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Ordering a New Trial After Sustaining Defendant's Motion to Correct Errors Under Indiana Trial Rule 59 Alleging Insufficient Evidence in a Nonjury Trial

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ORDERING A NEW TRIAL AFTER SUSTAINING DEFENDANT'S MOTION TO CORRECT ERRORS UNDER INDIANA TRIAL RULE 59 ALLEGING INSUFFICIENT EVIDENCE IN A NONJURY TRIAL

Indiana Trial Rule 59[1] governs courts' rulings on motions to correct errors. If a court sustains a motion to correct errors, Trial Rule 59 gives it broad discretion in determining the appropriate relief.[2] However, in some circumstances constitutional and policy considerations should limit the exercise of this statutory discretion. For example, when a court sustains a criminal defendant's motion to correct errors alleging insufficient evidence in a nonjury trial, two kinds of relief appear to be available. Trial Rule 59 could be interpreted to permit the court to order either a new judgment under 59(E)(7)[3] or a new trial pursuant to 59(A)[4] and 59(E)(1).[5] Recently in *Eskridge v. State*,[6] the Indiana Supreme Court

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1. IND. TRIAL R. 59. This Rule is made applicable to criminal trials by IND. CRIM. R. 16:

> Trial Rule 59 (Motion to Correct Errors) will apply to criminal proceedings insofar as applicable and when not in conflict with any specific rule adopted by this court for the conduct of criminal procedure.

2. (E) Relief granted on motion to correct errors. The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the issues:

> (1) Grant a new trial;
> (2) Enter final judgment;
> (3) Alter, amend, modify or correct judgment;
> (4) Amend or correct the findings or judgment as provided in Rule 52(b);
> (5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur;
> (6) Grant any other appropriate relief, or make relief subject to condition; or
> (7) In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a non-advisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a nonadvisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence. . . .

IND. TRIAL R. 59(E).

3. IND. TRIAL R. 59(E)(7).

4. (A) Motion to correct errors—When granted. The court upon its own motion or the motion of any of the parties for or against all or any of the parties and upon all or part of the issues shall enter an order for the correction of errors occurring prior to the filing thereof, including, without limitation, the following . . . .

IND. TRIAL R. 59(A).

5. IND. TRIAL R. 59(E)(1).

held that a new trial order was permissible in these circumstances. The court's approval of this relief in a nonjury, criminal case contradicts the explicit language of Trial Rule 59(E)(7), subjects the defendant to double jeopardy and violates basic policies of criminal justice. This note will examine these objections in greater detail.

TRIAL RULE 59

Subsection (E) of Trial Rule 59 enables the court, upon sustaining a motion to correct errors, to "take such action as will cure the error" by ordering any one of several specified remedies or any other appropriate relief.[7] One of the listed remedies is to grant a new trial.[8] The *Eskridge* court relied exclusively on this provision of the rule in upholding the trial court's new trial order.[9] However, subsection (E)(7) appears to limit the general rule of subsection (E)(1)[10] by making new trials unavailable

6. Eskridge v. State, —— Ind. ——, 281 N.E.2d 490 (1972).

Eskridge involved a prosecution for possession of narcotic drug administering paraphernalia with intent to violate a provision of a state statute. IND. CODE § 35-24-1-2 (1971), IND. ANN. STAT. § 10-3520(c) (Supp. 1970). The defendant waived arraignment, pleaded not guilty and waived trial by jury. At trial, the State of Indiana submitted its evidence and rested. Defendant then moved for discharge, which was overruled, and the defendant then rested without submitting any evidence. The court found defendant guilty. Pursuant to Trial Rule 59 defendant subsequently filed a motion to correct errors alleging insufficient evidence of intent. The motion stated:

> There was absolutely no evidence of intent to administer and use narcotic drugs. . . . No narcotics were found and there was no evidence of the requisite intent. . . . This defendant should . . . be discharged . . . .

Brief for Defendant-Appellant at 3-4, 281 N.E.2d 490. The trial court sustained the motion to correct errors. Then, instead of discharging defendant, the trial court ordered a new trial. Defendant subsequently moved for discharge on the grounds that a new trial would place her in double jeopardy, but the motion was overruled by the trial court. Defendant was again tried, found guilty, and sentenced to one to five years in the Indiana State Women's Prison. Defendant then filed her second motion to correct errors, which was overruled. The Indiana Supreme Court in a four to one decision upheld the trial court's ordering of the new trial.

