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13 June 2011

Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Mr. McCabe:

Enclosed please find my most recent article entitled, "When the Emperor Has No Clothes," which argues that the Federal Rules of Criminal Procedure should be amended to empower U.S. District Courts to grant summary judgment for the defense, in essence a pretrial judgment of acquittal, whenever there exist no genuine issues of material fact and no rational trier of fact could find the essential elements of the crime(s) charged beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution, or when disposition of the case involves only a question of law. Thus, the defendant would not need to wait until the case was fully tried, but could seek a final adjudication of the action by pretrial motion.

Best wishes,

A handwritten signature in black ink, appearing to read "CL", written over a white background.

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Article

***661 WHEN THE EMPEROR HAS NO CLOTHES: A PROPOSAL FOR DEFENSIVE SUMMARY JUDGMENT IN CRIMINAL CASES**

[Carrie Leonetti \[FN1\]](#)

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“Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement.” [FN1]

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***662** I. INTRODUCTION

When combined, three doctrinal areas of criminal adjudication create a perfect storm for the long-term, unreviewable pretrial detention of individuals who are not only presumed innocent as a constitutional matter, but who may also, in fact, be innocent (or, at least, whose guilt cannot be proven beyond a reasonable doubt). The first of these doctrinal areas is that governing pretrial detention--more specifically, the preventive detention of an individual who has been charged with a crime pending trial on the charge because of concerns that the individual may pose a danger to the community in the interim. In *United States v. Salerno*, [FN2] the Supreme Court upheld the constitutionality of the Federal Bail Reform Act of 1984 ("BRA") [FN3] in the face of a number of constitutional challenges--most importantly for the purpose of this Article, substantive and procedural due process challenges. The BRA permits the detention of individuals charged with certain enumerated offenses pending trial on the basis of their future dangerousness. [FN4] The finding of future dangerousness is made on a case-by-case basis, but the court's jurisdiction to make such a finding is offense triggered. [FN5] If an individual is charged with certain offenses involving drug trafficking or a minor victim, the statute provides for a rebuttable presumption of the individual's dangerousness (and therefore, detention). [FN6] If an individual is charged with an offense that is a crime of violence; that has a maximum sentence of life imprisonment or death; that involves drug trafficking, a minor victim, or possession of a dangerous weapon; or with any felony if the defendant has a serious prior conviction, the statute provides that he or she may be detained pending trial as a danger to the community on motion of the government, if the government proves the risk of danger by clear and convincing evidence. [FN7]

***663** In *Salerno*, the petitioner challenged the BRA's pretrial detention scheme under the Eighth Amendment's Excessive Bail Clause and the Due Process Clause of the Fifth Amendment. [FN8] The due process challenge was a facial challenge rather than an as-applied one for a very simple reason: the petitioner, Anthony "Fat Tony" Salerno, was precisely the type of defendant to whom the new statute was meant to be applied; he was the boss of the Genovese crime family and an accomplished hit man. [FN9] The Court rejected the Eighth Amendment challenge on the ground that the prohibition against excessive bail did not prohibit the denial of bail. [FN10] The Court rejected the procedural due process challenge on the basis of the statute's many procedural safeguards, particularly its provision of a full adversarial hearing before a neutral decisionmaker:

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. . . . [N]umerous procedural safeguards . . . attend this adversary hearing. [FN11] The Court rejected the substantive due process challenge on the ground that the statute's pretrial detention regime

was neither punitive nor excessive in relation to Congress's regulatory goal of preventing danger to the community, which the Court held could outweigh an individual's liberty interest. [FN12] In rejecting Salerno's facial challenge, however, the Court left open the possibility of a future as-applied challenge (presumably by a more sympathetic defendant). What the Court did not decide was at what point in any particular case pretrial detention could become excessive and therefore punitive, preferring instead to outline several rather extreme analogous situations, some of which exemplified instances when pretrial detention would be permitted and others when it would be prohibited. [FN13] Under the BRA, there are several factors that courts look at when making *664 their pretrial detention determination: the nature and circumstances of the offense charged, the weight of the evidence, the danger to the community posed by release, and the history and characteristics of the defendant (family ties, employment, community ties, financial resources, history of drug and alcohol abuse, criminal history, and so forth).

As a practical matter, however, courts tend not to look at the strength of the evidence against a particular defendant in making their detention determinations because of the nature of the detention proceedings: they are usually relatively quick, not governed by the rules of evidence, occur at an early stage in the proceedings when the judge and the parties have incomplete information (it is not uncommon for a defendant to be represented by a “duty” defender or to meet his or her permanent attorney for the first time at or immediately before a detention hearing), and judges are hesitant to turn a detention hearing into a miniature trial on the merits.

The second doctrinal area is the Court's speedy trial jurisprudence, particularly the recent case of *Vermont v. Brillon*. [FN14] The dominant standard for assessing the constitutionality of postaccusation delay was established in *Barker v. Wingo*, [FN15] in which the Supreme Court announced a balancing test to determine whether a defendant has been deprived of the right to a speedy trial. The Barker test factors are (1) the length of the delay; (2) the reason for it; (3) what actions the accused took to assert his or her right to a speedy trial; and (4) whether the delay caused prejudice to the accused. [FN16] In *Brillon*, the defendant was arrested for allegedly assaulting his girlfriend. [FN17] The chronology of his court-appointed representation was convoluted. He fired his first lawyer, asserting that the lawyer was not adequately prepared; his second lawyer withdrew due to a conflict of interest, discovered several months into his representation of Michael Brillon. He attempted to fire his third lawyer, again asserting that the lawyer was not adequately prepared, who withdrew after he threatened him; his fourth attorney was assigned to his case for five months, during which time the attorney asked for multiple continuances to “prepare” but actually did little to no work on Brillon's case until his employment contract with the public defender's office expired. Brillon's fifth attorney was assigned two months later and withdrew four and a half months after that, also having done little to no work on Brillon's case, because of a deleterious change in his contract with *665 the public defender's office. [FN18]

At that point, Brillon had been incarcerated “pending trial” for approximately two years. He was then without counsel for another four months, until his sixth and final attorney was assigned to the case. [FN19] Despite the already significant delay up to that point, the parties stipulated to several more continuances before Brillon's trial was actually held. [FN20] After almost three years in pretrial detention, Brillon was convicted of felony domestic violence. [FN21] On appeal, neither party questioned the application of *Barker* to the pretrial delay. Rather, the contested issue was who was to blame for the denial of a speedy trial--Brillon and his many attorneys or the state. [FN22] The Vermont Supreme Court found that the delay was primarily attributable not to Brillon but to Vermont's system of provision of court-appointed counsel, and therefore, to the state for speedy trial purposes. [FN23] The court found that the majority of the delay had been caused by the assigned lawyers' inaction and a breakdown in the public defender system. [FN24] In other words, the delay was really caused by the state's failure to provide adequate representation, which was ultimately the result of systemic underfunding of its public defense system. The Supreme Court reversed, applying an agency theory to attribute any delay caused or requested by defense counsel to the defendant personally, because defense counsel was the defendant's agent and therefore sought continuances on Brillon's behalf. [FN25] The result of *Brillon* is that at least some neutral

reasons for delay count against a defendant in the sense that they do not give rise to a speedy trial violation.

***666** The third doctrinal area is that regulating (or, perhaps more appropriately, not regulating) prosecutorial charging discretion. As a practical matter, prosecutorial charging discretion is virtually unlimited and unreviewable--particularly in the context of decisions about whether, when, and what charge to bring or dismiss--unless a defendant or other petitioner can prove both a discriminatory or retaliatory motive and actual prejudice stemming from a charging decision. [FN26] Of course, there are ethical limitations on prosecutorial charging decisions. For example, the American Bar Association's ("ABA's") Model Rule 3.8(a) prohibits prosecutors from prosecuting charges that they know are not supported by probable cause (a notoriously low standard). [FN27]

The combination of these three strands of doctrine means that (1) it takes only probable cause as a constitutional and ethical matter for a prosecutor to bring and maintain a charge against a defendant and, unless the charge is brought or maintained with a discriminatory motive in violation of the Equal Protection Clause, the charging decision is essentially unreviewable; (2) it takes only a charge for a defendant to be detained pending trial, with little to no consideration of the strength of the supporting evidence; and (3) delays resulting from the administration of a public defense system count against the defendant, at least when they result from staffing and caseload issues, in a speedy trial claim.

One reason courts tend to be relatively unconcerned about lengthy terms of pretrial detention is the high likelihood (in the aggregate) that most incarcerated defendants will ultimately be found guilty and will receive credit toward their ultimate sentences for the time they served in pretrial detention. This logic becomes problematic when the prosecution has a weak case against a defendant who is being detained pending trial, an increasingly prevalent occurrence in an era of overcharging. [FN28]

***667** This occurs primarily in three different types of scenarios. In the first, the prosecution has simply failed to plead a legally sufficient case ("pleading cases"). In the second and third, the prosecution has pleaded correctly, but either its theory of the defendant's guilt is based on a misunderstanding of the governing law ("legal-question cases"), or the evidence to support the charges is legally insufficient for conviction--that is, the prosecution has alleged facts in the charging document for which it has probable cause but cannot prove beyond a reasonable doubt at trial ("sufficiency cases"). This third category of sufficiency cases can itself be broken into two categories: cases in which the prosecution's evidence is legally insufficient under *Jackson v. Virginia* [FN29] ("legal-insufficiency cases"), and cases in which the prosecution's evidence is legally sufficient but not strong enough as a practical matter to actually convince any given jury of twelve citizens.

For example, imagine that the prosecution wishes to charge Jane Defendant with identity theft for using the identity Jane Innocent. "Identity theft" is defined as "knowingly . . . us[ing] . . . a means of identification of another person." [FN30] The another-person element is specific intent--that is, in order to be guilty, not only must Jane Innocent be a real person, but also Defendant must have known that at the time of the offense. In the first scenario (a pleading case), the prosecution charges Defendant with using the means of identification of another person--to wit, Jane Innocent--but does not allege that Defendant knew that Innocent was a real person. In the second scenario (a legal-question case), the prosecution charges Defendant with using the means of another person--to wit, Jane Innocent--when she knew or should have known that Innocent was a real person. The prosecution's incorrect legal theory is that even if Defendant did not know that Innocent was a real person, she should have known; the prosecutor has pleaded actual and, in the alternative, constructive knowledge. In the third scenario (a legal-insufficiency case), the prosecution has charged Defendant with using the means of another person--to wit, Jane Innocent--knowing that Innocent was a real person, but has very little evidence to back up its claim on the knowledge element of the offense.

***668** In all jurisdictions, the first case (the pleading case) can presently be disposed of with a pretrial motion to dismiss, for example, under Rule 12 in federal court. [FN31] In most if not all jurisdictions, the second case likely can as well--at least in practice, even if the rules do not expressly allow such a motion (that is, because the prosecution has charged actual and constructive knowledge, the result of a motion to dismiss should be striking the “should have known” language, but leaving for a jury's determination whether Defendant actually did know that Innocent was a real person--in essence, converting the prosecution's case from a pleading case to a sufficiency case). This Article is concerned with the third scenario, one in which the prosecution has pleaded the charge sufficiently and has probable cause to support it, but simply lacks legally sufficient evidence to sustain it. In the interim between charging and trial, enormous amounts of resources are expended by the court, prosecution, and defense for the sake of pretrial litigation, discovery, investigation, and trial preparation.

As a practical matter, this scenario tends to occur in three broad categories of cases: (1) when the defendant's conduct at issue is outrageous and often high profile, but not necessarily illegal; (2) when the prosecution has probable cause to believe that the defendant has committed the charged offense but cannot quite prove so beyond a reasonable doubt, particularly when the crime for which the defendant is a suspect is a serious one; and (3) after a defendant has won a motion to suppress or exclude certain inculpatory evidence prior to trial or on appeal, depriving the prosecution of some of the evidence necessary to prove guilt beyond a reasonable doubt. [FN32] There is even a colloquial expression among defendants and criminal practitioners for the time spent by the defendant in pretrial detention in these scenarios--“doing D.A. time.” [FN33]

The rules of criminal procedure are meant to ensure simple procedures and the fair administration of justice and to eliminate unjustifiable expense and delay. [FN34] Nonetheless, it is a matter of black letter law that trial courts lack the subject matter jurisdiction to grant summary judgment or ***669** otherwise direct a verdict prior to trial for either party in a criminal case. [FN35] The power that trial courts have to direct verdicts in criminal cases (of acquittal only, for constitutional reasons discussed in greater detail in this Article) arises only after the commencement of trial, at the close of the prosecution's case, [FN36] at the close of the defendant's case, [FN37] or, under more limited circumstances, after the jury has rendered a guilty verdict. [FN38] This Article does not dispute this proposition as a descriptive matter. Rather, it argues that this proposition should no longer be true as a normative matter.

Part II discusses the rationales that underlie the creation of summary judgment in civil cases. Part III surveys the existing mechanisms for summary disposition of criminal charges: pretrial motions to dismiss, preliminary hearings, and grand jury proceedings. This part explains why none of these mechanisms can provide relief to a defendant in a case in which the prosecution has pleaded sufficient facts to constitute a crime but lacks sufficient evidence to prove the charges. Part IV surveys the existing alternatives to a jury trial in criminal cases--the mid- or posttrial motion for judgment of acquittal and the stipulated bench trial--and argues that the inadequacies of each of these alternatives, in conjunction with the legal standards governing pretrial detention, prosecutorial charging discretion, and a defendant's right to a speedy trial, make it likely that a defendant could spend years in pretrial detention awaiting trial on a charge for which the prosecution cannot secure conviction with no mechanism to secure release.

