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POSTCONVICTION PROCEDURE

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SUFFICIENCY OF EVIDENCE

Standard for Review

Prior to the decision in *Jackson v. Virginia*,[1] the Louisiana Supreme Court reviewed sufficiency of evidence using a no evidence test thought to have been mandated by the Louisiana constitutional proscription of review of facts in criminal cases.[2] Recognizing that appeals in criminal cases are permitted on questions of law alone, the court determined that, when the issue is sufficiency of evidence to support a conviction, a question of law is presented only when the defendant alleges a total absence of any factual support for a verdict.[3] However, before Justice Tate left the court, he began to use the circumstantial evidence test of Louisiana Revised Statutes 15:438, which requires that the circumstantial evidence exclude every reasonable hypothesis of innocence,[4] in tandem with the no evidence test, to produce interesting results.

In *State v. Lindinger*,[5] for example, the accused was convicted of driving while intoxicated based on a showing that he was standing in an intoxicated condition next to his truck, which had come to rest in a field some hundred or so feet from the road. Justice Tate, the author of an opinion reversing the conviction, said there was no evidence which could exclude a reasonable hypothesis of innocence. The court in *State v. Elzie*[6] took a similar approach to reverse a conviction for possession with intent to distribute when only a small amount of cocaine was found in the defendant's possession. An earlier symposium article in this *Review* applauded the result but criticized the court's methodology and suggested that the court should simply recognize that sufficiency of evidence is not a question of fact but rather is a question of law.[7] It did not make sense to say that the appellate courts were constitutionally banned from reviewing facts in criminal cases, because appellate courts had for some time been

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1. 443 U.S. 307 (1979).

2. LA. CONST. art. V, § 5(C) (limits the supreme court's appellate jurisdiction in criminal cases "only to questions of law"). LA. CONST. art. V, § 10(B) (limits appellate jurisdiction of the court of appeal); *see also* LA. CONST. of 1921, art. VII, § 10.

3. *See* State v. Hudson, 373 So. 2d 1294 (La. 1979), *rev'd*, 450 U.S. 40 (1981); State v. Baskin, 301 So. 2d 313 (La. 1974); State v. Douglas, 278 So. 2d 485 (La. 1973).

4. LA. R.S. 15:438 provides: "The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."

5. 357 So. 2d 500 (La. 1978).

6. 343 So. 2d 712 (La. 1977).

7. *See* Joseph, *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Criminal Trial and Post Conviction Procedure*, 38 LA. L. REV. 533, 555-57 (1978).

reviewing the sufficiency of facts to support a finding of probable cause. No doubt the issue of probable cause relates to admissibility of evidence and not to the guilt or innocence of the accused. Nevertheless, the same principle applies to both the probable cause issue and the sufficiency of evidence issue: in criminal cases (as in others) some issues of law require a review of the record to determine whether the factual showing was sufficient to meet a certain legal standard.

Later, in *Jackson v. Virginia*,[8] the United States Supreme Court held that a reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[9] Even after *Jackson*, however, the Louisiana Supreme Court seemed unwilling to embrace the standard of review mandated by the Constitution of the United States.[10] Eventually, in *State v. Byrd*,[11] the court adopted the *Jackson* standard and used it to test each element of the offense for which the verdict was rendered. Thereafter, the court no longer seemed to doubt that it must employ the *Jackson* test and abandoned forever the old no evidence test.

A very interesting development occurred as the court, having adopted *Jackson*, began to move beyond the federally mandated review of sufficiency. In a series of cases, the court began to use the circumstantial evidence test of Louisiana Revised Statutes 15:438 in connection with the reasonable juror *Jackson* test to analyze evidentiary sufficiency. In *State v. Williams*[12] and *State v. Shapiro*[13] (opinions by Chief Justice Dixon and Justice Calogero, respectively), the court (arguably in dicta) announced that Louisiana has an even more stringent standard for review of sufficiency of evidence than is required by *Jackson*.[14] The authors of the opin-

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8. 443 U.S. 307 (1979).