After the first trial, but before the hearing on the defendant's first motion to correct errors, the Indiana Supreme Court reversed, for insufficient evidence of intent, a conviction for violating the same statute under which the defendant in *Eskridge* was charged. Taylor v. State, —— Ind. ——, 267 N.E.2d 383 (1971). In *Taylor,* the court reversed and remanded with an order that the appellant be discharged. The defendant in *Taylor* had been convicted in a nonjury trial by the same trial court in which the defendant in *Eskridge* was being tried. A potential issue in *Eskridge* was the propriety of giving the state a chance to rehabilitate its case in light of the *Taylor* holding. However, the Indiana Supreme Court in *Eskridge* makes no mention of this issue.

7. IND. TRIAL R. 59(E).

8. *Id.* 59(E)(1).

9. Eskridge v. State, —— Ind. ——, ——, 281 N.E.2d 490, 493 (1972).

10. The court apparently reasons that (E)(1) is a blanket grant of authority to a trial court to order a new trial after sustaining a motion to correct errors. This authority would be reviewable only as an abuse of discretion. Under this analysis, (E)(7) would then become a mere list of specific instances wherein this authority could be exercised. However, such an interpretation makes (E)(7) superfluous. Therefore, (E)(7) must be construed as limiting (E)(1), if it is to have any effect at all.

where a court in a nonjury trial determines that the judgment is against the weight of the evidence. Two basic rules of statutory interpretation mandate this conclusion.

First, subsection (E)(7) makes the new judgment compulsory while the new trial remedy under subsection (E)(1) is merely permissive.[11] While (E)(1) simply states that the court *may* "[g]rant a new trial,"[12] (E)(7) specifies instances in which a new trial and in which a new judgment *must* be ordered. Subsection (E)(7) provides that where the decision is against the weight of the evidence the court *shall* order a new trial if the verdict was by jury and a new verdict if the case was tried to the judge alone.

Second, under traditional rules of statutory interpretation the specific provision, (E)(7), must govern the more general (E)(1).[13] This would mean that the rule permits only the entry of a new judgment where the evidence in a nonjury trial is insufficient. Further, interpreting Trial Rule 59 so as not to permit a new trial in these circumstances avoids possible constitutional infirmities of a new trial order.

Double Jeopardy

If, as in *Eskridge*,[14] a defendant's motion to correct errors is based on the prosecution's failure to prove a material element of the offense in a nonjury case, a trial court's decision to order a new trial presents serious double jeopardy problems.[15] "[D]ouble jeopardy is a rule of finality:

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11. This is the position adopted in Justice DeBruler's persuasive dissent in *Eskridge*. —— Ind. at ——, 281 N.E.2d at 494-95.

Trial Rule 59 is among the Indiana Rules of Procedure adopted by the Indiana Supreme Court in 1969 when Justice DeBruler was Chief Justice.

12. Ind. Trial R. 59(E)(1).

13. It is a rule of right reason that general words may be qualified by particular clauses of a statute, but that on the other hand a thing which is given in particular shall not be taken away by general words. . . . [W]here a general intention is expressed in a statute, and the act also expresses a particular intention, incompatible with the general intention, the particular intention shall be considered as an exception.

T. Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law 423 (1857). *See also* F. McCaffrey, Statutory Construction 35-36 (1953).

14. Eskridge v. State, —— Ind. ——, 281 N.E.2d 490 (1972).

15. [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .

U.S. Const. amend. V.

The fifth amendment guarantee against double jeopardy was held enforceable against the states through the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1968). Protection against double jeopardy is also provided by the State of Indiana in its constitution:

No person shall be put in jeopardy twice for the same offense.

Ind. Const. art. I, § 14.

In a nonjury trial jeopardy attaches after the trial has been entered upon, Hasse v.

a single fair trial on a criminal charge bars reprosecution."[16] The courts, however, have developed exceptions to the rule. The exceptions arguably applicable to the *Eskridge* situation are the "manifest necessity" exception and the appeal exception.