Part V outlines the proposal that courts should have the authority to grant summary judgment prior to trial for the defense in a criminal case. It argues that if the prosecution is incapable of mustering a legally sufficient case on one or more essential elements, no legitimate purpose is served by waiting until the close of the prosecution's evidence to grant a judgment of ***670** acquittal or by sending a legally insufficient case to the jury and risking a guilty verdict stemming from jury confusion or vindictive nullification. This part discusses in detail recent high-profile criminal cases in which the prosecution had probable cause but not proof beyond a reasonable doubt of guilt, and whose outcomes could have been improved had a pretrial summary judgment mechanism existed to dispose of the charges without lengthy pretrial

proceedings (and, in one case, wrongful conviction). It argues that the efficiency and judicial economy rationales for summary judgment in civil cases apply equally, if not more forcefully, in the context of criminal cases, and posits additional rationales for employing defensive summary judgment that are unique to the criminal justice system.

Part VI sets forth examples in which trial courts have granted summary judgment to a criminal defendant despite lacking the authority to do so (usually while purporting to do something else, like granting a motion to dismiss) and discusses the ramifications of such inadvertent grants of summary judgment for subsequent proceedings. Part VII discusses the double jeopardy ramifications of the current proposal and asserts that it is likely that a trial court's granting of a defense motion for summary judgment would function as an acquittal in form and substance because the court would be, in effect, acquitting a defendant of the offense charged prior to trial by resolving factual questions pertinent to guilt or innocence. Part VIII discusses the impact that the present proposal would have on pretrial discovery practices and argues that the creation of a defense motion for summary judgment would necessarily accelerate the timing of the prosecution's disclosures, give additional meaning to the Brady requirements, and thereby improve the quality of justice.

In many ways, this is a modest proposal. Its adoption would alter the present system in only two significant ways: timing and preclusion. It would allow defendants facing properly pleaded but unsubstantiated charges to dispose of such charges sooner (that is, prior to trial rather than at the close of the prosecution's case). And, such dispositions would likely carry double jeopardy effects because a court's ruling that the prosecution's evidence is insufficient is at least a de facto acquittal not created by a pretrial dismissal on procedural grounds (for example, a case dismissed due to prejudicial precharge delay). Nonetheless, its effects on criminal adjudication could be significant: most importantly, it would provide criminal defendants with some leverage to force prosecutors to bring only those charges they can actually prove beyond a reasonable doubt.

*671 II. THE RATIONALES FOR CIVIL SUMMARY JUDGMENT

The rules of civil procedure authorize trial courts to grant summary judgment to either party in a civil proceeding when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. [FN39] A motion for summary judgment may be directed toward all or part of a claim, and it may be made on the basis of the pleadings or other portions of the record in the case, or supported by affidavits and outside materials. [FN40] The parties submit their evidence and legal contentions, and the judge determines summarily whether a bona fide issue of fact exists between the parties. [FN41] The nonmoving party asserting that a fact is genuinely disputed must support this assertion by "citing to particular parts of materials in the record," showing "that the materials cited do not establish the absence . . . of a genuine dispute," or showing that the moving party "cannot produce admissible evidence to support the fact." [FN42] If it cannot do so, the court must grant summary judgment to the moving party. [FN43]

The purpose of the summary judgment procedure is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." [FN44] In other words,

the motion for summary judgment challenges the very existence or legal sufficiency of the claim . . . to which it is addressed. In effect, the moving party takes the position that he [or she] is entitled to prevail as a matter of law because the opponent has no valid claim for relief . . . [FN45]

Civil summary judgment was designed as a mechanism for the speedy disposition of meritless claims or defenses and for simplifying "the ordinary long drawn out suit." [FN46] The procedure outlined in Federal Rule of *672 Civil Procedure 56 was intended to eliminate frivolous claims as well as claims that are unsupported or unable to be supported by any admissible evidence. [FN47] "Growing concern over cost and delay in civil litigation has focused increased attention on Rule 56 as a vehicle to implement . . . the just, speedy, and inexpensive resolution of [civil] litigation." [FN48]

Courts have described the purpose of summary judgment in a variety of ways. They have said that the rule is intended to “prevent vexation and delay,” [FN49] “improve the machinery of justice,” [FN50] expedite litigation and “promote the expeditious disposition of cases,” [FN51] and “avoid unnecessary trials where no genuine issues of fact [have been] raised.” [FN52] The objects of summary judgment in civil cases are, inter alia, to “[e]mpower [the] court summarily to determine whether a bona fide issue exists between the *673 parties” and “[r]equire [the] plaintiff to show that he [or she] has an arguable cause of action.” [FN53] Summary judgment has also come to be recognized as an effective case-management device to identify and narrow issues. [FN54] “Properly used, summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties. It can offer a fast track to a decision or at least substantially shorten the track.” [FN55] Summary judgment

has operated to prevent the system of extremely simple pleadings from shielding claimants without real claims; in addition to proving an effective means of summary action in clear cases, it serves as an instrument of discovery in its recognized use to call forth quickly the disclosure on the merits . . . on pain of loss of the case for failure to do so. [FN56]

All of these rationales apply with equal if not greater force in the criminal law arena. In the context of civil summary judgment, the Supreme Court has noted the parallel between a court's ruling on a motion for summary judgment in a civil case and its ruling on a motion for judgment of acquittal in a criminal one: “In terms of the nature of the inquiry, this is no different from the consideration of a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies and where the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt.” [FN57] Criminal cases can also be fraught with delay and are certainly costly--in terms beyond money--for their participants (defendants, victims, witnesses, judges, and juries). Why then should a meritless criminal charge be allowed to stand until the close of the prosecution's case or a legal dispute be resolved only at the time of jury instructions?

***674 III. EXISTING MECHANISMS FOR SUMMARY DISPOSITION OF CRIMINAL CHARGES**

There are three existing mechanisms for summary pretrial disposition of criminal charges: the motion to dismiss, the preliminary hearing, and the grand jury, though not all of these are available in all criminal cases.

A. Pretrial Dismissal of Charges

The permissible grounds for dismissal of a charging document in a criminal case are very narrow. While a court can dismiss the charge if the charging document is insufficiently pleaded or fails to state a legally cognizable claim, [FN58] the only pleading requirement is that the indictment set forth a simple and direct statement of the crime charged. [FN59] A court's review of the sufficiency of the indictment is limited to the document's four corners. [FN60] All that is required for an indictment to constitute a legally sufficient pleading is that it sets forth the elements of the charged offense in factual terms, [FN61] with sufficient notice to the defendant of the charge against him or her, [FN62] and in sufficient detail to permit a later determination of what the prohibition against double jeopardy would preclude in a subsequent prosecution arising out of related acts or transactions. [FN63] A pretrial motion to *675 dismiss for failure to state a claim is addressed only to the pleadings (the charging document) and does not address whether there are material triable issues of fact in the case. [FN64] As such, the pretrial motion to dismiss cannot provide relief to a defendant in a case in which the prosecution has pleaded sufficient facts to constitute a crime but lacks sufficient evidence to prove the charges. [FN65] As the Supreme Court has explained in the context of pleading and civil summary judgment,

Before the shift to “notice pleading” accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and

prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of “notice pleading,” the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims . . . that are adequately based in fact to have those claims . . . tried to a jury, but also for the rights of persons opposing such claims . . . to demonstrate in the manner provided by the Rule, prior to trial, that the claims . . . have no factual basis. [FN66]

*676 The same critique about the inadequacy of the notice pleading regime to ferret out legally insufficient claims prior to trial applies in the context of the criminal pretrial motion to dismiss, but unlike civil defendants, criminal defendants presently have no procedure analogous to that of [Federal Rule of Civil Procedure 56](#) of which to avail themselves to replace formerly robust pretrial dismissal mechanisms.

The case of *United States v. Hayes* [FN67] offers a good example of how a motion to dismiss does not adequately address the insufficiency of the prosecution's evidence. Chante Hayes, a health care worker, was charged with conspiracy to commit health care fraud based on her role in signing fraudulent time sheets and bills that were submitted for Medicaid reimbursement. [FN68] Prior to trial, she moved to dismiss all counts of the superceding indictment on the ground that it failed to state an offense because it did not sufficiently allege the existence of provider agreements between the nursing home at which she worked and Missouri Medicaid. [FN69] The district court denied the motion, and the jury convicted her of one of the twelve counts with which she was charged. [FN70]

On appeal, the Eighth Circuit Court of Appeals rejected her argument that the district court erred in denying her motion to dismiss, finding that the indictment sufficiently alleged the offense with which she was charged, even though it ultimately agreed that the evidence adduced against her at trial was legally insufficient to establish that she knew her supervisor was falsifying documents or that she committed an act to further her supervisor's fraud, both necessary elements under the government's aiding and abetting theory. [FN71]

B. Preliminary Hearings and Grand Jury Proceedings

The purpose of a preliminary hearing is for the trial court to determine whether probable cause exists to bind a defendant over for trial. [FN72] Accordingly, the preliminary hearing serves as an independent screening *677 device for prosecutorial charging decisions from outside of the prosecutor's office. The preliminary hearing is conducted before the court (generally a magistrate judge), not before the jury. [FN73] The court acts as the trier of fact, considering the testimony, observing the witnesses during direct and cross-examination, and evaluating the credibility of the witnesses. In cases in which a grand jury indictment is not required, the preliminary hearing is the only determination of the sufficiency of the prosecution's evidence prior to trial. [FN74] The court may base its finding of probable cause entirely on inadmissible evidence, including hearsay or unlawfully obtained evidence. [FN75] If the court finds that probable cause is lacking, the court must dismiss the criminal complaint and discharge the defendant from the court's jurisdiction.

A preliminary hearing is not required if a grand jury indictment is obtained and filed prior to the scheduled hearing time. [FN76] There is a common *678 perception that the grand jury is a passive body that receives from the prosecution just enough evidence (usually in the form of unchallenged hearsay testimony) to satisfy the probable cause threshold, and that the grand jurors reflexively and without critical analysis vote to indict the defendant per the prosecutor's request—hence, the old expression that a grand jury would “indict a ham sandwich.” [FN77] The California Supreme Court has defined the grand jury's role as follows:

The prosecuting attorney is typically in complete control of the total process in the grand jury room: he calls the witnesses, interprets the evidence, states and applies the law, and advises the grand jury on whether a crime has

been committed. The grand jury is independent only in the sense that it is not formally attached to the prosecutor's office; though legally free to vote as they please, grand jurors virtually always assent to the recommendations of the prosecuting attorney Indeed, the fiction of grand jury independence is perhaps best demonstrated by the following fact to which the parties herein have stipulated: between January 1, 1974, and June 30, 1977, 235 cases were presented to the San Francisco Grand Jury and indictments were returned in all 235. [FN78]

There is a great deal of basis to this perception. Grand jury proceedings are secret and ex parte; no other attorneys, either for the defendant or witnesses, are permitted inside the grand jury chamber, and grand jurors are forbidden under penalty of contempt of court from disclosing anything that occurred while the grand jury was in session, even after the grand jury has disbanded. [FN79] The defendant has no right to offer *679 evidence, including his or her own testimony. [FN80] The prosecutor functions as the grand jury's legal advisor. [FN81] There are few constitutional barriers to a grand jury's reception of evidence; it can be based largely or entirely on non-cross-examined hearsay, [FN82] and unlike during a jury trial, constitutional exclusionary rules do not apply during grand jury proceedings. [FN83] The Grand Jury Clause of the Fifth Amendment requires only that the indictment be valid on its face; it does not allow a defendant or a court to question the evidence underlying it. There is no mechanism for a court to review, postindictment, the sufficiency of the evidence that was presented to the grand jury. [FN84] Prosecutors are not constitutionally required to tell juries about evidence of innocence, no matter how strong.

The real weakness of both the grand jury and the preliminary hearing from the perspective of the problem that this Article seeks to solve, however, relates to their respective burdens of proof. They cannot weed out cases with legally insufficient evidence because that is simply not what they were designed to do. Because they assess only the presence or lack of probable cause based on evidence that does not have to be admissible at trial, they cannot substitute for a court's determination of whether the admissible evidence is legally sufficient to go to trial. That determination must wait until the close of the prosecution's evidence. A ruling on a defendant's motion for summary judgment, on the other hand, would ask the question appropriate to resolving legal-insufficiency cases--whether there is sufficient evidence from which a reasonable trier of fact could find the defendant's guilt beyond a reasonable doubt--and this question can be answered only by resorting to evidence that would be admissible at a trial on the merits. [FN85]

*680 IV. TRIAL ALTERNATIVES

A. Judgments of Acquittal

Trial courts are empowered to grant mid- and posttrial judgments of acquittal under rules like [Federal Rule of Criminal Procedure 29](#). A court may grant a motion for judgment of acquittal when the evidence is legally insufficient to sustain a conviction [FN86] or when an acquittal is warranted on the basis of an issue of law for the court to decide. [FN87] Most federal courts of appeal articulate the standard for deciding whether to grant a motion for judgment of acquittal in a formulation similar to the following:

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. [FN88]

The genesis of codified rules like [Rule 29 of the Federal Rules of Criminal Procedure](#) is “somewhat obscure.” [FN89] “The motion for acquittal in the criminal trial and its civil counterpart, the motion for directed verdict, is the product of an evolutionary trend that has increased the supervisory role of the judge over the trial process.” [FN90] “The demurrer to the evidence was the first method by which a judge [by consent of the parties] could withdraw a civil case from the jury and decide it with finality” [FN91] Later, *681 the common law motion for nonsuit empowered the judge to dismiss an action on the motion of the defendant but allowed the plaintiff to reinstitute the suit. [FN92] “In the 19th century judges began to utilize the directed verdict in civil cases, granting final judgment on the motion of the defendant when the proponent’s case failed the test of sufficiency.” [FN93] The power of a court to grant a motion for judgment of acquittal for a criminal defendant was first exercised under common law in the late nineteenth century “and was probably influenced by these earlier developments in the civil trial.” [FN94] These first decisions cited no authority but apparently viewed the power to direct an acquittal as inherent in the judge’s supervisory role over the conduct of the criminal trial. [FN95] “The authority to direct acquittals also appears to have grown out of the courts’ concern with efficiency and judicial economy.” [FN96]

A trial court’s grant of a motion for judgment for acquittal is substantively identical to a grant of defensive summary judgment in a civil trial, except for its timing. [FN97] Under the rules of criminal procedure, a judgment of acquittal may not be entered until all pretrial procedures have been completed, the trial in due form has commenced, and at least the prosecution’s case-in-chief has been presented before the jury. Because a defendant cannot move for a judgment of acquittal until trial, many if not most criminal defendants are detained pending trial, and defendants who maintain not-guilty pleas and go to trial are generally sentenced more severely than defendants who agree to plead guilty prior to trial. The lack of a pretrial mechanism to determine the sufficiency of the prosecution’s case gives rise to a substantial risk that innocent defendants will agree to plead guilty prior to trial (and therein, long before the opportunity to seek a legal ruling on the sufficiency of the prosecution’s case) in order to secure their release from pretrial detention or avoid an enhanced sentence if their midtrial motions for judgment of acquittal are denied. [FN98] Even when a *682 defendant has the fortitude and resources to persevere to trial, by that point enormous amounts of resources have been expended by both parties on a case that is legally insufficient to proceed to a jury’s verdict.

