply to the elements of the crime. In a murder trial, it is a jury's job to determine whether the defendant had an intent to kill, not to second guess jury instructions or deliberate as to whether the intent to kill is the correct element in the first place.[123] Correcting an error of law puts the prosecution and defendant on an equal playing field.[124] The facts of the case and the applicable laws are what the jury is presented with at trial; it is the burden of the jury to apply these facts, as they relate to the elements of the offense, and come to a verdict.[125] A jury does not deliberate on errors of law.[126]

The *Green* dissent made a similar point in support of prosecutor appeals when it argued that the government has an interest in "obtaining a trial 'free

120. *See generally* Green v. United States, 355 U.S. 184 (1957); Sanabria v. United States, 437 U.S. 54 (1978); United States v. Lynch, 162 F.3d 732 (2d Cir. 1998).

121. State v. Pistorius 2015 ZASCA 1 (SA) at 5 (S. Afr.), http://www.saflii.org/za/cases/ZASCA/2015/204.pdf; Louise Jordaan, *Appeal by the Prosecution and the Right of the Accused to be Protected Against Double Jeopardy: A Comparative Perspective*, 32 COMPAR. & INT'L L.J. OF S. AFR. 1, 7 (1999) (discussing when a prosecutor appeal is appropriate).

122. Jordaan, *supra* note 121.

123. *See How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), http://americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/jury_rule.

124. *See generally How to Evaluate an Appeal*, SMITH, GAMBRELL & RUSSELL LLP, http://sgrlaw.com/ttl-articles/863/#fnref:1 (last visited Nov. 14, 2020) (discussing the objective standards in appealing questions of law).

125. Apprendi v. New Jersey, 530 U.S. 466, 483 (2000).

126. 3 SIR EDWARD COKE, COMMENTARY IN LITTLETON 466 (John Henry Thomas ed., 1818).

from the corrosion of substantial legal error.'"[127] The *Green* dissent limited their argument for prosecutor appeals to situations in which the defendant chooses to appeal the jury's decision to convict on a lesser-included offense, which would allow the prosecution to then retry the defendant on the greater offense, the original charge.[128] The *Green* dissent believed the defendant then opens the door to "a complete re-examination of the issues in dispute."[129] The dissent pointed to earlier decisions in *Trono v. United States*[130] and *Palko v. Connecticut*[131] to support the idea that the Court was previously willing to allow the prosecution the ability to retry a defendant on all charges (even those that the jury had remained silent on) if the defendant appealed the conviction for the lesser-included offense and obtained a reversal.[132]

Despite the *Green* dissent's attempt to suggest the Supreme Court has sent mixed messages as it applies to prosecutor appeals in the context of the double jeopardy doctrine, the loudest and most consistent message the Supreme Court has sent is this: A mistaken acquittal should be considered an acquittal nonetheless.[133] This stems from their opinion that at the heart of the Double Jeopardy Clause is the idea that defendants should not be subjected to multiple prosecutions for the same offense.[134] If the prosecution was able to appeal an error of law after an acquittal, the defendant would more than likely (if the appellate court agreed there was an error of law) be retried again. However, the court in the *Pistorius* case did not retry the defendant.[135] The prosecutor appealed an error of law (improper murder elements were applied), and the appellate court corrected the law, applied the facts as determined by the trial judge, and found the defendant to have committed murder rather than culpable homicide.[136]

Such a scenario easily played out in South Africa because the trial judge had written a lengthy finding of facts as to why they decided culpable homicide was appropriate rather than murder.[137] In the United States, juries typically use general verdicts—the prosecution (and appellate court) have no

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127. Green v. United States, 355 U.S. 184, 216 (1957) (Frankfurter, J., dissenting) (quoting Palko v. Connecticut, 302 U.S. 319, 328 (1937)).

128. *Id.* at 198, 219.

129. *Id.* at 219.

130. Trono v. United States, 199 U.S. 521, 522, 534 (1905). In *Trono*, the defendants were acquitted of first-degree murder but convicted of the lesser offense of assault. *See id*. The Supreme Court later held that because the defendants appealed the assault conviction, there was no bar to the appellate court reviewing the whole case on the facts and the law and convicting them of second-degree murder. *See id*.