9. 443 U.S. at 319. In *Jackson*, the Court concluded that the beyond a reasonable doubt standard constitutionally mandated by the due process clause of the fourteenth amendment is not satisfied by instructions to the jury that it must be satisfied that the evidence met that standard. The Court in *Jackson* announced that the test which reviewing courts must employ in determining whether the trier of fact had adequate evidence before it is that a reviewing court must conclude that the prosecution met its constitutionally required burden of proof.

10. *See, e.g.*, State v. Main Motors, 383 So. 2d 327 (La. 1979).

11. 385 So. 2d 248 (La. 1980).

12. 423 So. 2d 1048 (La. 1982).

13. 431 So. 2d 372 (La. 1983) (on reh'g).

14. In *Williams* the supreme court, citing LA. R.S. 15:438, said:

> The Louisiana legislature has, through this statute, provided greater protection against erroneous convictions based on circumstantial evidence than is provided by the Fourteenth Amendment. There is a possibility that the quality of evidence supporting a conviction would satisfy *Jackson v. Virginia*, supra, but would not satisfy the requirement of R.S. 15:438.
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> In this case there is no direct evidence of any element of the crime charged,

ions derived this mandate from the statutory formulation of the former 1928 Code of Criminal Procedure which was retained in Louisiana Revised Statutes 15:438. The issue raised by *Williams* and *Shapiro* is twofold: first, whether the statute's standard requiring circumstantial evidence to exclude every reasonable hypothesis of innocence is any different from the reasonable juror standard of *Jackson*, and, second, whether the statute's standard was ever intended as a standard of appellate review.

Justice Dennis' and Justice Lemmon's views, as expressed in *State v. Chism*[15] and *State v. Sutton*,[16] question the earlier language of *Williams* and *Shapiro*. In *Chism*, Justice Dennis noted that there may indeed be no difference between the standards but that the "excluding every reasonable hypothesis of innocence" standard may provide a helpful methodology to assure careful review of sufficiency.[17] This conclusion may

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other than the fact that the crime was committed. We therefore, need not consider whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the necessary elements of the crime beyond a reasonable doubt. Rather, the circumstantial evidence must be analyzed to determine whether it excludes every reasonable hypothesis of innocence.

423 So. 2d at 1052. Similarly, in *Shapiro*, the supreme court said:

Assuming without deciding that the due process clause of the federal constitution as espoused in *Jackson v. Virginia* is not offended by a state conviction supported by the identical evidence in this record, that constitutional consideration is irrelevant to our disposition of this case. We are constrained in a case of this sort by Louisiana law of long standing, La.R.S. 15:438, to decide as a matter of law whether every reasonable hypothesis of innocence has been excluded, assuming every fact proven that the evidence tends to prove. Upon review, we have determined that a reasonable hypothesis of innocence has not been excluded in this case and have concluded that there was insufficient evidence under state law to support the conviction.

431 So. 2d at 388-89.

15. 436 So. 2d 464 (La. 1983).

16. 436 So. 2d 471 (La. 1983).

17. In *Chism*, Justice Dennis wrote:

Although the circumstantial evidence rule may not establish a stricter standard of review than the more general reasonable juror's reasonable doubt formula, it emphasizes the need for careful observance of the usual standard, and provides a helpful methodology for its implementation in cases which hinge on the evaluation of circumstantial evidence.