B. Trials on Stipulated Facts

The parties, with the approval of the trial court, can stipulate to a bench trial and file an agreed statement of facts on which the judge can decide the case, in order to streamline trial and focus solely on truly contested issues. [FN99] Sometimes defendants also proceed by way of a stipulated court trial when there are no contested trial issues, allowing them *683 to preserve a pretrial issue for appellate review and expedite the appeal without forgoing sentencing credit under guidelines that reduce sentences for “acceptance of responsibility.” [FN100]

There are several drawbacks to the stipulated trial alternative, however. First, a defendant does not have the right to insist on one. In fact, a defendant cannot demand a court trial at all, at least not in federal court. In *United States v. Drew* (discussed in Part V), for instance, the court denied Lori Drew’s request to waive her right to a trial by jury and be tried before the court. [FN101] Even if a defendant had the right to demand a court trial, he or she is further powerless to exact the factual stipulations necessary from the prosecution. Presumably, prosecutors who bring criminal charges hold out at least some hope of sustaining them since they are ethically required to do so, even if such hopes sometimes turn out to be unrealistic. Sometimes referred to as “trial psychosis” among practitioners, this adversary’s bias (in the best-case scenario, or, in the worst, unethical maintenance of knowingly unsubstantiated charges in the hopes of engendering a favorable plea agreement) can make the parties’ task of reaching a stipulation about the facts difficult.

Second, stipulated court trials do not necessarily occur more quickly than jury trials on contested facts. After all, in most criminal cases, the bulk of the time between charging and trial is spent not on finding a jury and a courtroom but on investigation, discovery, motions litigation, and trial preparation, all of which still has to occur prior to a stipulated court trial.

Third, the stipulated court trial is a risky strategy for a defendant. Stipulating to the facts (presumably framed in the light most favorable to the prosecution, since a prosecutor is likely to consent to this streamlined process only under such a condition) underlying the prosecution's case-in-chief forfeits perhaps the defendant's most valuable trial advantage--the possibility that something unexpected will happen, such as a witness recanting, failing to appear, or coming across as incredible; an unexpected evidentiary ruling; jury nullification; or a trial court error that could be *684 reviewed on appeal. Conceding the best-case scenario for the prosecution is a high-stakes gamble for a defendant betting that the prosecution will not, in the final analysis, have a legally sufficient case. [FN102]

As a result of the inadequacies of each of the existing mechanisms for summary disposition of a criminal case based on charges that the prosecution lacks legally sufficient evidence to sustain, in conjunction with the legal standards governing pretrial detention, prosecutorial charging discretion, and a defendant's right to a speedy trial, it is likely, if not common, that a defendant could spend years in pretrial detention awaiting trial on a charge for which the prosecution cannot secure conviction with no mechanism to secure release.

V. THE PROPOSAL

There is no question that it would be unconstitutional for a court to grant summary judgment for the prosecution in a criminal case (or direct a verdict of guilt). [FN103] The question that this Article poses, however, is why should a court not have the authority to grant summary judgment prior to *685 trial for the defense in a criminal case when there is no constitutional barrier to its doing so?

Prosecutors have virtually unreviewable discretion in their charging decisions (absent discrimination or retaliation), including the decision to charge a defendant in the first instance, what crime to charge, and whether to dismiss or modify some or all of the crimes previously charged. [FN104] Prosecutors, who are generally either elected or appointed through political processes, often have motivations to charge defendants other than the strength of the evidence: the seriousness of the crime, the defendant's prior criminal record, pretrial publicity, the status of the complaining witness in the community, jury appeal, and preexisting prosecutorial priorities (for example, certain types of crimes that the office has committed to prosecute universally). Well-documented psychosocial phenomena, such as political distortion and irrational escalation of commitment, can contribute to erroneous charging decisions. [FN105]

The prosecution in a criminal case bears the burden of proving each essential element of the crime charged beyond a reasonable doubt. [FN106] If the *686 prosecution is incapable of mustering a legally sufficient case on one or more essential elements, what purpose is served by waiting until the close of the prosecution's presentation of evidence to grant a judgment of acquittal? Or by sending a legally insufficient case to the jury and risking a guilty verdict stemming from jury confusion or vindictive nullification? When the cost of going to trial and losing is very high for a defendant and the sentencing "discount" of pleading guilty substantial, even a defendant who is factually innocent of the crime charged may decide to plead guilty in an act of risk aversion. [FN107]

Prosecutors are particularly prone to overcharging in cases in which a potential defendant has engaged in highly unpopular or undesirable conduct that nonetheless falls short of constituting a crime. There are several recent high-profile examples of this. For instance, in the 2009 case of *United States v. Drew*, [FN108] the government charged Lori Drew

with conspiracy and aiding and abetting the unauthorized access of a computer in furtherance of the tort of intentional infliction of emotional distress, in violation of 18 U.S.C. § 1030, the federal computer fraud statute. [FN109] Specifically, the government charged that Drew and others had obtained a MySpace account [FN110] and created an online profile of a fictitious sixteen-year-old boy named Josh Evans to obtain information from a teenage female MySpace user, “M.T.M.,” and torment, harass, humiliate, and embarrass her, all in violation of the MySpace terms of service. [FN111] The government claimed that Drew’s actions had caused the girl to commit suicide. [FN112]

Drew filed a motion to dismiss the indictment for failure to state an *687 offense. [FN113] Specifically, the motion claimed that the government failed to allege that Drew had intentionally accessed a computer without authorization (two elements of the charged offense). [FN114] While Drew’s motion was ostensibly filed under the auspices of Rule 12, [FN115] the motion was in essence a motion for summary judgment based on uncontested facts. The primary defense arguments were that violating the MySpace terms of service did not constitute unauthorized access and that the government had failed to allege sufficient facts to show that any unauthorized access was intentional. [FN116] The defense recognized the government’s allegation that Drew and her coconspirators had agreed with one another intentionally to access a computer in violation of the publicly available MySpace terms of service, but asserted that the allegation was insufficiently supported because the government did not have evidence to establish that the conspirators had actual knowledge of the terms of service. [FN117] Probably because of this defense concession, the court took Drew’s motion to dismiss under advisement pending the trial, functionally converting it into a motion for judgment of acquittal.

Drew’s jury trial resulted in a partial conviction. [FN118] Approximately eight months and three posttrial hearings later, the court tentatively granted Drew’s posttrial motion for judgment of acquittal on the counts of conviction. [FN119] Approximately seven weeks after that, the court issued its written order granting Drew’s motion. [FN120]

Another example occurred in the now-infamous Duke lacrosse rape case. On the night of March 13, 2006, the captains of the Duke lacrosse team hosted a spring break “stripper party” in a rented off-campus house. [FN121] One of the two dancers who was sent to the party was Crystal Mangum. [FN122] Mangum had a history of psychological problems, including anxiety and *688 bipolar disorders, for which she had been prescribed antipsychotic medications. [FN123] By 11:40 p.m. on March 13, the approximate time Mangum arrived (the other dancer, Kim “Nikki” Roberts, had already arrived), there were approximately forty lacrosse players gathered at the house. [FN124] The women started dancing at midnight. [FN125] Mangum was stumbling and incoherent. [FN126] The tone of the party deteriorated. [FN127] Time-stamped photographs showed that the dancers stormed offstage at 12:04 a.m. on March 14. [FN128] Roberts wanted to leave, but Mangum preferred to stay to make more money. [FN129] The women left the house around 12:25 a.m., topless, taking their belongings and the toiletries kit of one of the lacrosse players, Dave Evans, with them. [FN130] At 12:26 a.m., Mangum made a call on her cell phone to an escort service for which she worked. [FN131] A time-stamped photograph appeared to show her smiling and attempting to get back into the house via the back door, but it was locked. [FN132] Another time-stamped photograph showed one of the players carrying an unconscious Mangum to Roberts’s car at 12:41 a.m. and helping her into the passenger seat. [FN133] Roberts drove Mangum to a nearby grocery store to get help, at which point a security guard called 911 at 1:22 a.m. [FN134]

Police responded, finding Mangum “just passed-out drunk.” [FN135] Mangum appeared to be unconscious, but police later concluded that she was faking because she began breathing through her mouth when an ammonia capsule was placed under her nose. [FN136] The police began to process Mangum for involuntary mental health commitment. [FN137] At the commitment facility, she told the intake nurse that she did not want to go to jail. [FN138] When the nurse asked her if she had been raped, in which case the *689 facility would not admit her, she nodded affirmatively. [FN139] Mangum had said nothing about rape to Roberts, the security guard, or the police in the ninety minutes prior to her mental health intake assessment, and her rape complaint saved her from involuntary confinement. [FN140] Mangum was in-

interviewed by several police officers, doctors, and nurses at the hospital where she was taken for sexual-assault assessment and treatment, and gave conflicting accounts of her alleged half-hour ordeal being gang raped by multiple lacrosse players, at one point recanting her rape allegation. [FN141] She insisted that her attackers had not worn condoms and had ejaculated during the assault. [FN142] The hospital took samples of biological evidence from Mangum's clothing, mouth, vagina, rectum, and pubic hair as part of its rape kit but found no physical evidence (bruises, bleeding, or tearing) consistent with Mangum's allegation of a brutal assault by multiple men. [FN143]

Three days later, Mangum returned to work at her regular strip club, bragging that she was “going to get paid by the white boys.” [FN144] When police interviewed Mangum again after her discharge from the hospital, her account contradicted all of her previous ones as to numerous details, including the number of rapists. [FN145] She gave uselessly vague descriptions and was unable to identify any of her alleged attackers out of a series of photo arrays. [FN146] When police finally interviewed Roberts six days after the alleged rape, she told them that Mangum's rape claim was a “crock” and that she had been with Mangum the entire time that she was at the party. [FN147] The state crime laboratory found no semen, blood, or saliva anywhere in or on Mangum and no DNA matching any lacrosse player in any of the samples taken from her. [FN148] A private DNA laboratory, however, found the DNA of four other men with whom Mangum had had earlier encounters, including her boyfriend, in the evidence from Mangum's rape kit. [FN149]

Despite the obvious and serious problems in the case, the Durham County District Attorney's Office sought and obtained a sealed grand jury indictment of two players, Reade Seligman and Collin Finnerty, for rape, *690 sexual assault, and kidnapping. [FN150] Both defendants had partial alibis. Phone company records showed that Seligman made “eight cell [phone] calls between 12:05 and 12:14 a.m., the last being to a taxi service.” [FN151] A taxi driver attested to picking Seligman up one block from the party house at 12:19 a.m. and driving him to an ATM; bank records and security video recorded him withdrawing cash at 12:24 a.m. [FN152] An electronic record showed that Seligman swiped into his dorm at 12:46 a.m. [FN153] Finnerty made and received eight cell phone calls beginning at 12:22 a.m. [FN154] Triangulation calculations made from cell tower records showed that he was walking outside away from the party house at the time that the calls were made. [FN155] A credit card receipt showed that Finnerty purchased food across campus at 12:56 a.m. [FN156] The grand jury never heard any testimony from Mangum, Roberts, or any lacrosse player, doctor, nurse, or other witness with personal knowledge of the events in question. [FN157]

Finnerty's attorney requested an accelerated trial date, but the court denied his request. [FN158] The grand jury subsequently indicted a third defendant, Evans. [FN159] Approximately one month after the first two indictments, the defendants had their first court hearing. [FN160] At that hearing, the court denied Seligman's request for a speedy trial and denied the defendants' request for open-file discovery. [FN161] At the second hearing approximately a month later, the court denied Seligman's request that it impose a discovery deadline on the state to facilitate a speedy trial. [FN162] More than six months after Evans's indictment, the defendants filed a joint motion documenting the substantial evidence of their innocence, particularly the exculpatory DNA results. [FN163] Approximately one month later, the state dismissed the rape charges against the defendants but left in *691 place the sexual assault and kidnapping charges. [FN164] The remaining charges were dismissed on the basis of “insufficient evidence” after an independent investigation by the North Carolina Attorney General's Office approximately one year after the first two defendants were indicted. [FN165] In announcing the dismissals, Attorney General Ray Cooper declared, in pertinent part,

In this case, with the weight of the state behind him, the Durham district attorney pushed forward unchecked. There were many points in the case where caution would have served justice better than bravado. And in the rush to condemn, a community and a state lost the ability to see clearly. . . . This case shows the enormous consequences of overreaching by a prosecutor. [FN166]

Of course, this dismissal by the prosecution was discretionary. Had the Attorney General's Office not stepped in and

acknowledged the writing on the wall, the defendants would have had no mechanism to force an early disposition of their charges, but rather would have had to wait until the close of the prosecution's case-in-chief to move for judgments of acquittal.