131. *Palko*, 302 U.S. at 321, 328. In *Palko*, the Supreme Court held that it was acceptable for the state prosecutor to appeal the defendant's conviction for second-degree murder, and on retrial convict the defendant of first-degree murder. *Id*.

132. *Green*, 355 U.S. at 215–16.

133. *Id.* at 188.

134. *Id.*

135. Gauteng v. Pistorius 2015 (96) ZASCA 204 (SA) at 1 para. 58 (S. Afr.), http://www.saflii.org/za/cases/ZASCA/2015/204.pdf.

136. *Id.* at 4, 31.

137. *See id.* at 15, 27.

way of knowing how the jury arrived at their decision.[138] Therefore, if the United States appellate courts were to correct the error of law committed at the trial level, the court would have to rely on the record below, sort out the facts, and make their own decisions as to the credibility of the witnesses and evidence because the jury's views on credibility are unknown.[139] What is only known is the jury's ultimate outcome. In the United States, it is more likely the appellate court would apply their own judgment, experience, or perspective to the evidence presented at trial, and apply the facts to the corrected law through their own lens without the benefit of the jury's input.[140] The ability to parse through the trial judge's findings of fact assisted the appellate court in identifying the legal errors and correcting the mistakes.[141] Unfortunately, the lack of a special verdict in the United States allows for a greater chance that the appellate court would substitute their own judgment as to what the correct crime should be, rather than merely correcting the legal errors of the trial and carrying out the jury's actual wishes.[142]

Recognizing the differences between the South African judge-and-assessor system and the United States' jury system, is it still possible to allow prosecutor appeals after acquittal when there has been an error of law?[143] The Supreme Court already allows prosecutors to appeal if the jury convicts and the trial judge reverses and acquits, or the jury never makes a factual finding and the judge dismisses the case.[144] Why allow for prosecutor appeals after guilty verdicts or mistrials and not after faulty acquittals?[145] In this context, the Court has repeatedly stressed the importance of the finality of the not guilty verdict over "getting it right." Allowing the government a second attempt at conviction, if the defendant has already been acquitted, would subject the defendant to "embarrassment, expense and ordeal and compel[] him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[146]

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138. Stephen S. Korniczky & Don W. Martens, *Verdict Forms – A Peek into the "Black Box"*, 23 AIPLA Q.J. 617, 621–22 (1995).

139. *See id*. at 631.

140. *See supra* Part II.B (discussing appellate courts' inability to view how juries arrive at their decisions and whether juries erroneously applied the laws to the facts through general verdicts).

141. *See* State v. Pistorius 2014 (42) ZAGPPHC 3280 (SA) at 3288–89 (S. Afr.), http://www.saflii.org/za/cases/ZAGPPHC/2014/793.pdf.

142. *See supra* Part II.B (discussing how special findings of fact allow the prosecution and appellate court to identify the error of law more easily); *see generally* United States v. O'Looney, 544 F.2d 385 (9th Cir. 1976) (showing special verdicts in criminal cases are not favored).

143. *See supra* Part II (discussing prosecutor appeals in the United States); *see supra* Part III (discussing prosecutor appeals in South Africa).

144. United States v. Scott, 987 F.2d 261, 264 (5th Cir. 1993).

145. *Id.*

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

However, in other contexts, the Court has described the trial process and the prosecutor's role in the trial process as the "search for truth."[147] In fact, the Supreme Court even stated the following in 1986: "[T]he very nature of a [criminal] trial [is] a search for truth."[148] As for the role of the prosecutor:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[149]

If this power to appeal was granted to prosecutors, the benefits of arriving at the truth, seeking justice, and requesting an accurate and fair verdict based on the facts already presented at the first trial must be foremost on the prosecutor's mind. A possible concern is that prosecutors would be so immersed in the adversarial system that they would lose perspective and choose to appeal based upon personal feelings or tunnel-vision thinking that leads to confirmation bias. If the United States were to go the way of Canada, South Africa, and others, the current vindictive prosecution standard would need to be broadened in its application and strengthened as to its consequences.[150]