436 So. 2d at 470. In *Sutton*, Justice Lemmon wrote in a footnote:

The *Jackson* standard is an objective standard for testing the overall evidence, direct and circumstantial, for reasonable doubt. As suggested by Judge Anderson in a special concurring opinion in *United States v. Bell*, 678 F.2d 547, 550 (5th Cir. 1982):

"To say that the evidence is sufficient if 'a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt,' is not substantively different from saying that the evidence is sufficient if a reasonable trier of fact could find that the 'evidence was inconsistent with every reasonable hypothesis of innocence.' *United States v. Marx*, 635 F.2d 436, 438 (5th Cir. 1981). It is true that '[i]t is not necessary that the evidence exclude every reasonable hypothesis

be correct. However, it is doubtful that appellate courts will have to face serious challenges to evidentiary sufficiency *except* in circumstantial evidence cases.[18] Thus, the writer would prefer that the court acknowledge that the question is simply whether the jury has placed a reasonable construction on the evidence—not whether the appellate court has a reasonable doubt based on the evidence presented. The opinions in *Williams* and *Shapiro* suggest that the authors may be tempted to retest the evidence and impose their own views of whether the evidence proved guilt beyond a reasonable doubt and may fail to afford adequate deference to the jury's finding on that issue.

Furthermore, "excluding every reasonable hypothesis of innocence" is merely a different linguistic formulation of what is essentially the *Jackson* test. If the evidence leaves a "reasonable hypothesis of innocence," then a "reasonable juror" must have a reasonable doubt.[19] In *Chism*, Justice Dennis expressed that the use of the circumstantial evidence formulation provides a helpful methodology. The writer respectfully disagrees. The unadorned *Jackson* standard provides the best methodology because it emphasizes the jury's principal role in weighing the *persuasiveness* of the state's circumstantial evidence. The reasonable juror standard reminds the appellate judge that the question is *not* whether he would have voted not guilty had the same facts (viewed in a light most favorable to the state) been presented to him as the trier of fact.

The *Williams-Shapiro* approach stems from the court's view that Louisiana Revised Statutes 15:438 should be utilized as a standard of appellate review. With deference the writer submits that this view is in error. Following the court's decision in *State v. Byrd*, the Louisiana Legislature, on recommendation of the Louisiana State Law Institute, enacted article 821 of the Code of Criminal Procedure. The article provides for a post-verdict judgment of acquittal and clearly manifests an intent to adopt the *Jackson* standard as the proper degree of deference which both trial and appellate courts owe to the jury's verdict. Therefore, even if Louisiana Revised Statutes 15:438 was initially intended to serve as a standard for a reviewing court,[20] the subsequent enactment of article 821 supersedes that standard.

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of innocence or be wholly inconsistent with every conclusion except that of guilt,' but *it is equally true that if a hypothesis of innocence is sufficiently reasonable and sufficiently strong, then a reasonable trier of fact must necessarily entertain a reasonable doubt about guilt.*" (Emphasis supplied)

436 So. 2d at 475 n.10.

18. When the evidence is "viewed in a light most favorable" to the state, arguably, all *credibility* choices must basically be left with the jury. Conceivably, a credibility choice by the jury could be so unreasonable that it should not be accepted by an appellate court, but that question is not yet clearly resolved in the jurisprudence.

19. See Judge Anderson's concurring opinion in United States v. Bell, 678 F.2d 547, 550 (5th Cir. 1982), *aff'd*, 103 S. Ct. 2398 (1983) quoted in part *supra* note 16.

20. Since LA. R.S. 15:438 was enacted and initially applied in a pre-*Jackson* era when

In conclusion, the writer must express his disagreement with the beautifully reasoned and thoughtfully articulated special concurrence of Judge Lanier in *State v. Ruple*.[21] Judge Lanier argues that Louisiana appellate courts cannot review sufficiency claims using the *Jackson* standard because the Louisiana Constitution limits review to questions of law in criminal cases. Judge Lanier argues that *Jackson* does not require the state courts to provide a forum for litigating the issue of sufficiency. Under Judge Lanier's theory, sufficiency claims would have to be presented to federal courts sitting (as in *Jackson* itself) to hear the state prisoner's contention under 28 U.S.C. § 2254.[22] The writer's response to Judge Lanier's position is simply that sufficiency of evidence under the Louisiana Constitution can (and must) be treated as a question of law—not a question of fact. *Jackson* merely expands the understanding of the circumstances under which inadequate factual support for the jury's verdict becomes a reviewable question of law.