There are two primary problems with the current system. First, it lacks an official remedy for courts to employ when the prosecution charges an offense that it has no chance of proving. Many of the efficiency and judicial economy rationales for summary judgment in civil cases apply equally if not more forcefully in the context of criminal cases. Because the trial court can decide summary judgment motions in multiple criminal cases in less time than it would take to try a single one before a jury, the litigation of summary judgment motions should reduce the criminal court's trial calendar considerably. [FN167] This includes defense summary judgment motions that are denied because a denial of summary judgment, after the parties have disclosed their evidence, will induce the parties to agree more readily to settle their action or, at least, knowing each other's real evidence and contentions, to prepare for and conduct the trial more efficiently. [FN168] As such, criminal summary judgment could be a powerful docket-clearing device for overburdened courts. There are also rationales for employing defensive summary judgment that are unique to the criminal justice system. The availability of a pretrial summary judgment mechanism to the defense *692 could serve as a check on what is otherwise essentially unfettered prosecutorial discretion. It could significantly reduce the time spent in pretrial detention as well as the other burdens of being prosecuted for defendants whose guilt cannot be proven beyond a reasonable doubt. [FN169]

Second, when courts unofficially grant summary judgment to the defense under the guise of granting a motion to dismiss (probably compelled by the policy considerations outlined in the previous paragraphs), as discussed further in Part VI, the procedural posture of the case is rendered ambiguous, particularly in the context of a prosecutorial appeal of the dismissal and the prohibition against double jeopardy. [FN170]

Trial courts should be empowered to grant summary judgment for the defense--in essence a pretrial judgment of acquittal--whenever there exist no genuine issues of material fact and no rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt after viewing the evidence in the light most favorable to the prosecution, or when disposition of the case involves only a question of law. [FN171] Thus, the defendant would not need to wait until the case is fully tried but could seek a final adjudication of the action by pretrial motion. [FN172] In this way, dilatory *693 tactics resulting from the charging of unfounded crimes could be defeated, the parties could be afforded expeditious justice, and some of the pressure on criminal court dockets could be alleviated.

Such a motion (and the prosecution's response) could be supported by affidavits, documents, live testimony, or other evidence sufficient for the court to determine whether the defendant is entitled to judgment. The proffered proof should be evaluated under the same standard as a motion for judgment of acquittal made during trial. [FN173] Even when there are no *694 disputes over the sufficiency of the evidence establishing the prosecution's facts that control the application of a rule of law, the court could utilize summary judgment to decide legal issues, such as an issue of statutory construction or constitutional interpretation, prior to trial (that is, prior to the formulation of jury instructions). [FN174] In this way, defensive summary judgment could be utilized in a criminal case to separate form from substance issues, eliminate improper allegations, determine what, if any, issues of fact are present for the jury to decide, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist. [FN175]

When evidentiary facts are in dispute, when the credibility of witnesses is an issue, or when conflicting evidence must be weighed, a trial is necessary. Such disputes should not be resolved on the basis of affidavits. When the question for decision concerns interpreting and evaluating undisputed evidence to drive legal conclusions, however, a jury trial is unnecessary. A court will ultimately rule on a defense motion for judgment of acquittal at the close of the evidence or

notwithstanding a guilty verdict; a defense motion for summary judgment only accelerates the timetable for that same decision.

The case of *Orloff v. Allman* [FN176] provides an example of how this criminal summary judgment mechanism would work. Several members of the Orloff family sued Sheldon Allman and several other individuals and business entities for civil securities fraud arising out of a real estate *695 development pyramid scheme. [FN177] The trial court granted summary judgment for one of the defendants, Edward Allen, a real estate developer who the Orloffs had alleged was liable as an aider and abettor of the other defendants. [FN178] Specifically, the Orloffs claimed that the developer received finders fees for the subject properties that he located, that they had invested in the scheme in part because of representations that the developer would be managing the investment properties, and that they assumed the developer was a knowing participant in the investment scheme. [FN179] The developer claimed that “he was responsible for finding properties, not for raising money, and that he did not know where Allman got the money to finance [the development]” [FN180] The trial court granted summary judgment prior to trial (of course), concluding that the Orloffs failed to make a legally sufficient showing to support their aider-and-abettor theory because they presented no evidence that Allen knew or was willfully blind to the fact of the securities fraud. [FN181]

Contrast Orloff with the criminal case of *United States v. Souder*. [FN182] The defendants were the leaders of a Free Mason lodge in North Carolina. They established a life insurance program for the older members of the lodge, through which the lodge owned the whole-life policies on the members, subsidized the premiums, and received a portion of the death benefit. [FN183] They were charged with mail fraud and honest-services fraud and aiding and abetting the same. [FN184] The government's theory was that the defendants had not been forthcoming with the members participating in the program about the financial benefit to the lodge of their participation and had induced those members to participate in the program with material omissions, in breach of their fiduciary duty as plan administrators. [FN185] All three defendants were released from custody pending trial and subjected to the supervision of the pretrial services office for more than a year while *696 awaiting trial. [FN186] One defendant, Marvin Chambers, had his travel restricted to the Western and Middle Districts of North Carolina pending trial. [FN187] William Souder was also ordered not to change his address, place of employment, or telephone number without the prior permission of pretrial services; to surrender his passport; to avoid all contact with the other two defendants; and had his travel restricted to the Northern District of Georgia. [FN188]

The defendants were convicted after a jury trial. [FN189] They moved for a judgment of acquittal notwithstanding the verdict [FN190] and a new trial [FN191] on the ground that the government had failed to meet its burden to prove the existence of a scheme to defraud, [FN192] the intent to defraud, the intent to breach or to aid and abet a breach of a fiduciary duty, or the foreseeability of the economic harm resulting from the breach of fiduciary duty. [FN193] The court granted the motion, agreeing that the jury verdicts were against the weight of the evidence because the government had failed to produce legally sufficient evidence of the defendants' criminal intent, and it conditionally granted the defendants' motion for a new trial on the honest-services and mail-fraud charges. [FN194] Because the judgment of acquittal was granted after and contrary to the jury verdict in the case, neither the Double Jeopardy Clause of the Fifth Amendment nor the doctrines of collateral estoppel or res judicata precluded a new trial on the same charges. [FN195]

*697 The only significant difference between Orloff and Souder is that Orloff was a civil fraud action and Souder was a criminal fraud action. The real significance of that difference, however, was that Orloff was able to dispose of the legally insufficient civil charges prior to trial on summary judgment, whereas the defendants in Souder were granted a judgment of acquittal only after a jury trial, preserving the government's right to retry them on the same charges. It is hard to imagine why the government should be entitled to multiple bites at the prosecutorial apple in a criminal fraud case that would not have proceeded past summary judgment had the case been a civil one.

VI. EXAMPLES OF INADVERTENT DEFENSIVE SUMMARY JUDGMENT

While trial courts are not currently empowered to grant summary judgment in criminal cases, sometimes they have inadvertently done so anyway. One example is *State v. Taylor*. [FN196] In *Taylor*, the Maryland Court of Appeals consolidated several criminal appeals to consider the question of “whether jeopardy attaches in a proceeding where a trial judge grants a pretrial motion to dismiss based on a finding of insufficiency of evidentiary facts beyond those contained within the ‘four corners’ of the charging document, i.e., criminal indictment or criminal information.” [FN197]

In petitioner Larry Bledsoe's case, Bledsoe and his codefendants were charged with conspiracy to commit public indecency. [FN198] Specifically, the state charged that the men conspired to have several women engage in nude dancing in a local theater. [FN199] Bledsoe filed a pretrial “Motion to Dismiss, or in the Alternative for Judgment of Acquittal.” [FN200] In support of his motion, Bledsoe argued that the theater in which the nude dancing had allegedly taken place was not “public” for the purposes of the public indecency ordinance that he allegedly conspired to violate. [FN201] Prior to the court's ruling on the motion, the state and Bledsoe stipulated that the “nude dancing took place in an enclosed building located in an industrial park,” the theater was a for-profit building that charged an admission fee, the *698 theater did not admit anyone under eighteen years of age, and the dancers arrived in costumes and did not undress until their performances. [FN202] The state also filed an opposition to Bledsoe's motion to dismiss, which included as an exhibit an advertising flyer for the theater “describing it as an adult entertainment theater” featuring “exotic all nude female dancers.” [FN203] The trial court granted Bledsoe's motion, applying statutory construction principles to conclude that the theater was not a “public place” under the statute. [FN204] On appeal, the circuit court concluded that the trial court had erred in dismissing the charges and remanded the matter for trial, rejecting Bledsoe's argument that doing so violated his double jeopardy rights. [FN205]

In the second of the consolidated cases, Donald Taylor was charged with soliciting unlawful sexual conduct under the state's child pornography statute, attempted sexual abuse of a minor, and attempted assault. [FN206] Taylor filed a pretrial motion to dismiss. [FN207] At the hearing on the motion, Taylor admitted a memorandum prepared by the Maryland State Police, stipulating that it was “an accurate and complete summary of the facts underlying the charges.” [FN208] According to the memorandum, Taylor had exchanged a series of email messages and online chats with a state trooper posing as a fifteen-year-old girl. [FN209] During these online interactions, Taylor instructed the fictional girl to masturbate and arranged to meet with her to have sex. [FN210] Taylor showed up for the meeting and signaled the undercover officer to come to his car. [FN211] When he was arrested, Taylor admitted that he had traveled to Maryland to have sex with an underage girl and that he had rented a hotel room and brought condoms for that purpose, admissions that were subsequently confirmed when the police executed a search warrant at the hotel room. [FN212]

In support of his motion to dismiss, Taylor argued that his conduct did not amount to a crime under the solicitation statute that he was charged with violating and that the doctrines of impossibility (because there was no *699 real minor involved) and mere preparation (that is, he had not taken a substantial step toward the completion of the sexual assault) precluded his conviction of the attempt charges. [FN213] The trial court granted Taylor's motion and dismissed the charges against him. [FN214] The court found that Taylor's online exchanges did not violate the child pornography statute, that it was legally impossible for Taylor to have committed the charged attempted sexual abuse, and that Taylor's conduct was mere preparation, not a substantial step toward the attempt crimes. [FN215]

In both cases, the state appealed the dismissals pursuant to statutes that permitted it to appeal a final judgment of dismissal in a criminal case. [FN216] The Maryland Court of Appeals held that the trial court in Bledsoe's case had erred by considering facts extrinsic to the charging document and that the trial court in Taylor's case had erred in rendering pretrial decisions on the sufficiency of the evidence; both trial courts had failed to limit themselves to a consideration of the

legal sufficiency of the charging documents on their faces. [FN217] The court of appeals held that, in granting the motions to dismiss, the trial courts had “exceeded the permissible scope of a motion to dismiss.” [FN218] The court concluded, however, that although the trial courts exceeded their authority to dismiss the charges, the dismissals “substantively constituted judgments of acquittal and therefore must be given effect as such for jeopardy purposes,” precluding the state’s appeal in either case. [FN219] In doing so, the court characterized the motions as having been “judgments of acquittal” that were “cloaked in the form of the grant of motions to dismiss.” [FN220]

*700 In sum, a criminal defendant charged with a crime for which the prosecution lacks legally sufficient proof of guilt presently has four options: (1) wait until the close of the prosecution’s case, at which point he or she can make a motion for judgment of acquittal; (2) plead guilty to a charge of which he or she is potentially innocent in order to get out of jail or to guarantee a lenient sentence; (3) agree to a stipulated bench trial, if possible, to speed up disposition of the case; or (4) file a (wink, wink) motion to dismiss, ostensibly on the ground that the prosecution has failed to charge (that is, plead) an offense--although really on the ground that the prosecution lacks legally sufficient evidence to sustain what is likely a sufficiently pleaded charge.