Manifest Necessity Exception

An exception to the double jeopardy protection is created when a mistrial is ordered either with the defendant's consent[17] or upon the court's determination that there is "manifest necessity" for the mistrial.[18] In an *Eskridge*-type situation the defendant seeks to correct the finding of the first trial and does not want a new trial.[19] Thus, there is no consent by the defendant to justify a new trial. However, a mistrial ordered without the consent of defendant may be justified if the court, taking all circum-

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State, 8 Ind. App. 488, 36 N.E. 54 (1894), and jeopardy will attach where the cause of the first aborted trial is prosecutorial error rather than independent operation of a state procedural rule, Crim v. State, —— Ind. App. ——, 294 N.E.2d 822, 829-30 (1973) (Query: Is this decision designed more to prevent prosecution error than to enforce the policies behind double jeopardy protection?). Furthermore, "the Double Jeopardy Clause . . . is written in terms of potential or risk of trial and conviction, not punishment." Price v. Georgia, 398 U.S. 323, 329 (1970). Thus, the defendant in an *Eskridge* situation has been put in jeopardy at the first trial.

Justice DeBruler, dissenting in *Eskridge*, argues that the trial judge must review the evidence in order to pass upon the motion to correct errors. The sustaining of the motion, therefore, constitutes a finding of not guilty in a nonjury case, Eskridge v. State, —— Ind. ——, ——, 281 N.E.2d 490, 494-95 (1972) (dissenting opinion), and the defendant may not be retried without violating the double jeopardy protection, Ashe v. Swenson, 397 U.S. 436 (1970) (fifth amendment guarantee against double jeopardy applicable to state through fourteenth amendment embodies collateral estoppel as a constitutional requirement); Benton v. Maryland, 395 U.S. 784 (1968) (double jeopardy prohibition held applicable to states through fourteenth amendment); United States v. Ball, 163 U.S. 662 (1896) (acquittal bars subsequent prosecution for same offense); Dunn v. State, 70 Ind. 47 (1880) (acquittal bars retrial for same offense).

16. Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 277 (1965).

> Double jeopardy shares the purposes of civil law rules of finality; it protects the defendant from continuing distress, enables him to consider the matter closed and to plan ahead accordingly, and saves both the public and defendant the cost of redundant litigation. But double jeopardy is not simply res judicata dressed in prison grey. It was called forth more by oppression than by crowded calendars. It equalizes, in some measure, the adversary capabilities of grossly unequal litigants. It reflects not only our demand for speedy justice, but all of our civilized caution about criminal law—our respect for a jury verdict and the presumption of innocence, our aversion to needless punishment, our distinction between prosecution and persecution.

Id. at 277-78 (footnotes omitted).

17. *See* Crim v. State, —— Ind. App. ——, ——, 294 N.E.2d 822, 829 (1973).

18. United States v. Perez, 22 U.S. 579 (1824). *See also* Wade v. Hunter, 336 U.S. 684, 689-90 (1949); Crim v. State, —— Ind. App. ——, ——, 294 N.E.2d 822, 829-30 (1973).

19. The defendant in *Eskridge* had not asked for a new trial in her motion to correct errors, Brief for Defendant at 3-4, and objected to the ordering of a new trial, —— Ind. at ——, 281 N.E.2d at 491. Therefore, it could not be argued that defendant consented to the new trial.

stances into consideration, determines that there is a "manifest necessity" for a mistrial so that the ends of public justice will not be defeated.[20] This rule gives the trial judge great discretion in determining whether a manifest necessity exists.

However, the United States Supreme Court has set some limits to this discretion. In a case analogous to *Eskridge,* the Court held that there was no manifest necessity to justify the trial court's granting of a mistrial at the request of the prosecutor who, after the jury was sworn, had been unable, due to negligence, to produce a witness who was necessary to prove two of the six counts of the indictment.[21] There is an even stronger argument against manifest necessity for a new trial after a full trial, as in *Eskridge*[22] where the prosecution has had a full opportunity to

20. United States v. Perez, 22 U.S. 579 (1824). *See also* Wade v. Hunter, 336 U.S. 684, 689-90 (1949).

21. Downum v. United States, 372 U.S. 734 (1963).

The United States Supreme Court has also held that it is an abuse of discretion in determining manifest necessity for a trial judge to order a mistrial on his own motion, after the first witness is called, without opportunity for reflection or the consideration of less drastic alternatives. United States v. Jorn, 400 U.S. 470 (1971).