Standard for Review in Juvenile Delinquency Cases

In *State ex rel. Racine*,[23] Judge Lanier did a masterful job of discussing whether the appellate courts should apply the civil manifest error standard[24] or the criminal *Jackson* standard when reviewing sufficiency of evidentiary support for the trial court's adjudication of delinquency, but he did not resolve the issue because the evidence in *Racine* met either test. Although Judge Lanier convincingly revealed the lack of any clear answer in the jurisprudence, his opinion demonstrates that the appellate courts ought to apply the *Jackson* standard rather than the civil standard of manifest error. Since a delinquency proceeding is essentially criminal in nature and involves the alleged violation of a criminal statute, there is little justification for reviewing sufficiency of evidentiary support for the adjudication of delinquency by means different from those employed in adult cases in which the verdict is a similar finding of a violation of a criminal statute. The degree of deference which ought to be accorded to the fact finder's verdict should be the same in both cases; therefore, the standard employed ought to be the same.

A more interesting aspect of the case, however, is the manner in which Judge Lanier's very scholarly opinion may lead the reader to conclude

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the no evidence standard was employed, it is very doubtful that the legislature enacting LA. R.S. 15:438 ever considered this to be a standard for an appellate court to utilize. It was rather clearly intended only as a standard by which to instruct a trial jury.

21. 426 So. 2d 249, 253 (La. App. 1st Cir. 1983).

22. There is no doubt that sufficiency claims can be raised, as in *Jackson* itself, in a petition for post-conviction relief in the United States District Court. *See, e.g.*, Hillie v. Maggio, 712 F.2d 182 (5th Cir. 1983); Harris v. Blackburn, 646 F.2d 904 (5th Cir. 1981).

23. 433 So. 2d 243 (La. App. 1st Cir. 1983).

24. *See* Arceneaux v. Domingue, 365 So. 2d 1330 (La. 1978); Canter v. Koehring, 283 So. 2d 716 (La. 1973).

that the two standards may be merely different linguistic formulations not leading to differences in ultimate result. The problem here may be very similar to the earlier discussion of the *Jackson* standard versus the circumstantial evidence standard. The similarity should not be surprising. Both civil and criminal cases present an obvious need to resolve purely factual questions at the trial level and to pay great deference to any factual conclusion for which there is reasonable evidentiary support.

The Insanity Defense

In *State v. Gerone*,[25] the Louisiana First Circuit Court of Appeals found that the evidence presented by the defendant at his bank robbery trial established an affirmative defense of insanity. The court found that the trial judge, in returning a verdict of guilty as charged, unreasonably rejected the defendant's evidence of insanity. Earlier, in *State v. Roy*,[26] the Louisiana Supreme Court formulated a standard modeled on *Jackson* by which to test whether the evidence was such that no reasonable juror could fail to find that the affirmative defense of insanity was established. However, in *Roy*, the court simply reversed the jury's guilty verdict and remanded without giving directions as to what further steps needed to be taken.

In *Gerone*, the first circuit in remanding instructed the trial court to proceed in conformity with article 654 of the Code of Criminal Procedure—that is, to treat the case as though a *verdict* of not guilty by reason of insanity was returned and to determine whether the defendant should be committed for treatment or released. Although the mandate of the first circuit did not specifically order the trial court to enter a judgment of not guilty by reason of insanity, the effect of the court's instructions appears to be the same.

The result in *Gerone* differs significantly from that in a case in which the appellate court orders the defendant discharged or renders a verdict of guilty of a lesser offense. Unlike the situation in *State v. Byrd*[27] (in which the jury found the elements of the lesser offense), in *Gerone*, the appellate court made a finding from the record—a finding which was *not* made by the trier of fact.