The drawbacks to the first two of these options are, hopefully, obvious. As discussed in Part IV.B, the third option is not always available to a defendant because it requires, among other things, that the parties agree on every material piece of evidence and is a risky strategy. In order to obtain the prosecution’s necessary consent to a court trial, a defendant would presumably have to stipulate to the version of the facts most favorable to the prosecution, thereby forfeiting much of the benefit of the reasonable doubt burden of proof in a criminal trial and waiving the right to appeal the court’s crediting of those stipulated facts. The fourth option is problematic because it does not actually exist. Not all courts will entertain a motion to dismiss on the ground of insufficient evidence, and they probably should not. Courts that do grant such motions create a procedural mess for subsequent proceedings, particularly if the prosecution wants to appeal the dismissal or recharge the defendant after obtaining additional incriminating evidence. [FN221]

VII. DOUBLE JEOPARDY RAMIFICATIONS

Under the Supreme Court’s recent double jeopardy jurisprudence, it is an open question whether the prohibition against double jeopardy bars the prosecution from appealing a trial court’s grant of summary judgment to the defense or from retrying a defendant if additional evidence were later discovered. On the one hand, if a defendant is acquitted after a stipulated bench trial or because a court has granted a mid- or posttrial judgment of acquittal, the Fifth Amendment, [FN222] and more specifically the doctrine of *701 *autrefois acquit*, would bar retrial and, in most circumstances, even an appeal by the prosecution of the acquittal. On the other hand, if a court finds that probable cause is lacking at a preliminary hearing, or a grand jury declines to issue an indictment, or a court grants a pretrial motion to dismiss charges on grounds other than insufficiency of the evidence, double jeopardy would not prevent the prosecution either from appealing the court’s ruling or from reinstating charges if additional evidence were discovered. [FN223]

In *United States v. Martin Linen Supply Co.*, the Supreme Court held that the Double Jeopardy Clause barred appellate review and retrial following a judgment of acquittal entered pursuant to [Federal Rule of Criminal Procedure 29\(c\)](#). [FN224] The Court unequivocally defined an “acquittal” for double jeopardy purposes by looking not to the form of the judge’s action, but rather to whether the judge’s ruling, “whatever its label, actually represent[ed] a resolution, correct or not, of some or all of the factual elements of the offense charged.” [FN225] The Court reasoned,

In the situation where a criminal prosecution is tried to a judge alone, there is no question that the Double Jeopardy Clause accords his determination in favor of a defendant full constitutional effect. See [United States v. Jenkins](#), 420 U.S. 358, 365-367 (1975). Even though, as proposed here by the Government with respect to a [Rule](#)

29 judgment of acquittal, it can be argued that the prosecution has a legitimate interest in correcting the possibility of error by a judge sitting without a jury, the court in *Jenkins* refused to accept theories of double jeopardy that would permit reconsideration of a trial judge's ruling discharging a criminal defendant. [FN226]

One year after *Martin Linen*, the Court revisited the issue of double jeopardy in *United States v. Scott*. [FN227] The district court had dismissed one count of *Scott's* indictment “based upon a claim of preindictment delay and not on the court's conclusion that the Government had not produced sufficient evidence to establish the guilt of the defendant.” [FN228] The Supreme Court determined that the government's appeal of the dismissal was not *702 barred because the proceedings had been terminated on a basis unrelated to *Scott's* factual guilt or innocence. [FN229] The *Scott* opinion contrasted *Scott's* situation--a midtrial dismissal “on grounds unrelated to guilt or innocence”-- with an acquittal resolving guilt or innocence. [FN230] The Court stressed that “the law attaches particular significance to an acquittal . . . , however mistaken the acquittal may have been.” [FN231] The Supreme Court's subsequent decision in *Smalis v. Pennsylvania* reinforced the limited application of *Scott* to situations involving dismissals unrelated to the sufficiency of the evidence. [FN232]

The Supreme Court recently revisited the question of the double jeopardy implications of granting a motion for judgment of acquittal in *Smith v. Massachusetts*. [FN233] *Melvin Smith* was tried before a Massachusetts jury on three related charges stemming from a shooting. [FN234] At the conclusion of the Commonwealth's case, *Smith* moved for a finding of not guilty on the charge of unlawful possession of a firearm. [FN235] The court granted the motion, finding no evidence to support the statutory requirement that the firearm have a barrel shorter than sixteen inches. [FN236] The Commonwealth rested, and the trial proceeded on the remaining counts. [FN237] Prior to closing arguments, the court reversed its ruling, reasoning that the alleged victim's testimony that *Smith* had shot him with a “revolver that appeared to be a .32 or a .38” sufficed to establish barrel length. [FN238] The jury convicted *Smith* on all counts. [FN239] Acknowledging that “[d]ouble-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal,” [FN240] the Supreme Court nonetheless reversed *Smith's* conviction, *703 holding that the court's granting of his motion constituted a judgment of acquittal and that the Double Jeopardy Clause barred the court from reconsidering the acquittal. [FN241] The Court reasoned,

An order entering such a finding [that the evidence was insufficient as a matter of law to sustain a conviction] thus meets the definition of acquittal that our double-jeopardy cases have consistently used: It “actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” [FN242]

The Court explained its holding in *Martin Linen* as follows: “[T]he Rule 29 judgment of acquittal is a substantive determination that the prosecution has failed to carry its burden.” [FN243] The Court continued,

[W]e have long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict. This is so whether the judge's ruling of acquittal comes in a bench trial or . . . in a trial by jury. [FN244]

The Court concluded, “Our double-jeopardy cases make clear that an acquittal bars the prosecution from seeking ‘another opportunity to supply evidence which it failed to muster’ before jeopardy terminated.” [FN245]

On the one hand, it is clear from *Martin Linen* that a final ruling granting a judgment of acquittal is an acquittal for double jeopardy purposes. The exception to the scope of double jeopardy protection enumerated in *Scott* is a narrow one and does not seem to apply to a pretrial grant of summary judgment for the defense. In contrast to the basis for dismissal in *Scott* (preindictment delay), the basis for a grant of summary judgment would be the trial court's conclusion that the government did not possess or could not present sufficient evidence to sustain the defendant's conviction; thus, a grant of summary judgment would be directly related to guilt or innocence. Furthermore, the Supreme Court made clear in *Smalis* that it would be irrelevant to the issue of double jeopardy if a grant of summary judgment were based on a legal error:

The status of the trial court's judgment as an acquittal is not affected by the Commonwealth's allegation that the court erred in deciding what degree of recklessness was . . . required to be shown under *704 Pennsylvania's definition of [third-degree] murder. [T]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination but it does not alter its essential character. [FN246]

In other words, double jeopardy would be implicated even if the trial court's legal determination that the uncontested material facts, when taken in the light most favorable to the prosecution, were legally insufficient to prove the crime charged turns out to be erroneous. “[T]he determinative question is whether the [trial] court found the evidence legally insufficient to sustain a conviction.” [FN247] Similarly, a granted motion for summary judgment in a civil case operates to bar the cause of action for the purposes of claim and issue preclusion because summary judgment goes to the merits of the case. [FN248]

On the other hand, it is well established that neither a trial court's grant of a pretrial motion to dismiss [FN249] nor a trial court's finding that the prosecution lacks probable cause to proceed to trial and its consequent dismissal of the charges after a preliminary hearing in a criminal case [FN250] precludes a subsequent prosecution for the dismissed offense. While there *705 may be institutional restraints on doing so, there is no federal constitutional bar to reinstating the charge because the preliminary hearing dismissal occurs prior to the attachment of jeopardy, and state law commonly imposes few, if any, restrictions on reinitiating prosecution after a finding of no probable cause at the preliminary hearing. [FN251] The vast majority of states permit the prosecutor to refile the charge and seek another preliminary hearing on the same evidence. [FN252] Like a court's finding that probable cause is lacking after a preliminary hearing, a grand jury's decision not to issue an indictment also does not trigger the double jeopardy bar. [FN253] While the prosecution may self-regulate its ability to present a case to successive grand juries, the Fifth Amendment does not prevent it from doing so. If a grand jury is readily available, the prosecutor may present the same case to the grand jury for indictment. [FN254]

As the Supreme Court's decisions make clear, the determinative double jeopardy question on a prosecution appeal of a trial court's pretrial *706 grant of a defendant's summary judgment motion would be whether the trial court had found the proffered or uncontested material facts legally insufficient to sustain a conviction. In ruling on a motion for summary judgment, the judge would analyze the proof submitted by both parties to determine whether (1) the prosecutor has presented sufficient evidence to entitle the state to judgment on the cause of action and (2) the defendant has submitted sufficient evidence to demonstrate that his or her denials or defenses are sufficient to defeat the prosecution's claim. [FN255] It seems likely that a trial court's grant of a defense motion for summary judgment would function as an acquittal in form and substance. Because the trial court would be, in effect, acquitting a defendant of the offense charged prior to trial by resolving factual questions pertinent to guilt or innocence, an appellate court's reversal of a grant of defensive summary judgment and remanding for further proceedings (that is, a trial on the merits before a jury) would be construed as exposing such a defendant to jeopardy a second time. [FN256]

In this way, the grant of a defense motion for summary judgment would function in the same manner for double jeopardy purposes as the grant of a motion for judgment of acquittal after the beginning of the trial or verdict of acquittal after a bench trial on stipulated facts. The difference would be one of timing and its attendant effect on use of resources and relative burdens only.

The purpose underlying the Double Jeopardy Clause would be best *707 served if a grant of summary judgment to a defendant were to function as an acquittal. The Supreme Court has described the purpose of the double jeopardy prohibition as follows:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is 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 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.

In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when "not followed by any judgment, is a bar to a subsequent prosecution for the same offence." Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. [FN257]

The case of *Finch v. United States*, [FN258] as well as the *Taylor* and *Bledsoe* cases discussed in Part VI, are instructive in this regard. James Finch was charged with knowingly fishing on a portion of a river reserved exclusively for use by the Crow Indians. [FN259] After considering an agreed statement of facts, the district court found that Finch had not made entry onto Crow lands and granted Finch's motion to dismiss the charge on the ground that the charging document failed to state an offense. [FN260] On appeal, the Supreme Court reasoned that "[w]hen the District Court dismissed the information, jeopardy had attached." [FN261] The Court held, "[B]ecause the dismissal was granted . . . 'on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged,' we hold that the Government's appeal was barred by the Double Jeopardy Clause." [FN262] Accordingly, the *708 prosecution would likely be constitutionally prohibited from appealing even an erroneous grant of summary judgment to the defense.

Ultimately, however, whether a grant of summary judgment to a criminal defendant would preclude an appeal or subsequent charges is probably less important than the fact that the existence of summary judgment for defendants would force courts to definitively answer that question, and in the process give clearer guidance to trial courts and parties about the preclusive effects of a court finding that the prosecution has over- or prematurely charged a criminal suspect without legally sufficient evidence to sustain the charges.

VIII. IMPACT ON DISCOVERY

Under *Brady v. Maryland*, [FN263] prosecutors have a duty to divulge to the defense in advance of trial "evidence favorable to an accused." [FN264] Exactly when before trial is not always clear. [FN265] And, *Brady* has often been rather notoriously honored in its breach. [FN266] Presumably, criminal charges have *709 been fully investigated prior to the filing of a formal charge (at least, one would hope so). Nonetheless, commentators have noted the persistence of delayed disclosure of *Brady* material and the detrimental effects that the late timing of *Brady* disclosure has on fairness in criminal trials. [FN267]

The creation of a pretrial defense motion for summary judgment should accelerate the timing of the prosecution's disclosures. Civil courts presently have the discretion to order additional discovery prior to ruling on motions for summary judgment. [FN268] Most criminal courts presently require *710 the prosecution to disclose favorable material information pertaining to a motion to suppress prior to the suppression hearing. [FN269] One would presume that those same courts would also require the prosecution to disclose favorable information bearing on the propriety of summary judgment prior to a hearing on the defense motion, in much the same way that civil courts generally require discovery to be completed prior to ruling on motions for summary judgment. Because the existence of a motion for summary judgment by the defense would prevent the prosecution from masking its overcharging with a favorable plea offer, [FN270] the prosecution would have no choice but to disclose favorable information in time for the defense to make a more accurate decision regarding a plea, trial, and sentencing. [FN271] This accelerated disclosure would give additional meaning to

the Brady requirements and improve the transparency of criminal cases and the accuracy of criminal adjudication outcomes. [FN272] After all, it is hard to *711 imagine a benefit that inures to the system from delaying or suppressing constitutionally required disclosures.

IX. CONCLUSION

The volume of criminal litigation has exploded in this country, giving rise to the need to eliminate or streamline trials in order to manage the judicial docket. Permitting a weak or even frivolous prosecution case to proceed to trial and verdict unnecessarily risks having some juries convict despite the paucity of evidence of guilt. There is presently no mechanism for a defendant in a criminal case to move prior to trial to dismiss a charging document that is adequately pleaded but lacking in substantive evidence to back it up. The defendant's earliest opportunity to challenge the sufficiency of the evidence supporting the charge is during a trial on the merits, at the close of the prosecution's case. In the meantime, the defendant bears significant burdens as a result of the ongoing criminal prosecution: the stigma of arrest and charge; the possibility of pretrial detention with its concordant consequences (being cut off from friends and family, loss of employment, loss of liberty, the degradations of imprisonment, threats from other inmates, violence or even rape); [FN273] and the possibility of wrongful conviction. [FN274] As the Supreme Court has noted, *712 “[A] proliferation of doubtful issues which not only burden the judiciary, but, because of uncertainties inherent in their resolution, work a hardship upon both the prosecution and the defense in criminal cases, is hardly a desideratum.” [FN275]

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[FN1]. *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966).

[FN2]. *United States v. Salerno*, 481 U.S. 739 (1987).

[FN3]. Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§3141-3156 (2006)).

[FN4]. See 18 U.S.C. §3142(e).

[FN5]. See *id.*

[FN6]. See *id.*

[FN7]. See *id.* §3142(f). Any defendant, regardless of the charge against him or her, may be detained pending trial if he or she poses a risk of nonappearance at future court proceedings. See *id.* §3142(f)(2).

[FN8]. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

[FN9]. See *id.* at 743; James Dao, Anthony (Fat Tony) Salerno, 80, A Top Crime Boss, Dies in Prison, N.Y. Times, July 29, 1992, at D19.

[FN10]. [Salerno](#), 481 U.S. at 754.

[FN11]. [Id.](#) at 755 (emphasis added).

[FN12]. [Id.](#) at 750-51.

[FN13]. [Id.](#) at 748-49.

[FN14]. [Vermont v. Brillon](#), 129 S. Ct. 1283 (2009).

[FN15]. [Barker v. Wingo](#), 407 U.S. 514 (1972).

[FN16]. [Id.](#) at 530.

[FN17]. [Brillon](#), 129 S. Ct. at 1287.

[FN18]. [Id.](#) at 1287-89.

[FN19]. [Id.](#) at 1289.

[FN20]. [Id.](#)

[FN21]. [Id.](#)

[FN22]. [Id.](#) This “blame theory” of speedy trial jurisprudence, which asks to which party pretrial delay should be “charged,” seems to be an outgrowth of the Barker factors relating to the reasons for the delay and the efforts that the accused made in seeking a speedy trial. Of course, nothing in Barker suggests, much less requires, that individual periods of delay be assigned to or blamed on one party or the other. One possibility is that this blame theory has resulted from the grafting by trial courts of the newer Barker standards onto older demand- and waiver-based speedy trial systems (which the Court expressly eschewed in Barker).