22. The only apparent explanation for the *Eskridge* decision is the Indiana Supreme Court's distaste for allowing the defendant to escape conviction through the "technical ground" of insufficient evidence. "Technical ground" has the negative connotation of an archaic, obscure, or insignificant point of law which has no bearing on the merits of the case. Such a term hardly seems an appropriate description of failure to provide one of the two essential substantive elements of a crime. The term "technical ground" is especially inappropriate in this particular case because the intent provision is so clearly spelled out in the statute under which defendant was prosecuted. It is difficult to understand how insufficient evidence as to this essential substantive element can be called a "technical ground," especially when the majority opinion itself states:

> It is clear that under Burns' Ind. Stat. Anno., § 10-3520(c), 1970 Supp., intent . . . is an element of the crime which must be proven beyond a reasonable doubt by the state.

Eskridge v. State, —— Ind. ——, ——, 281 N.E.2d 490, 492 (1972).

Referring to insufficient evidence as a "technical ground" is also incongruous in light of the facts that the presumption of innocence is a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law,'" *In re* Winship, 397 U.S. 358, 363 (1970), *citing* Coffin v. United States, 156 U.S. 432, 453 (1895), and that the United States Supreme Court has explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. If it is a bedrock principle of our criminal law that one is presumed innocent until proven guilty of a criminal charge, and if the Constitution of the United States provides that one is not proven guilty of a criminal charge until every element of that charge is proved beyond a reasonable doubt, insufficient evidence as to one of the two major elements of a criminal charge cannot properly be classified as a "technical ground."

To state that insufficient evidence is a "technical ground" and to uphold the ordering of a new trial under the circumstances present in *Eskridge* would seem directly opposed to the policy underlying the constitutional prohibition against double jeopardy:

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

present its case.[23]

Appeal Exception

The most frequently applied exception to the double jeopardy prohibition, the appeal exception, provides that a defendant may be retried after a reversal on appeal.[24] While the majority rule is to permit application of

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and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

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

It is distressing to read the concluding comments of the majority opinion in *Eskridge* as it states:

> In our opinion the appellant here was given justice and due process and was guilty as a second trial revealed. We do not feel she is entitled to escape through a technicality such as is being urged.

—— Ind. at ——, 281 N.E.2d at 494. Such comments seem highly inappropriate in an opinion which deals with the question of whether or not the second trial should have occurred at all. The accused in *Eskridge* was innocent until proven guilty, and there was insufficient evidence to prove her guilty at the first trial. To use the end result of the second trial to justify allowing the second trial to be held at all reflects faulty reasoning and indicates that the majority has ignored or is insensitive to the fact that even an innocent defendant might be found guilty through repeated prosecutions.

Finally, a defendant should have a right to an error-free trial. If it were too great a price to pay to let a defendant off completely, then few reversals would occur.

23. The United States Supreme Court in a five to four decision in Illinois v. Somerville, 410 U.S. 458 (1973), upheld the trial court's grant of a mistrial upon discovery of a defective indictment after the jury had been sworn, but before any evidence was taken. The indictment had failed to allege intent, and such a defect under Illinois law required reversal of conviction if the point were raised on appeal or in a habeas corpus proceeding. *Somerville* cannot be reconciled with Downum v. United States, 372 U.S. 734 (1963), and may indicate a shift in position by the new Court. The Court in *Somerville* expressed concern with the early deprival of the State's opportunity to convict defendant, and held that the mistrial was required by manifest necessity and the ends of public justice. In an *Eskridge*-type situation the State has had a full opportunity to convict the defendant.

In Gori v. United States, 367 U.S. 364 (1961), the United States Supreme Court upheld the declaration of a mistrial, upon the court's own motion, during the presentation of the government's case. A major reason for allowing mistrial and reprosecution in this case was that the court's action was for the defendant's benefit. The trial court's ordering of a new trial in an *Eskridge* situation is not for the defendant's benefit, since the defendant is to be needlessly subjected to the ordeal of a criminal prosecution a second time. *See* note 16 *supra* & text accompanying.