The writer applauds the result reached by Judge Savoie's opinion in *Gerone* and suggests only that future cases clarify the rationale. The fact that the finding of insanity is made by the appellate court and not by the trial judge presents an interesting theoretical problem. The trial judge did find that the state's proof satisfactorily established the defendant's culpability of the elements of the offense charged. The trial judge simply improperly rejected the affirmative defense of insanity. Unlike the *Byrd*

25. 435 So. 2d 1132 (La. App. 1st Cir. 1983).
26. 395 So. 2d 664 (La. 1981).
27. 385 So. 2d 248 (La. 1980).

situation in which adequately supported *findings* were left untouched in the modification of the verdict, here the trial judge made no finding of insanity. Nevertheless, the defendant's rights are not endangered because the defendant, not the state, is urging the appellate court to declare the verdict unreasonable because the trier of fact failed to accept the evidence of insanity. Therefore, the defendant has no complaint regarding the appellate court's substituting its judgment for that of the trier of fact.

There is no doubt that appellate courts should, as in *Byrd*, declare that they have the inherent authority to adopt such a procedure when necessary to achieve judicial efficiency and when not prohibited by constitutional or statutory provisions.[28] Clearly, no alternative is satisfactory. Since the appellate court decided that a rational fact finder must have found that the evidence established the defendant's insanity, a remand for a new trial to allow the state further to strengthen its evidence of defendant's *sanity* runs contrary to the double jeopardy principles expressed by the United States Supreme Court in *United States v. Burks*.[29] There the Court denied the government a second chance to strengthen its case at a retrial after it presented legally insufficient evidence at the first trial. It would also be inappropriate to remand with directions to retry the case, giving the jury the possible verdicts of not guilty by reason of insanity and not guilty. Thus, as in *Byrd*, the appellate court in *Gerone* faced a situation requiring it to recognize its inherent authority to modify the fact finder's verdict in order to protect the rights of the accused as well as to satisfy the interest of justice.

Responsive Verdicts

Until the plurality opinion in *State ex rel. Elaire v. Blackburn*,[30] there was no clear jurisprudential guidance for trial courts confronting situations in which article 814 of the Louisiana Code of Criminal Procedure designated an offense to be a proper responsive verdict, but the evidence presented by the state failed to include proof of the elements of such offense.

For example, aggravated battery is responsive to an indictment charging attempted first or second degree murder. However, if the facts show that the defendant fired a shot at the victim (intending to kill) but missed, there has been no battery. Earlier, in *State v. Dauzat*,[31] the court reversed the defendant's aggravated battery conviction under circumstances similar to those described.[32] The answer was simply that the state's proof failed to establish a battery.

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28. *See* LA. CODE CRIM. P. art. 3.

29. 437 U.S. 1 (1978).

30. 424 So. 2d 246 (La. 1982), *cert. denied*, 103 S. Ct. 2432 (1983).

31. 392 So. 2d 393 (La. 1980).

32. Dauzat fired at and missed the victim, but the shot struck the victim's automobile. On appeal from a conviction of the legislatively provided responsive offense of aggravated

Elaire reveals the difficulty with the *Dauzat* approach. Since the question of sufficiency of evidence need not be raised in the trial court but may be raised for the first time on appeal,[33] the trial judge under *Dauzat* was required to assess sufficiency and decide whether to instruct the jury as to a legislatively ordained responsive offense.[34] The defendant's failure to object afforded him the opportunity to gain the benefit of a lesser verdict from the jury, and then to challenge that verdict on appeal. *Elaire* seeks to reach a fair balance by requiring the defendant to object to the instruction on the lesser verdict or permitting the appellate court to review sufficiency of evidence on the basis of the offense *charged*, and not on the basis of the offense on which the responsive verdict was actually returned.