[FN23]. [Id.](#)

[FN24]. [Id.](#)

[FN25]. [Id.](#) at 1290-91. Of course, there was a middle ground between these two polarized positions that the Court could have forged. The Court could have answered the more interesting question of how “neutral” delays (that is, delays that are intentionally or negligently caused by neither party) should be analyzed under Barker—for example, the unavailability of courtrooms, jurors, or judges; backlogs at the state crime lab; and public defense and prosecution caseload issues, which are endemic in the criminal justice system—particularly under the reasons-for-delay prong.

[FN26]. See [Wayte v. United States](#), 470 U.S. 598, 607 (1985) (explaining that a prosecutor’s “broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review”); [United States v. Redondo-Lemos](#), 955 F.2d 1296, 1299-1300 (9th Cir. 1992) (rejecting Gilberto Redondo-Lemos’s challenge to the prosecutor’s charging decision and refusing to evaluate whether the decision had been made in an arbitrary and capricious manner, reasoning that prosecutorial charging decisions “involve exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation”), overruled on other grounds by [United States v. Armstrong](#), 48 F.3d 1508, 1510 (9th Cir. 1995) (en banc).

[FN27]. Model Rules of Prof'l Conduct R. 3.8(a) (2010).

[FN28]. See *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting) (noting that if overcharging occurs it should be done before the plea bargaining rather than after the defendant has accepted a plea); *United States v. Bowman*, 679 F.2d 798, 802 (9th Cir. 1982) (Henderson, J., dissenting) (noting that it is unclear whether overcharging would cease if the principle of mutuality was rejected); *United States v. Andrews*, 612 F.2d 235, 256 n.23 (6th Cir. 1979) (Keith, J., dissenting) (noting that there is a large amount of overcharging). As Justice Blackmun pointed out in *Bordenkircher*, such overcharging is nearly impossible to prove; if the defendant is either acquitted of or pleads guilty to a charge of which he or she is not guilty, an appellate court would not have jurisdiction to review the charging decision. See *Bordenkircher*, 434 U.S. at 368 n.2.

[FN29]. *Jackson v. Virginia*, 443 U.S. 307 (1979).

[FN30]. 18 U.S.C. §1028(a)(7) (2006).

[FN31]. See *Fed. R. Crim. P. 12(b)(3)(B)* (authorizing district courts to dismiss charging documents whenever they fail to state an offense).

[FN32]. See *infra* Parts V-VI (offering examples of several of these cases).

[FN33]. See, e.g., Douglas L. Colbert, *Professional Responsibility in Crisis*, 51 *How. L.J.* 677, 738 n.284 (2008); Phyllis E. Mann, *Hurricanes Katrina and Rita--A Year Later in Louisiana*, *Champion*, Dec. 2006, at 6, 8 (defining "D.A. time" as time spent "sitting in jail while unable to make the bond based on over-charging"); Pamela R. Metzger, *Doing Katrina Time*, 81 *Tul. L. Rev.* 1175, 1183 (2007).

[FN34]. *Fed. R. Crim. P. 2*.

[FN35]. See, e.g., *Russell v. United States*, 369 U.S. 749, 791 (1962) (Harlan, J., dissenting) ("There is no such thing as a motion for summary judgment in a criminal case."); *United States v. Browning*, 436 F.3d 780, 781 (7th Cir. 2006) ("[T]here is no summary judgment or directed verdict in a criminal case...."); *United States v. DeLaurentis*, 230 F.3d 659, 661 (3d Cir. 2000) (noting that there is no criminal equivalent to the motion for summary judgment in civil cases); *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992) ("There is no summary judgment procedure in criminal cases. Nor do the rules provide for a pre-trial determination of the sufficiency of the evidence.").

[FN36]. See, e.g., *Fed. R. Crim. P. 29(a)* (authorizing a district court to grant a motion for judgment of acquittal before submission to the jury if the evidence is insufficient to sustain a conviction). See also *infra* Part IV.A (discussing mid- and posttrial judgments of acquittal).

[FN37]. See *Fed. R. Crim. P. 29(a)*.

[FN38]. See, e.g., *Fed. R. Crim. P. 29(c)* (authorizing a district court to grant a motion for judgment of acquittal after the jury verdict or discharge).

[FN39]. *Fed. R. Civ. P. 56(a)*; 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §2711 (3d ed. 1998).

[FN40]. Wright, Miller & Kane, *supra* note 39, §2711.

[FN41]. David G. Paston, *Summary Judgment in New York* 25 (1958).

[FN42]. Fed. R. Civ. P. 56(c)(1).

[FN43]. See Paston, *supra* note 41, at 25. See also *Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc.*, 568 F.2d 1074, 1077 (5th Cir. 1978); *United States v. Gen. Motors Corp.*, 518 F.2d 420, 441-42 (D.C. Cir. 1975); *Commercial Iron & Metal Co. v. Bache & Co.*, 478 F.2d 39, 41 (10th Cir. 1973); *Applegate v. Top Assocs., Inc.*, 425 F.2d 92, 96 (2d Cir. 1970); *Kern v. Tri-State Ins. Co.*, 386 F.2d 754, 756 (8th Cir. 1967); *Gilmore v. Ivey*, 348 S.E.2d 180, 183 (S.C. Ct. App. 1986); *Larose v. Agway, Inc.*, 508 A.2d 1364, 1365 (Vt. 1986); Wright, Miller & Kane, *supra* note 39, §2712.

[FN44]. Fed. R. Civ. P. 56(e) advisory committee's note (1963).

[FN45]. See Wright, Miller & Kane, *supra* note 39, §2711.

[FN46]. Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 *Yale L.J.* 423, 423 (1929) (advocating the use of summary judgment as a remedy for excessive delay and congestion in the courts). See also Harold M. Kennedy, *The Federal Summary Judgment Rule*, 13 *Brook. L. Rev.* 5, 6 (1947).

[FN47]. See Kennedy, *supra* note 46, at 6.

[FN48]. See William W. Schwarzer, Alan Hirsch & David J. Barrans, Fed. Judicial Ctr., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure* vii (1991).

[FN49]. *Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.*, 388 F.2d 272, 278 (2d Cir. 1967) (quoting 3 William V. Barron & Alexander Holtzoff, *Federal Practice and Procedure* §1231 (Charles Alan Wright ed., 1958)). See also, e.g., *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1189 (11th Cir. 2005); *Apton v. Wilson*, 506 F.2d 83, 94 (D.C. Cir. 1974); *Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 498 (7th Cir. 1972); *Chambers v. United States*, 357 F.2d 224, 229 (8th Cir. 1966); *Krieger v. Ownership Corp.*, 270 F.2d 265, 270 (3d Cir. 1959); *S.M.S. Mfg. Co. v. U.S.-Mengel Plywoods, Inc.*, 219 F.2d 606, 607 (10th Cir. 1955).

[FN50]. *Am. Mfrs.*, 388 F.2d at 278 (quoting Barron & Holtzoff, *supra* note 49, §1231). See also, e.g., *Bros., Inc. v. W.E. Grace Mfg. Co.*, 261 F.2d 428, 432 (5th Cir. 1958).

[FN51]. *Am. Mfrs.*, 388 F.2d at 278 (quoting Barron & Holtzoff, *supra* note 49, §1231). See also, e.g., *Staren v. Am. Nat'l Bank & Trust Co.*, 529 F.2d 1257, 1261-62 (7th Cir. 1976); *Bland v. Norfolk & S. R.R. Co.*, 406 F.2d 863, 866 (4th Cir. 1969); *Kern v. Tri-State Ins. Co.*, 386 F.2d 754, 756 (8th Cir. 1967); *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.*, 378 F.2d 377, 386 (5th Cir. 1967); *Empire Elecs. Co. v. United States*, 311 F.2d 175, 179 (2d Cir. 1962); *Krieger*, 270 F.2d at 270; *Atlas Sewing Ctrs., Inc. v. Nat'l Ass'n of Indep. Sewing Mach. Dealers*, 260 F.2d 803, 806-07 (10th Cir. 1958); *1901 Wyo. Ave. Co-op. Ass'n v. Lee*, 345 A.2d 456, 460-61 (D.C. 1975); *Guthrie v. Nw. Mut. Life Ins. Co.*, 208 S.E.2d 60, 65 (W. Va. 1974).

[FN52]. *Am. Mfrs.*, 388 F.2d at 278 (quoting Barron & Holtzoff, *supra* note 49, §1231). See also, e.g., *United States v. Porter*, 581 F.2d 698, 703 (8th Cir. 1978); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976); *Broadway v. City of Montgomery*, 530 F.2d 657, 661 (5th Cir. 1976); *Zweig v. Hearst Corp.*, 521 F.2d 1129, 1135-36 (9th Cir. 1975) (explaining that summary judgment serves the goal of limiting the waste of time and resources of both the litigants and the courts in cases in which a trial would be a useless formality); *Bloomgarden v. Coyer*, 479 F.2d 201, 206 (D.C. Cir. 1973); *Wahl v. Vibranetics, Inc.*, 474 F.2d 971, 976 (6th Cir. 1973); *Mintz*, 463 F.2d at 498; *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969); *Bland*, 406 F.2d at 866; *New Home Appliance Ctr., Inc. v.*

Thompson, 250 F.2d 881, 883 (10th Cir. 1957) (“[S]ummary judgment is available to avoid expensive trials of frivolous claims.”); *Donald v. City Nat'l Bank of Dothan*, 329 So. 2d 92, 94 (Ala. 1976); Paston, *supra* note 41, at 25; Wright, Miller & Kane, *supra* note 39, §2712.

[FN53]. Paston, *supra* note 41, at 29.

[FN54]. See *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315, 320 (1902) (explaining that summary judgment “prescribes the means of making an issue”); Schwarzer, Hirsch & Barrans, *supra* note 48, at 8. Even when summary judgment is denied, the court must determine “if practicable...what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.” 41 C.F.R. §60-30.23(f) (2009). See generally *Fed. R. Civ. P. 56(g)* (noting that a court “may enter an order stating any material fact...that is not genuinely in dispute and treat[] the fact as established in the case” even if summary judgment is not granted).

[FN55]. See Schwarzer, Hirsch & Barrans, *supra* note 48, at 8.

[FN56]. Charles E. Clark, *Handbook of the Law of Code Pleading* 566 (2d ed. 1947) (footnote omitted).

[FN57]. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (citing *Jackson v. Virginia*, 433 U.S. 307, 318-19 (1979)).

[FN58]. See, e.g., *Fed. R. Crim. P. 12(b)(3)(B)*.

[FN59]. See, e.g., *Fed. R. Crim. P. 7(c)* (“The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged....”); *United States v. Debrow*, 346 U.S. 374, 377 (1953) (upholding the sufficiency of a perjury indictment that failed to allege either the name or authority of the person who administered the oath because the charge in the indictment “followed substantially the wording of the statute, which embodies all the elements of the crime”). Cf. *United States v. Russell*, 369 U.S. 749, 752-53 (1962) (holding that the indictment's failure to identify the subject of the inquiry in Russell's prosecution for failure to answer a congressional subcommittee's questions was a fatal defect in the charging document, because the failure to answer immaterial questions posed by Congress was not a crime).

[FN60]. See *United States v. DiFonzo*, 603 F.2d 1260, 1263 (7th Cir. 1979) (“The scope of such a challenge to the sufficiency of the indictment, however, is not unrestricted. The defendant is not permitted to transcend the four-corners of the indictment in order to demonstrate its insufficiency.”).

[FN61]. See *Fed. R. Crim. P. 7(c)*; *United States v. Cruikshank*, 92 U.S. 542, 557-58 (1875); *United States v. Murphy*, 762 F.2d 1151, 1154 (1st Cir. 1985) (holding, in light of *Russell*, that a witness-tampering indictment was insufficient when it failed to identify the official proceeding in which the witness was to testify); *State v. Levasseur*, 538 A.2d 764, 766 (Me. 1988) (holding that because the information charging Levasseur with sexual misconduct failed to identify what method of compulsion he used, an essential element of the offense, the pleading failed to charge him with an offense). Cf. *United States v. Cotton*, 535 U.S. 625, 629-30 (2002) (holding that the failure of an indictment to include an essential element of an offense was not an unwaivable “jurisdictional” defect).

[FN62]. See *Russell*, 369 U.S. at 763.

[FN63]. See *id.* at 764; *Hamling v. United States*, 418 U.S. 87, 117 (1974). Cf. *Valentine v. Konteh*, 395 F.3d 626, 635-36 (6th Cir. 2005) (holding, on habeas review, that the state court had applied Supreme Court precedent in an objectively unreasonable manner when it failed to recognize that the due process standards of *Russell* invalidated the indict-

ment pursuant to which Valentine had been convicted of twenty “carbon-copy” counts of child rape and felonious sexual penetration, respectively, which were alleged to have occurred over a period of ten months with nothing to distinguish them, rendering the indictment too lacking in detail to meet the notice and double jeopardy functions of Russell).

[FN64]. See [United States v. King](#), 581 F.2d 800, 802 (10th Cir. 1978) (holding that a motion to dismiss was improperly granted when the trial court considered disputed evidence beyond the charging document to determine whether King's conduct constituted a violation of the statutes pleaded).

[FN65]. See [United States v. DeLaurentis](#), 230 F.3d 659, 661 (3d Cir. 2000) (holding that, while the Federal Rules of Criminal Procedure permit dismissal of the charges if the allegations in a charging document do not charge an offense, such dismissal may not be based on the insufficiency of the evidence to prove the allegations); [United States v. Ayarza-Garcia](#), 819 F.2d 1043, 1048 (11th Cir. 1987) (“[A] pretrial motion to dismiss the indictment cannot be based on a sufficiency of the evidence argument because such an argument raises factual questions embraced in the general issue.”); [King](#), 581 F.2d at 802 (noting that a charging document “may be dismissed if it is insufficient to charge an offense” but “may not be properly challenged by a pretrial motion on the ground that it is not supported by adequate evidence”). See generally [Fed. R. Crim. P. 12\(b\)](#) (providing that “any defense, objection, or request that the court can determine without a trial of the general issue” may be raised before trial by motion (emphasis added)).