Currently, defendants can only allege prosecutorial vindictiveness post-trial.[151] Prosecutors are found to be seeking revenge and exhibiting retaliatory behavior when they make charging decisions in only the rarest and narrowest of circumstances.[152] The charging decision, after appeal and prior to the retrial, must have been motivated by a desire to punish the defendant for doing something the law allowed the defendant to do (the defendant's right to appeal).[153] For example, in *Blackledge v. Perry*, the defendant appealed his

147. Nix v. Whiteside, 475 U.S. 157, 166 (1986).

148. *Id.*

149. Berger v. United States, 295 U.S. 78, 88 (1935); Floyd v. State, 902 So.2d 775, 778 (Fla. 2005) ("[A] special role [is] played by the American prosecutor in the search for truth in criminal trials.").

150. *See supra* Part I and note 8 (discussing the differences between procedures in the United States and in other countries such as South Africa).

151. *See* United States v. Goodwin, 457 U.S. 368, 382 (1982) ("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in the prosecution.").

152. *Id.* at 381 ("The conviction in this case may be reversed only if a *presumption* of vindictiveness . . . is unwarranted.").

153. *Id.* at 384.

misdemeanor conviction after trial (something he had a constitutional right to do), and the prosecutor then proceeded to charge him with a felony.[154]

Instead of looking at the prosecutor's internal motivations behind such a decision on an individual case-by-case basis, the Court decided it would presume vindictiveness anytime a prosecutor increased charges post-trial (and after the defendant had exercised a lawful, constitutional right).[155] In contrast, if a prosecutor adds additional charges that carry greater penalties pre-trial and during the "give and take" of plea negotiations, such actions are presumed lawful and fair game.[156] If the United States were to adopt the South African rule and permit prosecutor appeals of an acquittal to correct errors of law, the Court would have to broaden *Blackledge*'s application of prosecutorial vindictiveness and allow defendants the opportunity to allege vindictiveness if the prosecutor appeal was unwarranted (no error of law found) and the prosecutor's motives were purely retaliatory and irrational.[157]

Because prosecutor immunity protects most prosecutors from the consequences of prosecutorial misconduct, the prosecutorial vindictive standard needs to be clarified and utilized in cases in which prosecutors appear to appeal an acquittal simply because they can, and not because of a clear error of law that occurred at trial.[158]

Lastly, the United States should consider the South African rule allowing prosecutor appeals because faulty acquittals should not be considered the same as valid acquittals.[159] If an acquittal is premised on an error of law, it is not truly an acquittal and should be corrected.

The exclusionary rule was created as a remedy to constitutional violations in criminal cases under the theory that excluding evidence derived from a constitutional violation would deter police from committing the same mistake in the future.[160] When prosecutors appeal an acquittal based on an alleged error of law, they are alleging the trial judge has made a mistake.[161] What is the mechanism in place to ensure the judge does not make that mistake in the future if the acquittal cannot be appealed?

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154. *See* Blackledge v. Perry, 417 U.S. 21 (1974); *see, e.g.*, *Goodwin*, 457 U.S. at 373 ("Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to 'presume' an improper vindictive motive.").

155. *Goodwin*, 457 U.S. at 373.

156. *Id.* at 377–78.

157. *Compare* State v. Pistorius, 2015 (1) ZASCA 204 (SA) at 12–13 para. 20–24 (S. Afr.), http://saflii.org/za/cases/ZASCA/2015/204.pdf (explaining that the state may seek leave of court to appeal questions of law), *with Blackledge*, 417 U.S. at 27 ("[T]he Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.'").

158. *See supra* text accompanying note 20 (discussing an implied acquittal).

159. *See Pistorius*, 2015 (1) ZASCA 204 (SA) at 13 para. 23.

160. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914).

161. *See supra* Part IV ("[L]imiting a prosecutor appeal after acquittal to an error of law allows for a defendant not to profit from a mistake made by the trial judge in the case.").

If the prosecutor was given the ability to appeal in such a circumstance, the judge could learn of the error of law from the appellate court; the appellate court could fix the error, and the defendant would not be subjected to a second trial because the appellate court would simply correct the legal error and apply the appropriate and applicable laws based on the facts presented at the trial level. As it currently stands, the trial court does not learn from its mistakes; the same mistakes can be made in future trials dealing with similar offenses, wherein solely the defendant benefits from the trial judge's mistakes.