24. The *Eskridge* decision relies heavily upon the exception to double jeopardy protection for a defendant whose conviction is set aside because of an error in the proceedings, United States v. Tateo, 377 U.S. 463 (1964) (reindictment permissible after original conviction reversed because of coerced guilty plea).

Tateo appears to be based upon a combination of waiver theory and concern for sound administration of justice. The waiver theory is not properly applicable to a motion to correct errors at the trial court level. *See* notes 29-37 *infra* & text accompanying. Moreover, in an *Eskridge*-type situation the State has had a full opportunity to convict the defendant, so the ends of public justice are not defeated.

See also Forman v. United States, 361 U.S. 416 (1960) (reindictment permissible after original conviction reversed for error in jury instructions); Stroud v. United States, 251 U.S. 15 (1919) (reindictment permissible after conviction reversed because of confession of error); United States v. Ball, 163 U.S. 662 (1896) (reindictment permissible after original indictment found defective).

the appeal exception even where the ground for reversal is insufficient evidence, the rule has been persuasively criticized by scholars[25] and state courts[26] as violative of the double jeopardy prohibition. An early Supreme Court case adopting the majority rule[27] has since been undercut by the Court's later decisions.[28] Even if the double jeopardy exception continues to be allowed where the appellate reversal is based on insufficiency of the evidence, the exception should not be permitted in the quite different situation where the determination of insufficient evidence is made, not by an appellate court, but by a trial judge in a nonjury case. There are three theories used to support the appeal exception, none of which would justify allowing a double jeopardy exception in the *Eskridge*-type situation.

Under the first, the waiver theory, the criminal defendant who appeals his or her conviction is deemed to have waived double jeopardy protection.[29] To assert that a defendant who faces imprisonment freely chooses to waive his or her defense of double jeopardy to correct an erroneous conviction is "wholly fictional."[30] Waiver of a fundamental constitutional right should not be a Hobson's choice.[31] Further, a determina-

25. Cahan, *Granting the State a New Trial After an Appellate Reversal for Insufficient Evidence,* 57 ILL. B.J. 448 (1969) [hereinafter cited as Cahan]. This article was the annual Lincoln Award winner for 1969.

26. *See* People v. Brown, 99 Ill. App. 2d 281, 241 N.E.2d 653 (1968); State v. Moreno, 69 N.M. 113, 364 P.2d 594 (1961). These jurisdictions hold that the effect of an appellate reversal should not differ from the effect of a trial court's acquittal on the same ground.

27. Bryan v. United States, 338 U.S. 552 (1950).

28. Forman v. United States, 361 U.S. 416, 426 (1960), *citing* Sapir v. United States, 348 U.S. 373, 374 (1955) (concurring opinion). *See also* Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence,* 31 U. CHI. L. REV. 365, 365-67 (1964).

29. Cahan, *supra* note 25, at 452-54.

The *Eskridge* majority appears to rely upon the waiver theory for justification of the appeal exception and gives only cursory attention to the fact that this exception applies only to appellate courts ordering new trials as opposed to trial courts ordering new trials after defendant's motion to correct errors. In fact, the majority entirely avoids grappling with the difference, dismissing it as "[t]he only distinction" between *Eskridge* and appellate application of the appeal exception. Eskridge v. State, —— Ind. at ——, 281 N.E.2d at 493. Such superficial treatment of this critical distinction hardly seems appropriate when a fundamental constitutional guarantee is at stake.

While the motion to correct errors is a condition to an appeal under Trial Rule 59(G), it is primarily an opportunity for the trial court to correct its own errors. IND. TRIAL R. 59.

The waiver theory has been substantially undermined by the United States Supreme Court in North Carolina v. Pearce, 395 U.S. 711 (1969), where the Court held that one who appeals his conviction may not be given a more severe sentence upon retrial and reconviction unless the court gives affirmative, objective reasons concerning the defendant's conduct subsequent to the first sentencing.

30. *See* Green v. United States, 355 U.S. 184, 191-92 (1957).