[FN66]. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 327 (1986). See also [id.](#) at 325 (holding that, when a party moving for summary judgment does not bear the burden of proof at trial, the party need not negate the nonmoving party's case, but rather can discharge its burden by demonstrating the absence of an essential element of the nonmoving party's case); [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 254 (1986) (holding that the trial court, in ruling on a motion for summary judgment, should assess the sufficiency of the evidence according to the evidentiary burden imposed by the controlling substantive law). In [Celotex](#), the issue on summary judgment was whether Catrett had adduced proof of exposure to Celotex's products, an essential element of the claim. [Celotex](#), 477 U.S. at 319-20.

[FN67]. [United States v. Hayes](#), 574 F.3d 460 (8th Cir. 2009).

[FN68]. See [id.](#) at 465, 468.

[FN69]. See [id.](#) at 465.

[FN70]. See [id.](#) at 465, 471.

[FN71]. See [id.](#) at 473, 477-78. For a discussion of the inadequacy of a motion for judgment of acquittal under [Federal Rule of Criminal Procedure 29](#) to address such legal-insufficiency cases, see [infra](#) Part IV.A.

[FN72]. See, e.g., [Fed. R. Crim. P. 5.1\(e\)](#) (governing preliminary hearings in federal criminal proceedings).

[FN73]. See, e.g., [Fed. R. Crim. P. 5.1\(a\)](#).

[FN74]. See, e.g., [id.](#) (“If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless...the defendant is indicted....”).

[FN75]. See, e.g., [Fed. R. Crim. P. 5.1\(e\)](#) (“At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired.”); [Fed. R. Evid. 1101\(d\)\(3\)](#) (“The rules [of evidence]...do not apply in...preliminary examinations in criminal cases....”).

[FN76]. The Fifth Amendment right to a grand jury indictment does not apply to the states by way of the Due Process Clause of the Fourteenth Amendment. See [Hurtado v. California](#), 110 U.S. 516, 538 (1884) (sustaining Hurtado's first-degree murder conviction arising from a prosecution that was initiated by information rather than indictment). As a result, the states are permitted to charge even very serious crimes without obtaining a grand jury indictment. In fact, fewer than half of all states regularly use grand juries in charging. See 1 Sara Sun Beale et al., *Grand Jury Law and Practice* §1.1 (2d ed. 2008) (“Today only eighteen states require a grand jury indictment to initiate serious criminal charges; four additional states require an indictment to initiate charges that could result in a capital sentence or life imprisonment.” (footnote omitted)); 4 Wayne R. LaFave et al., *Criminal Procedure* §14.2(c) (3d ed. 2007) (“Eighteen states, as in the federal system, require prosecution by indictment (unless waived) for all felonies.”). Most states permit prosecution either by indictment or information at the discretion of the prosecutor. Beale et al., *supra*, §1.5; LaFave et al., *supra*, §14.2(d) (“Almost two-thirds of the states permit felony prosecutions to be brought by either information or indictment (although several in this group require indictments for capital or life-sentence felonies).”). See also, e.g., [Ariz. Const. art. 2, §30](#); [Ark. Const. amend. XXI, §1](#); [Cal. Const. art. I, §14](#); [Haw. Const. art. I, §10](#); [Idaho Const. art. I, §8](#); [Mo. Const. art. I, §17](#); [Mont. Const. art. II, §20\(1\)](#); [Nev. Const. art. I, §8\(1\)](#); [N.M. Const. art. II, §14](#); [Okla. Const. art. II, §17](#); [Or. Const. art. VII, §5\(3\)-\(5\)](#); [Pa. Const. art. I, §10](#) (providing that “[e]ach of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information,” a condition that has now been met in all counties--see [204 Pa. Code §201.3\(a\)](#) (2010)); [S.D. Const. art. VI, §10](#); [Utah Const. art. I, §13](#); [Colo. Rev. Stat. §16-5-205](#) (2002); [Conn. Gen. Stat. §54-46](#) (2009); [Haw. Rev. Stat. §806-6](#) (2009) (duplicating the authorization contained in the Hawaii constitutional provision cited *supra*); [725 Ill. Comp. Stat. 5/111-2\(a\)](#) (2008); [Ind. Code §35-34-1-1\(a\)](#) (2010); [Iowa Code §813.2](#) (1997); [Kan. Stat. Ann. §22-3201](#) (2007); [Md. Code Ann., Crim. Proc. §4-102](#) (LexisNexis 2010); [Mich. Comp. Laws §767.1](#) (1979); [Neb. Rev. Stat. §29-1601](#) (2008); [Wash. Rev. Code §10.37.015](#) (2010); [Wis. Stat. §967.05](#) (2007); [Wyo. Stat. Ann. §7-1-106\(a\)](#) (2009); [N.D. R. Crim. P. 7\(a\)](#); [Vt. R. Crim. P. 7\(a\)](#).

The Supreme Court has defined an “infamous” offense as one punishable by imprisonment (that is, a felony). [Green v. United States](#), 356 U.S. 165, 183 (1958); [Mackin v. United States](#), 117 U.S. 348, 354 (1886) (“‘Infamous crimes’ are thus in the most explicit words defined to be those ‘punishable by imprisonment in the penitentiary.’”). See also [18 U.S.C. §4083](#) (2006) (“Persons convicted of offenses against the United States or by courts-martial punishable by imprisonment for more than one year may be confined in any United States penitentiary.”). Even in federal court, misdemeanor prosecutions may be initiated directly by the government by way of information. See [Fed. R. Crim. P. 58\(b\)\(1\)](#) (“The trial of a misdemeanor may proceed on an indictment, information, or complaint. The trial of a petty offense may also proceed on a citation or violation notice.”). The roles played by the prosecutor, court, and grand jury are not identical in all jurisdictions.

[FN77]. See, e.g., Stuart Taylor, Jr. & K.C. Johnson, *Until Proven Innocent* 177 (2007) (“[G]rand juries are rubber stamps. The notion that they protect defendants --any defendants--against prosecutorial abuse is a fraud.”).

[FN78]. [Hawkins v. Superior Court](#), 586 P.2d 916, 919 (Cal. 1978) (citations omitted).

[FN79]. See, e.g., [Fed. R. Crim. P. 6\(e\)\(2\)\(B\)](#) (forbidding grand jurors, prosecutors, and court personnel from disclosing matters occurring during grand jury proceedings). The grand jury secrecy requirements also shield the identity of grand jury witnesses. In federal court, grand jury testimony is sealed unless and until it is ordered released by the court.

[FN80]. See [United States v. Williams](#), 504 U.S. 36, 52 (1992). Cf. [United States v. Calandra](#), 414 U.S. 338, 343-44 (1974).

[FN81]. See [United States v. Sears, Roebuck & Co.](#), 719 F.2d 1386, 1393-94 (9th Cir. 1983); [United States v. Ciam-](#)

brone, 601 F.2d 616, 622 (2d Cir. 1979); ABA Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and Defense Function §3.5, at 87 (1971).

[FN82]. See *Costello v. United States*, 350 U.S. 359, 363 (1956) (holding that a grand jury may constitutionally rely solely on hearsay evidence in reaching its decision to issue an indictment).

[FN83]. See *Calandra*, 414 U.S. at 345 (opining that the rationale of *Costello* barred a challenge to an indictment issued on the basis of unconstitutionally obtained evidence).

[FN84]. See *United States v. Alexander*, 789 F.2d 1046, 1048 (4th Cir. 1986) (“[A] facially valid indictment suffices to permit the trial of the party indicted.”). But see *United States v. Mills*, 995 F.2d 480, 489 (4th Cir. 1993) (explaining that, when a trial court “is presented with a facially valid indictment founded entirely upon mistaken evidence” and “no rational grand jury could have found probable cause to indict,” it should dismiss the indictment).

[FN85]. In civil cases, summary judgment must be based on admissible evidence. See *Fed. R. Civ. P. 56(c)(2)*; *Feliciano v. Rhode Island*, 160 F.3d 780, 787 (1st Cir. 1998); *In re Harris*, 209 B.R. 990, 994 (B.A.P. 10th Cir. 1997); *Tomlinson v. City of Cincinnati*, 446 N.E.2d 454, 455 (Ohio 1983).

[FN86]. See, e.g., *United States v. Freter*, 31 F.3d 783, 785 (9th Cir. 1994).

[FN87]. See, e.g., *United States v. Pardue*, 983 F.2d 843, 847 (8th Cir. 1993) (holding that the question of whether Jack Pardue was entitled to a judgment of acquittal on the basis of outrageous government conduct was “one of law for the court”).

[FN88]. *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir. 1947) (footnote omitted). See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253-54 (1986) (citing *Curley*, 160 F.2d at 232-33).

[FN89]. Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal*, 44 *Am. U. L. Rev.* 433, 439 (1994).

[FN90]. Theodore W. Phillips, Note, *The Motion for Acquittal: A Neglected Safeguard*, 70 *Yale L.J.* 1151, 1151 (1961).

[FN91]. *Id.*

[FN92]. *Id.* at 1151-52.

[FN93]. *Id.* at 1152.

[FN94]. *Id.* See also Sauber & Waldman, *supra* note 89, at 439.

[FN95]. Sauber & Waldman, *supra* note 89, at 439.

[FN96]. *Id.* at 441.

[FN97]. Cf. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (explaining that the standard for summary judgment under *Federal Rule of Civil Procedure 56* mirrors the standard for a directed verdict under *Federal Rule of Civil Procedure 50(a)*).

[FN98]. See, e.g., *Fed. R. Crim. P. 29(a)*; Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren*

and Burger Courts' Competing Ideologies, 72 *Geo. L.J.* 185, 217 (1983) (“One obvious response to [the claim that plea bargaining results in accurate and fair results] is to dispute its assumption that the parties' evaluation of the defendant's degree of culpability plays a significant role in shaping the ultimate bargain. Negotiated compromises concerning the charging decision or sentencing ‘recommendation’ often reflect and promote institutional, financial, and tactical considerations that have little bearing on what the defendant did, or his culpability in doing it.” (footnotes omitted)); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2463, 2465-69 (2004) (rejecting as “far too simplistic” the theory that plea bargaining reflects merely a risk calculus of the likelihood of conviction at trial and its attendant sentencing enhancement, and discussing “the structural influences that skew [plea] bargains, such as lawyer quality, agency costs, bail and detention rules, sentencing guidelines and statutes, and information deficits”); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *Stan. L. Rev.* 29, 31-32 (2002) (advocating better and earlier prosecutorial screening of charges as a mechanism to reduce questionable plea bargaining practices); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 *U. Pa. L. Rev.* 79, 130-31 (2005) (noting the substantial size of the “plea discount” due to prosecutor-controlled sentencing in concessions that defendants in federal court gain by pleading guilty).

[FN99]. See, e.g., *United States v. Moody*, 30 *F. App'x* 58, 59 (4th Cir. 2002) (“At the stipulated bench trial, the district court dismissed three counts against Moody, but found Moody guilty of the remaining two counts....”); *United States v. Collazo*, 815 *F.2d* 1138, 1141 (7th Cir. 1987) (“Collazo and the prosecutor with the approval of the court stipulated to a bench trial and filed an agreed set of facts upon which the judge decided the case. The presiding judge found Collazo guilty of Counts one (conspiracy to receive and possess stolen checks), forty-eight and sixty-five (aiding and abetting the unlawful possession of stolen checks.)”); *United States ex rel. Potts v. Chrans*, 700 *F. Supp.* 1505, 1513 (N.D. Ill. 1988) (convicting Chrans of manslaughter instead of murder at a quasi-stipulated bench trial); *State v. Williams*, No. 0805027568, 2010 Del. Super. LEXIS 246, at *1-2 (Del. Super. Ct. May 28, 2010) (“A stipulated bench trial was held on October 23, 2008, and the Court found Defendant guilty as to Possession of a Controlled Substance Within 300 Feet of a Park, Recreation Area or Place of Worship and not guilty as to Loitering.” (footnote omitted)); *Davis v. State*, 690 *S.E.2d* 464, 466 (Ga. Ct. App. 2010) (“A stipulated bench trial resulted in Davis's acquittal on the DUI (less safe) charge and in his conviction on the remaining charges, giving rise to this appeal.”); *Commonwealth v. Monteiro*, 913 *N.E.2d* 900, 902 (Mass. App. Ct. 2009) (“After a jury-waived trial on stipulated evidence, a District Court judge found the defendant guilty of unlicensed possession of a firearm...and possession of a firearm without a firearm identification card... and not guilty of receipt of stolen property with a value over \$250....”); *Commonwealth v. Wilkins*, 8 *Pa. D. & C.5th* 404, 406-07 (2009) (“[A]ppellant proceeded to a stipulated bench trial wherein he stipulated to certain facts including the arresting officer's testimony from the preliminary hearing. This court found appellant guilty of one count of driving under the influence, general impairment, and not guilty of the remaining two counts.” (citation omitted)).

[FN100]. See, e.g., *Illinois v. Wardlow*, 528 *U.S.* 119, 122 (2000) (“Following a stipulated bench trial, Wardlow was convicted of unlawful use of a weapon by a felon. The Illinois Appellate Court reversed Wardlow's conviction, concluding that the gun should have been suppressed because Officer Nolan did not have reasonable suspicion sufficient to justify an investigative stop.... The Illinois Supreme Court agreed.”); *United States v. Abbott*, No. H-05-0309-01, 2009 *U.S. Dist. LEXIS* 44919, at *2 (S.D. Tex. May 28, 2009) (“After this Court denied Abbott's motion to suppress evidence, Abbott agreed to a stipulated bench trial. This Court found Abbott guilty as charged....The conviction was affirmed on direct appeal.”).