When this theory is applied to the *Dauzat* hypothetical earlier posed, the result is clear. If the defendant chooses to object to the instruction on the responsive verdict of guilty of aggravated battery, the objection must be sustained because there is a lack of proof of the battery element. If the objection is not sustained and an aggravated battery verdict is returned, the conviction will be reversed due to the failure of proof of the latter, and the defendant must be discharged. On the other hand, if the defendant fails to object, the case goes to the jury with the option of returning an aggravated battery verdict. If such a verdict is returned, it will be sustained on appeal if the evidence was sufficient to sustain a conviction for attempted second degree murder—the offense charged—even though the evidence is insufficient to prove aggravated battery. Put simply, in the no objection situation, the conviction will be affirmed if the proof was *legally* sufficient as to the greater (but *not* found) offense but legally insufficient as to the unobjected to lesser offense.

In dissent, Justice Dennis correctly noted that convictions will be af-

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battery, the Louisiana Supreme Court reversed and remanded for a new trial because the evidence did not support a finding of the use of force or violence upon the person of the victim, although the evidence would have supported a conviction of attempted murder.

33. *See* State v. Raymo, 419 So. 2d 858 (La. 1982); State v. Peoples, 383 So. 2d 1006 (La. 1980).

34. LA. CODE CRIM. P. art. 814(C), *added by* 1982 La. Acts, No. 763, § 1. This addition allows the trial court to refuse to instruct a jury on a statutorily designated responsive offense if there is no evidence to support such a responsive offense. In *Elaire*, the court, noting the use of the no evidence phraseology, said:

> Interestingly, the Legislature used the phrase "no evidence", ever [sic] after the decision in *Jackson v. Virginia*, 443 U.S. 307 . . . (1979), replaced that test for sufficiency of evidence with a different standard. We need not decide in this case whether to construe the standard in Article 814 C as fulfilled when the evidence would be insufficient, as a matter of law, to support a verdict of guilty of the responsive offense. See the standard used in La.C.Cr.P. Art. 821, providing for postverdict judgment of acquittal. We note, however, that the 1982 amendment to Article 814 has the effect of authorizing the trial judge to grant a judgment of acquittal to responsive verdicts which are not supported by the evidence.

424 So. 2d at 250 n.8.

firmed under this scheme when the evidence does not meet the *Jackson* test as to each element of the offense. What *Elaire* approves as legitimate is the jury's power to ignore the evidence and enter a "compromise" verdict. To the extent that the defendant acquiesces in the submission of the compromise verdict which does not fit the facts, he is bound by that decision.

Judgment of Acquittal versus New Trial

In *Hudson v. Louisiana*,[35] the United States Supreme Court made very clear the principle that double jeopardy precludes retrial of a case in which the guilty verdict is set aside on the basis of legal insufficiency of the evidence. In a footnote, the Court recognized that it was not confronted with a situation in which the trial judge (or appellate judge) in effect sat as a thirteenth juror.[36] In the thirteenth juror situation the judge decides that he is not satisfied with the state's case, but cannot find that a reasonable juror must necessarily have entertained a reasonable doubt. Such a case presents a different and difficult question as the Court subsequently recognized in *Tibbs v. Florida*,[37] which permitted the retrial in the thirteenth juror situation. An excellent note published in this *Review* thoroughly discusses *Tibbs* and evaluates its impact.[38]

In the wake of *Jackson v. Virginia* and *Hudson v. Louisiana*, the Louisiana Legislature enacted article 821 of the Code of Criminal Procedure to provide for a post-verdict judgment of acquittal.[39] In enacting the new statute, the legislature did not amend or repeal article 851(1) of the Code of Criminal Procedure, which requires the trial court to grant a new trial whenever "the verdict is contrary to the law and the evidence."

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35. 450 U.S. 40 (1981).