31. [Waiver] . . . connotes some kind of voluntary knowing relinquishment of a right . . . [I]t is wholly fictional to say that he 'chooses' to forego his

tion that the double jeopardy protection has been waived should be made only after an inquiry into the specific facts of each case. Allowing a fictional waiver of the constitutional right against double jeopardy is inconsistent with the voluntary, intelligent and knowing waiver required for relinquishing other fundamental constitutional rights.[32] A guarantee which has been considered so important as to merit express mention in both the United States Constitution[33] and the Indiana constitution[34] cannot be taken away by judicial assumption of a waiver.[35] In addition, one has constitutional rights both to double jeopardy protection and to procedural due process.[36] Courts should not require the forfeiture of one fundamental constitutional right in order to assert another.[37]

Even if the waiver theory were tenable it would not be applicable to the defendant making a motion to correct errors as in *Eskridge.* A defendant may view an appeal to a different, higher court as a new phase, a different level, or a new step; whereas the motion to correct errors at the trial court level may be viewed as merely another transaction, perhaps perfunctory or *pro forma,* before the same tribunal. Therefore, it is significantly less likely that a defendant moving to correct errors at the trial court level would be aware of the possible consequences of his or her action.

A second theory sometimes used to justify the exception to the double jeopardy protection for one who appeals his conviction is the continuing jeopardy theory.[38] Under this theory, jeopardy is considered to continue through appeals and new trials. The continuing jeopardy theory lacks merit because its logic would allow the state to appeal a judgment of

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constitutional defense of former jeopardy . . . . [if] . . . he has no meaningful choice.

Id.

32. Adams v. United States, 317 U.S. 269 (1942) (waiver of trial by jury must be express and intelligent); Waley v. Johnston, 316 U.S. 101 (1942) (constitutional prohibition against guilty plea that is not voluntary); Johnson v. Zerbst, 304 U.S. 458 (1938) (required intentional waiver of a known right to counsel).

33. U.S. CONST. amend. V.

34. IND. CONST. art. I, § 14.

35. As Mr. Justice Holmes once stated:

Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.

Kepner v. United States, 195 U.S. 100, 135 (1904) (dissenting opinion). *See* People v. Iaconis, 29 Mich. App. 443, 185 N.W.2d 609 (1971).

36. U.S. CONST. amend. V, amend. XIV.

37. *Cf.* Simmons v. United States, 390 U.S. 377, 394 (1968).

38. *See* Cahan, *supra* note 25, at 454-55.

acquittal.[39] Such an appeal is not permitted.[40]

A third theory, that of erasure, is sometimes used to justify retrial of a defendant whose conviction has been set aside on appeal.[41] Under this theory, the first trial is considered erased from the record when it is set aside. The theory is more of a tautology than a justification. If retrial is considered to wipe out the existence of the prior trial the double jeopardy clause would be rendered meaningless.[42]

None of these theories, then, supports the result reached in *Eskridge*. In addition to the constitutional prohibition against double jeopardy, however, other persuasive reasons counsel against the result reached in that case.

Policy Considerations

There are a number of policy considerations, in addition to the statutory and constitutional arguments, against permitting a new trial after the granting of a motion to correct errors alleging insufficient evidence in a nonjury trial.

First, unrestricted ordering of new trials on motions to correct errors could lead to habitual retrial of criminal cases. This would result in poor judicial economy, unnecessary additional expense to the public and to the individual, and lowered public respect for the fairness and efficiency of the judicial system. Furthermore, unrestricted ordering of new trials could result in an indefinite number of retrials of an accused. The policies of double jeopardy and the right of an accused to have his or her

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39. *Id.*

Even if this theory is accepted, it does not apply to the *Eskridge* situation, since the sustaining of the motion is, in essence, a finding of not guilty which terminates jeopardy and bars retrial. Eskridge v. State, —— Ind. ——, ——, 281 N.E.2d 490, 494-95 (1972) (dissenting opinion).

40. While the prosecution may appeal a question of law after an acquittal to the Indiana Supreme Court, the Supreme Court is not authorized to reverse the judgment, but only to "pronounce an opinion upon the correctness of the decision of the trial court." Ind. Code § 35-1-43-2 (1971), Ind. Ann. Stat. § 9-2102 (1956). The prosecution cannot question by appeal the sufficiency of the evidence to sustain the verdict. State v. Valkenberg, 60 Ind. 302 (1878); State v. Hall, 58 Ind. 512 (1877); State v. Phillips, 25 Ind. App. 579, 58 N.E. 727 (1900).