This rationale for prosecutor appeals justifies certain states' willingness to allow the issuance of appellate advisory opinions after an acquittal in which an error of law was a factor.[162] If the prosecution appeals the error of law, the appellate court does not overturn the acquittal, but rather issues an advisory opinion suggesting to the trial judge that an error of law had been made, i.e., the error of law affected the validity of the acquittal.[163] An alternative suggestion would be to allow appellate courts to create an oversight board comprised of seasoned judges who could review trial decisions on acquittal; this oversight board could alert trial judges when an error has been made. Similar suggestions have been made concerning ways to curb police misconduct (e.g., create police or citizen review boards which could examine questionable law enforcement actions).[164]

Under the current system, has justice been served if the defendant is acquitted permanently due solely to an error of law? Some may argue the defendant has been sufficiently punished by having to undergo one trial (albeit a faulty trial), expend financial resources to pay for defense counsel, and be subjected to embarrassment, anxiety, and concern throughout the process. Some may argue being formally charged and arrested is enough of a deterrent to ensure the defendant does not re-offend—there is little need for an actual conviction and subsequent punishment. Finality trumps the "search for [the] truth" based on the double jeopardy principle.[165]

In reality, if the United States were to allow such prosecutor appeals (if executed correctly and only in cases where a true error of law occurred), the cases would be limited, and trial judges who repeatedly make the same mistakes (particularly in the jury instruction context) would learn from their mistakes. If an error of law is found at the appellate level, the appellate court could correct the error of law and apply the correct standard to the evidence already presented at trial. There would be no need for a retrial, thereby neutralizing the double jeopardy concerns of allowing for multiple trials. The appellate court's deliberations would prove to be easier when reviewing the

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162. *See* Finch v. United States, 433 U.S. 676 (1977).

163. *See* Strazzella, *supra* note 55.

164. *See generally* Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033 (2016) (discussing the creation of civilian review boards).

165. United States v. Wilson, 420 U.S. 332, 343 (1975).

facts from a bench trial rather than jury trial—typically, trial judges do a better job explaining their findings of fact on the record since juries usually return a general verdict.[166] Jury verdicts could be excluded and the prosecutor appeal limited solely to bench trial decisions. Alternatively, if jury verdicts are considered, appellate courts would solely be allowed to apply the evidence presented to the jury to the corrected elements of the offense and avoid any attempt to substitute their own judgments for the jury's verdict. Instituting a "no retrial rule" would be more in step with double jeopardy protections. Appellate courts would need to review the facts presented at trial to prevent a defendant from being subjected to a second trial.

V. CONCLUSION

In conclusion, this Article recommends that the United States consider the South African rule allowing for prosecutor appeals after an acquittal to correct errors of law that occurred at the trial level. As the *Green* dissent suggested, there is a certain amount of fundamental fairness associated with such a rule: If the defendant can appeal a conviction, why can't the prosecution appeal an acquittal if there was an error of law?[167]

The double jeopardy principles espoused by the Supreme Court value finality over the search for the truth.[168] However, the search for the truth should always be paramount in all legal decisions. If the United States were to allow prosecutors the ability to appeal an acquittal, the prosecutorial vindictiveness standard would need to be expanded to include this particular scenario. Prosecutor appeals must only be permitted in instances of true legal error.

Let's revisit the Queen and the Knave of Hearts once more.[169] In the alternate version of this story, the King commits a legal error and the Knave is acquitted of theft. The Queen cannot appeal the legal error. The King's decision of acquittal is final. The question becomes, will the Knave still vow to steal no more even though he went unpunished, or is it much more likely he will steal another tart? Does punishment deter the Knave from recidivism, or does the lack of consequences for his crime make him more likely to steal in the future? More importantly, consider this: If the Knave steals a second

166. Boyde v. California, 494 U.S. 370, 377–79 (1990).

167. Green v. United States, 355 U.S. 184, 214 (1957) (Frankfurter, J., dissenting).

168. *Wilson*, 420 U.S. at 352.

> Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal.

Id.

169. *Queen of Hearts*, *supra* note 3.

tart, is it likely the King will err again? Having never been told of his initial error of law, it is likely the King will err again, and the Knave may be set free a second time.