36. In footnote five, the Court said:

> Whether a state trial judge in a jury trial may assess evidence as a "13th juror" is a question of state law. Compare *People v. Noga*, 196 Colo. 478, 480, 586 P.2d 1002, 1003 (1978); *State v. Bowle*, 318 So. 2d 407, 408 (Fla. App. 1975), with *Veitch v. Superior Court*, 89 Cal. App. 3d 722, 730-731, 152 Cal. Rptr. 822, 827 (1979); *People v. Ramos*, 33 App.Div.2d 344, 347, 308 N.Y.S.2d 195, 197-198 (1970). Justice Tate's concurring opinion for the Louisiana Supreme Court suggests that Louisiana law allows trial judges to act as "13th jurors." We do not decide whether the Double Jeopardy Clause would have barred Louisiana from retrying petitioner if the trial judge had granted a new trial in that capacity, for that is not the case before us. We note, however, that *Burks* precludes retrial where the State has failed as a matter of law to prove its case despite a fair opportunity to do so. *Supra*, at 972. By definition, a new trial ordered by a trial judge acting as a "13th juror" is not such a case. Thus, nothing in *Burks* precludes retrial in such a case.

450 U.S. at 44 n.5.

37. 457 U.S. 31 (1982).

38. *See* Note, *Double Jeopardy: Retrial After Reversal of a Conviction on Evidentiary Grounds*, 43 LA. L. REV. 1061 (1983).

39. *See* 1982 La. Acts, No. 144, § 1.

A brief review of the statutory development aids an understanding of the state of the jurisprudence. In 1975, the judgment of acquittal statute (article 778 of the Code of Criminal Procedure) was amended to delete the authority of the trial court to grant a judgment of acquittal in jury cases.[40] Subsequently, the court recognized the availability of the "verdict contrary to the law and the evidence" ground for new trial as a proper procedural device for asserting the legal insufficiency of evidence.[41] This development preceded *Jackson* and arose when the test for legal insufficiency was decided according to the former no evidence standard.

With the enactment of the post-verdict judgment of acquittal statute, a clear distinction can now be made between a judgment of acquittal and the granting of a new trial by a trial judge who is personally dissatisfied with the weight of the state's evidence, although the verdict is supported by legally sufficient evidence.[42]

In *State v. Korman*,[43] in a thoroughly reasoned opinion by Judge Crain, the Louisiana First Circuit Court of Appeals recognized the distinction and remanded a case to the trial court to clarify its ruling by fitting the case into one category or another. In *Korman*, the trial judge had declared that the state's evidence was "insufficient" to support the jury's manslaughter verdict and ordered a new trial. The court of appeals remanded the case to the trial judge with directions to grant the new trial only if the judge was "dissatisfied with the weight of the evidence," and informed the trial judge that in granting a new trial under the provisions of article 851 of the Code of Criminal Procedure he must make "a factual review as a thirteenth juror rather than under the *Jackson* standard."[44] On the other hand, the appellate court instructed the trial judge to grant a judgment of acquittal under article 821 if he determined that the evidence was legally insufficient. The court of appeals reminded the trial judge that the "trial judge cannot act as a thirteenth juror in reviewing a jury verdict under C.Cr.P. Art. 821, but must review under the much more restrictive *Jackson* standard."[45]

Judge Crain's view is eminently correct. Furthermore, the approach taken by the court of appeals properly guides trial judges who have been

40. *See* 1975 La. Acts, No. 527, § 1. For a review of the jurisprudential development leading to the 1975 amendment, see State v. Hudson, 253 La. 992, 221 So. 2d 484 (1969), *rev'd*, 403 U.S. 946 (Duplessis), *cert. dismissed*, 403 U.S. 949 (1971) (Hudson) (State v. Douglas, 278 So. 2d 485, 491 (La. 1973) overruled *Hudson* "to the extent that it invalidates the directed verdict article," article 778); State v. Baskin, 301 So. 2d 313 (La. 1974).

41. *See* State v. May, 339 So. 2d 764 (La. 1976).

42. In State v. Jones, 288 So. 2d 48 (La. 1974), the Louisiana Supreme Court remanded a case to the trial court with instructions that the judge must decide whether he (the judge) was satisfied that the state's proof established defendant's guilt beyond a reasonable doubt. *See also* State v. Daspit, 167 La. 53, 118 So. 690 (1928).

43. 439 So. 2d 1099 (La. App. 1st Cir. 1983).

44. *Id.* at 1101.