41. *See* State v. Robinson, 100 Ohio App. 466, 137 N.E.2d 141 (1956).

42. *See* Cahan, *supra* note 25, at 455. *See also* Price v. Georgia, 398 U.S. 323, 329 (1970).

Another argument supporting the discharge of a defendant in the *Eskridge* situation is that the granting of a motion to correct errors on the ground of insufficient evidence is effectively an acquittal. *See* United States v. Sanges, 144 U.S. 310 (1892); West v. State, 22 N.J.L. 212 (1849). Under Illinois law, for example, the acquittal is considered to occur when a jury makes the finding that there is insufficient evidence for conviction. Ill. Ann. Stat. ch. 38, § 3-4(a)(1) (Smith-Hurd 1972); People v. Drymalski, 22 Ill.2d 347, 175 N.E.2d 553 (1961).

guilt or innocence finally determined oppose such a practice.[43]

Second, this practice may make the judge an ally of the prosecution, when the judge should be a neutral magistrate. There is a distinction between an error attributable to the court and prosecution failure to provide the material elements necessary for conviction. In the former case the court corrects its own error, while in the latter the court rescues the prosecution from the prosecution's own error.

Third, ordering a new trial at the appellate level after reversal for insufficient evidence[44] involves different considerations from ordering a new trial at the nonjury trial level. The United States Supreme Court has held that appellate reversals and new trial orders do not constitute double jeopardy.[45] In an appeal, an appellate court, being reluctant to overturn the findings of another court because it has not had the opportunity to observe the proceedings and the demeanor of witnesses, may find it desirable to order a new trial. However, in a nonjury case, a trial court itself is deciding upon the motion to correct errors. The reluctance to overturn the judgment of another court is not present. While it may be embarrassing for a trial court to admit its own error, such embarrassment is probably significantly less than that experienced in having a higher court correct the error.[46]

Fourth, even if it could accurately be determined that failure to provide sufficient evidence were an oversight or inadvertance, the prosecution should not be rescued from its careless preparation. Rescue could condone and encourage this caliber of performance or allow the prosecution to cover up its mistakes through a new trial. The prosecution should not be allowed to use the first trial as a "dry run for [a] second prosecution."[47]

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43. *See* United States v. Ball, 163 U.S. 662, 668 (1896).

In a similar discussion, Mr. Justice Harlan has stated: "Lack of preparedness by the Government . . . directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee." United States v. Jorn, 400 U.S. 470, 486 (1971).

44. Bryan v. United States, 338 U.S. 552 (1950), a case heavily relied on by the *Eskridge* majority, holds that a court of appeals may direct a new trial after a reversal for insufficient evidence. This holding was based on the appellate "waiver" of double jeopardy theory. *See also* notes 29-37 *supra* & text accompanying.

45. Bryan v. United States, 338 U.S. 552 (1950).

46. While it can be argued that courts will be reluctant to sustain motions to correct errors if unable to grant new trials, Rule 59(E)(7) limits the requirements of a new judgment to specific instances and provides options in the form of alternative judgments.

47. Ashe v. Swenson, 397 U.S. 436, 447 (1970). In Cornero v. United States, 48 F.2d 69, 71 (9th Cir. 1931), the court stated:

> The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance.

Id.

Fifth, repeated prosecutions of an accused for the same offense "enhanc[e] the possibility that even though innocent he may be found guilty."[48] Since "a fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free,"[49] the *Eskridge* interpretation of Trial Rule 59 could lead to unfounded doubts about the innocence of a defendant who is retried after the prosecution failed in its initial attempt to obtain a conviction. There is also the possibilty that after seeing the results of the first trial, a frustrated or overzealous prosecutor, police officer or other person might fabricate evidence to assure conviction at the second trial.

Sixth, the *Eskridge* interpretation of Trial Rule 59 makes it easier for the prosecution to present new evidence and obtain a new trial than for the defendant.[50] The Indiana Supreme Court has ruled that only if a defendant's newly-produced evidence in a motion to correct errors meets nine requirements, may the trial court grant a new trial.[51] Under *Eskridge,* the *defendant's* showing of prosecution failure to produce evidence of a material element automatically allowed the *prosecution* to have a new trial. There appears to be no requirement that the new evidence even exist![52] The prosecution not only need not meet the requirements

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

49. *In re* Winship, 397 U.S. 358, 372 (1970) (concurring opinion).

50. In a nonjury case subsequent to *Eskridge* the Indiana Supreme Court upheld the decision of a trial court not to open a judgment to hear the defendant's new evidence. Cansler v. State, —— Ind. ——, 281 N.E.2d 881 (1972). After the finding of guilty, but before the sentencing, the defendant moved to open the judgment on the grounds of newly discovered evidence. The motion was overruled and defendant then filed a motion to correct errors to which was attached a sworn affidavit signed by an alibi witness. The trial court refused to open the judgment to hear the new evidence.

Justice DeBruler's majority opinion in *Cansler* notes however, that a trial court does possess the power to reopen a judgment to hear additional evidence without granting a whole new trial either upon a motion made prior to a motion to correct errors or upon a motion to correct errors. —— Ind. at ——, 281 N.E.2d at 883.

51. An application for a new trial, made on the ground of newly discovered evidence, must be supported by affidavit and such affidavit or affidavits must contain a statement of facts showing (1) that the evidence has been discovered since the trial; (2) that it is material and relevant; (3) that it is not cumulative; (4) that it is not merely impeaching; (5) that it is not privileged or incompetent; (6) that due diligence was used to discover it in time for trial; (7) that the evidence is worthy of credit; (8) that it can be produced upon a retrial of the case; and (9) that it will probably produce a different result.

Tungate v. State, 238 Ind. 48, 54-55, 147 N.E.2d 232, 235-36 (1958), *cited in* Cansler v. State, —— Ind. ——, ——, 281 N.E.2d 881, 883 (1972).

52. There is no written transcript of the first trial or the April 2, 1971, hearing during which the motion to correct errors was discussed and sustained and the new trial ordered. However, at no time did the prosecution present any indication to the court that the evidence needed was in its possession. The court seems to have assumed that it was. Minutes of the Court, Marion County Criminal Court, Division One, and Edison Voicewriter Disc audio records of the first trial and of the hearing were used to gather this information. Cause No. CR71-0253.

imposed on defendants, but it may benefit from the defendant's substantial efforts to prove prosecution failures. These inconsistent practices are arbitrary, especially in light of the adversaries' unequal resources and power. If preferential treatment is to be given, it should be given to the weaker party, not the stronger.[53]

Finally, the current state of Trial Rule 59 creates uncertainty for the practicing lawyer. "The bar requires a definitive answer in order adequately to advise a criminal defendant . . . ."[54] A lawyer should be able to advise his client of the rights he will surrender by filing a motion to correct errors, what effect asserting insufficient evidence in the motion will have upon the remedy, and what remedy will be granted by the trial court if the motion is sustained. Under the wording of Trial Rule 59(E)(7) the trial court would be required to enter judgment. The *Eskridge* decision creates uncertainty as to whether the court will enter judgment or whether the court might upon its own motion order a new trial. This sort of uncertainty in the law "diminishes popular confidence in the law and lawyers."[55] As former Chief Justice Warren has observed:

> No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.[56]

CONCLUSION

Trial Rule 59(E)(7) requiring a new judgment is the appropriate rule to be applied in a nonjury, criminal trial when a motion to correct errors alleging insufficient evidence is sustained. The interpretation of Trial Rule 59 chosen by the Indiana Supreme Court does not properly fall under any exception to the constitutional prohibition against double jeopardy. Even if the court's interpretation can be justified on theoretical grounds, serious policy considerations demand its reappraisal.

DENNIS L. MOESCHL

It should be noted that the prosecution was given at least eight days to prepare an explanation of why the motion to correct errors should not be sustained. Minutes of the Court, Marion County Criminal Court, Division One, Cause No. CR71-0253; Brief for Defendant at 4.

53. Downum v. United States, 372 U.S. 734, 738 (1963); United States v. Tateo, 377 U.S. 463, 475 (1964) (dissenting opinion).

54. Cahan, *supra* note 25, at 463.

55. *Id.*

56. Coppedge v. United States, 369 U.S. 438, 449 (1962).