45. *Id.*

justifiably confused by the concept of a motion for a new trial which does not really mean a new trial—but rather means an acquittal. Hopefully, the *Korman* approach will be followed by the Louisiana Supreme Court and the other four courts of appeals. *Korman* provides an excellent discussion of the applicable legal principles and reflects a clear recognition of the distinction between the trial judge's recognized prerogative to evaluate the weight of the evidence as a thirteenth juror and his duty to evaluate the purely legal question of sufficiency under the *Jackson* standard.

Contemporaneous Objection Rule—Jury Instructions

In *State v. Thomas*,[46] the Louisiana Supreme Court halted any possible trend toward broadening the review of unobjected to but erroneous jury instructions. Like the earlier case of *State v. Williamson*,[47] *Thomas* involved Louisiana homicide statutes which were surrounded by a state of confusion due to a series of legislative and jurisprudential developments.[48]

In *Thomas*, the jury was given the wrong definition of first degree murder. The verdict of guilty of first degree murder was not supported by the evidence; however, the evidence did support a verdict of guilty of second degree murder. The jury's verdict finding defendant guilty of the offense of first degree murder was understandable because the trial judge instructing the jury on first degree murder *actually* defined second degree murder. Therefore, on original hearing, the court simply followed its procedure adopted in *State v. Byrd*[49] (and subsequently adopted in article 821 of the Louisiana Code of Criminal Procedure) and reduced the verdict to guilty of second degree murder, a responsive offense fitting elements which were found and adequately supported by the record.

In this respect, *Thomas* is a very simple case. However, the defendant argued that he was entitled to a new trial (not merely a reduction in the grade of the offense—which incidentally also provided for a mandatory sentence of life imprisonment) because the jury was incorrectly instructed as to the essential elements of the offense charged.

In the earlier case of *State v. Williamson*, the evidence actually *did* support the verdict of attempted second degree murder but the jury instructions given *without objection* fundamentally misdefined the offenses. Although the jury's verdict in *Williamson* made no sense in view of the

46. 427 So. 2d 428 (La. 1983).

47. 389 So. 2d 1328 (La. 1980).

48. The Louisiana first and second degree murder statutes were amended almost annually during the several years following the United States Supreme Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976). *See* 1976 La. Acts, No. 657, §§ 1-2; 1977 La. Acts, No. 121, § 1; 1978 La. Acts, No. 796, § 1; 1979 La. Acts, No. 74, § 1; State v. Payton, 361 So. 2d 866 (La. 1978); State v. Perkins, 375 So. 2d 1179 (La. 1979).

49. 385 So. 2d 248 (La. 1980).

instructions given, the verdict happened to fit the facts presented under the actual definition of the responsive offense. In reversing the conviction, the court described the instruction as so fundamentally erroneous as to offend basic fairness concepts. As Justice Lemmon said, in concurrence in *Thomas*, the verdict in *Williamson* was "so illogical and inexplainable that this court could not affirm the conviction simply because the jury reached the right result on the wrong instructions."[50]

Nevertheless, without overruling *Williamson*, or even endeavoring to distinguish *Williamson*, the majority seemingly has repudiated its rationale. The court emphasized that *Williamson* was a unique case and created no "plain error rule of general application"[51] even as to fundamentally erroneous instructions of the definition of the offense charged.

The writer cannot disagree with Justice Dennis' thorough exposition of the plain error doctrine as it appears and is applied in the United States courts—or with his conclusion that the legislature of Louisiana never intended that the appellate courts adopt such an approach in reviewing jury instructions. The approach here, analogous to that adopted in *Elaire*, affords proper significance to the contemporaneous objection rule[52] and the values the rule seeks to advance by requiring counsel to complain of jury instructions at a time when mistakes can be corrected.

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50. 427 So. 2d at 435 (Lemmon, J., concurring).
51. 427 So. 2d at 435; *see* FED. R. CRIM. P. 52(b).
52. LA. CODE CRIM. P. art. 841.