[FN101]. See *United States v. Drew*, 259 *F.R.D.* 449 (C.D. Cal. 2009).

[FN102]. See, e.g., *United States v. Vasquez-Padilla*, 330 *F. App'x* 883, 886 (11th Cir. 2009) (per curiam) (“Vasquez-Padilla waived his right to a jury trial and, following a stipulated bench trial, was found guilty by the district

court on all three counts of the indictment.”); [United States v. Anderson](#), 131 F. App'x 212, 214 (11th Cir. 2005) (“Following a stipulated bench trial, the district court found Anderson guilty of violating 18 U.S.C. §922(g)(1).”); [United States v. Washington](#), 340 F.3d 222, 224 (5th Cir. 2003) (“Tony Washington was convicted at a bench trial on stipulated facts of being a felon in possession of a firearm. Washington claims the district court erred [in part by]...concluding that the evidence sufficiently proved that the weapons traveled in or affected interstate commerce as necessary for a conviction.”); [United States v. Kowal](#), 486 F. Supp. 2d 923, 935-39 (N.D. Iowa 2007) (finding Kowal guilty in a bench trial and articulating the court's findings on each of the disputed elements of the offense); [Johnson v. State](#), 676 S.E.2d 884, 885 (Ga. Ct. App. 2009) (“Following a stipulated bench trial, Randy Johnson was convicted of possession of cocaine with intent to distribute...and a headlight violation...and acquitted of driving with a suspended license...”); [Davis v. State](#), 653 S.E.2d 107, 108 (Ga. Ct. App. 2007) (“[F]ollowing a stipulated bench trial at which the state presented evidence of Davis's prior felony conviction, the trial court found Davis guilty of possession of a firearm by a convicted felon...”).

[FN103]. See U.S. Const. art. III, §2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”); [Duncan v. Louisiana](#), 391 U.S. 145, 149 (1968) (holding that the Sixth Amendment right to trial by an impartial jury was part of the due process guaranteed to state defendants by the Fourteenth Amendment); [Singer v. United States](#), 380 U.S. 24, 34 (1965) (“Thus, there is no federally recognized right to a criminal trial before a sitting judge alone...”); [Adams v. United States ex rel. McCann](#), 317 U.S. 269, 275 (1942) (noting that a defendant may waive a trial by jury only if it is “in the exercise of a free and intelligent choice, and with the considered approval of the court”).

[FN104]. See [United States v. Armstrong](#), 517 U.S. 456, 464-65 (1996) (“In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’” (citing [Bordenkircher v. Hayes](#), 434 U.S. 357, 364 (1978))). Of course, a prosecutor's discretion is “subject to constitutional constraints.” [United States v. Batchelder](#), 442 U.S. 114, 125 (1979). One of these constraints, imposed by the Equal Protection Clause of the Fourteenth Amendment, is that the decision to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” [Oyler v. Boles](#), 368 U.S. 448, 456 (1962). See also [Bolling v. Sharpe](#), 347 U.S. 497, 500 (1954) (holding that under federal law, “racial segregation in the public schools...is a denial of the due process of law”).

[FN105]. Studies have shown that early prosecutorial commitments to prosecute play a role in wrongful convictions because they create a psychological barrier to the prosecutor withdrawing the charges on the basis of subsequent information. See Alafair S. Burke, [Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science](#), 47 Wm. & Mary L. Rev. 1587, 1604-05 (2006) (“Recent attention to the risks of wrongful convictions has brought to light the influence of ‘tunnel vision,’ whereby the belief that a particular suspect has committed the crime might obfuscate an objective evaluation of alternative suspects or theories. In Illinois, a special commission on capital punishment identified tunnel vision as a contributing factor in many of the capital convictions of thirteen men who were subsequently exonerated and released from death row. Similarly, in Canada, a report issued under the authority of federal, provincial, and territorial justice ministers concluded that tunnel vision was one of the eight most common factors leading to convictions of the innocent. In cognitive terms, the tunnel vision phenomenon is simply one application of the widespread cognitive phenomenon of confirmation bias. Law enforcement fails to investigate alternative theories of the crime because people generally fail to look for evidence that disconfirms working hypotheses.” (footnotes omitted)).

[FN106]. See [In re Winship](#), 397 U.S. 358, 361 (1970) (“[Beyond a reasonable doubt] is now accepted in common law

jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all essential elements of guilt.” (internal quotation marks omitted)).

[FN107]. A defendant's decision to plead guilty pursuant to a plea agreement with the prosecution is deemed to be voluntary even if the defendant's subjective feeling is that he or she has no choice because of the risks of exercising his or her trial rights. See *Brady v. United States*, 397 U.S. 742, 755 (1970) (“[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).” (alteration in original) (internal quotation marks omitted)).

[FN108]. *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

[FN109]. Indictment at 5, *Drew*, 259 F.R.D. 449 (No. CR 08-0582-GW).

[FN110]. *Www.myspace.com* is a Web site that offers social network services by providing a forum in which individuals who have registered as members can post online personal profiles, post personal information and other content, and communicate with other MySpace users and view their personal content, including instant- and private-messaging services. *Id.* at 3-4.

[FN111]. *Id.* at 6-7.

[FN112]. *Id.* at 8.

[FN113]. See Motion to Dismiss, *Drew*, 259 F.R.D. 449 (No. CR 08-0582-GW).

[FN114]. See *id.* at 3.

[FN115]. Fed. R. Crim. P. 12(b)(3)(B).

[FN116]. Motion to Dismiss, *supra* note 113, at 4.

[FN117]. See *id.* at 5-8.

[FN118]. The jury acquitted *Drew* of the felony computer fraud charges regarding the unauthorized access of a computer to obtain information in furtherance of the tort of intentional infliction of emotional distress, but it convicted her of the misdemeanor charges of simple unauthorized access to a computer based solely on her creation of the Evans profile in violation of MySpace's terms of service. See *Drew*, 259 F.R.D. at 453, 461.

[FN119]. Criminal Docket, *Drew*, 259 F.R.D. 449 (No. CR 08-0582-GW).

[FN120]. *Id.*

[FN121]. Taylor & Johnson, *supra* note 77, at 16.

[FN122]. *Id.* at 17.

[FN123]. *Id.* at 19-20.

[FN124]. Id. at 23.

[FN125]. Id. at 24.

[FN126]. Id.

[FN127]. See id. at 24-25.

[FN128]. See id. at 25.

[FN129]. Id. at 27.

[FN130]. Id.

[FN131]. Id. at 28.

[FN132]. Id.

[FN133]. Id.

[FN134]. Id. at 30.

[FN135]. Id. (internal quotation marks omitted).

[FN136]. Id. at 30-31.

[FN137]. Id. at 31.

[FN138]. Id.

[FN139]. Id.

[FN140]. Id.

[FN141]. Id. at 31-32.

[FN142]. Id. at 96.

[FN143]. Id. at 32.

[FN144]. Id. at 35 (internal quotation marks omitted).

[FN145]. Id. at 37-39.

[FN146]. Id. at 38-39.

[FN147]. Id. at 46.

[FN148]. See id. at 34, 96, 162.

[FN149]. See id. at 163, 223, 303.

[FN150]. See *id.* at 174, 179. Under North Carolina law (which is typical), the issuance of the grand jury indictment preempted what otherwise would have been Seligman's and Finnerty's rights to a probable cause hearing. *Id.* at 173-74.

[FN151]. *Id.* at 181.

[FN152]. *Id.*

[FN153]. *Id.*

[FN154]. *Id.* at 183.

[FN155]. See *id.*

[FN156]. See *id.*

[FN157]. *Id.* at 178.

[FN158]. *Id.* at 200.

[FN159]. *Id.* at 225.

[FN160]. See *id.* at 229.

[FN161]. *Id.*

[FN162]. See *id.* at 249.

[FN163]. See *id.* at 303.

[FN164]. See *id.* at 316.

[FN165]. See *id.* at 351-52.

[FN166]. *Id.* at 352.

[FN167]. Cf. Paston, *supra* note 41, at 30.

[FN168]. Cf. *id.*

[FN169]. The common colloquial expression used to describe the time that defendants spend in pretrial detention (including the time spent in detention by defendants whose convictions have been overturned on appeal and who are awaiting a prosecutorial decision (not) to proceed with a second trial) is “doing D.A. time.” See *supra* note 33 and accompanying text.

[FN170]. See *infra* Part VII for further discussion of the double jeopardy ramifications of defensive summary judgment.

[FN171]. This is essentially the same standard that a court applies in ruling on a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. See, e.g., *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Freter*, 31 F.3d 783, 785 (9th Cir. 1994); *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986). The Supreme Court has articulated the development of the civil summary judgment standard in parallel terms:

Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

[Improvement Co. v. Munson](#), 81 U.S. (14 Wall.) 442, 448 (1871) (footnote omitted). See also [Pa. R.R. Co. v. Chamberlain](#), 288 U.S. 333, 343 (1933); [Coughran v. Bigelow](#), 164 U.S. 301, 307 (1896); [Pleasants v. Fant](#), 89 U.S. (22 Wall.) 116, 120-21 (1874) (citing [Munson](#), 81 U.S. (14 Wall.) at 448). This rationale is even more applicable in the context of a criminal case, in which the prosecution is constitutionally required to prove guilt beyond a reasonable doubt--a far higher standard than the civil standards of proof: a preponderance of the evidence and clear and convincing evidence.

[FN172]. This is similar to situations in which defensive summary judgment is employed in civil cases. A prominent example is [Matsushita Electric Industrial Co. v. Zenith Radio Corp.](#), 475 U.S. 574 (1986), in which the Supreme Court embraced a more active use of summary judgment in civil cases. See *id.* at 598 (affirming summary judgment for the defendants in an antitrust case involving an alleged conspiracy to fix unreasonably low prices). In [Matsushita Electric](#), American manufacturers of consumer electronic products (Zenith) had filed suit against a group of their Japanese competitors (Matsushita), alleging that they had violated American antitrust laws by conspiring to drive domestic firms from the American market by selling their products at a loss in the United States. *Id.* at 577-78. The district court granted the defendants' motion for summary judgment, finding that there was no significant probative evidence that the Japanese companies had entered into an agreement or acted in concert with respect to their exports in any way that could have resulted in a cognizable injury to the American firms. See *id.* at 578-79. The court of appeals reversed the district court, holding that a reasonable trier of fact could find the existence of a conspiracy to depress prices in America in order to drive out domestic competitors based on evidence of concerted action in the form of (1)an agreement among the Japanese companies and the Japanese government to set minimum export prices; (2)the companies' common practice of undercutting the minimum prices through rebate schemes that they concealed from the governments of both countries; and (3)an agreement among the companies to limit the number of their American distributors. *Id.* at 581. The Supreme Court reversed the court of appeals, finding that the plaintiffs had failed to adduce sufficient evidence in support of their predatory pricing theory because the purported evidence of concerted action had no relevance to the alleged predatory pricing conspiracy and the Japanese companies lacked any plausible motive to engage in such a conspiracy, which would have involved substantial profit losses and had little likelihood of success. *Id.* at 595. See also [Celotex Corp. v. Catrett](#), 477 U.S. 317, 320, 322 (1986) (upholding the district court's grant of summary judgment to Celotex because Catrett was unable to produce evidence in support of her allegation in her wrongful death complaint that the decedent, her husband, had been exposed to Celotex's asbestos products, and holding that the plain language of [Federal Rule of Civil Procedure 56\(c\)](#) "mandat[ed] the entry of summary judgment, after adequate time for discovery and upon motion, against a party who failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"); [Monsanto Co. v. Spray-Rite Serv. Corp.](#), 465 U.S. 752, 768 (1984) (holding that conduct as consistent with permissible competition as with illegal conspiracy did not, standing alone, constitute sufficient evidence of an antitrust conspiracy). The Court held that, as a matter of substantive antitrust law, a case could not be submitted to a jury if the plaintiffs had produced no direct evidence of a conspiracy and an inference of lawful conduct from the circumstantial evidence was at least as plausible as an inference of a conspiracy. [Matsushita Elec.](#), 475 U.S. at 595.

[FN173]. The Supreme Court has delineated a parallel standard for civil summary judgment--namely, that it "should be

granted where the evidence is such that ‘it would require a directed verdict for the moving party.’” [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 251 (1986) (quoting [Sartor v. Ark. Natural Gas Corp.](#), 321 U.S. 620, 624 (1944) (holding that the test for determining whether a genuine issue of material fact exists is the same as the test for granting a directed verdict—namely, whether the evidence is sufficient to sustain a verdict for the nonmoving party)). “The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.” [Bill Johnson's Rests., Inc. v. NLRB](#), 461 U.S. 731, 745 n.11 (1983).

[FN174]. Cf. [Edwards v. Aguillard](#), 482 U.S. 578, 594 (1987) (holding that summary judgment is the appropriate means of deciding an issue that turns on statutory interpretation when there is no dispute over the sufficiency of the evidence establishing the facts that control the application of a rule of law). In the context of a criminal case, this is analogous to the court deciding a pretrial motion to suppress illegally obtained evidence. Cf. [Gramenos v. Jewel Cos.](#), 797 F.2d 432, 438-39 (7th Cir. 1986) (holding that the issue of whether a police arrest was reasonable under the circumstances presented a legal question with policy considerations transcending the particular case and was, therefore, best decided by the court rather than a jury).

[FN175]. In a criminal case, the jury determines disputed issues of fact, but the court determines disputed issues of law. See [Bollenbach v. United States](#), 326 U.S. 607, 612 (1946) (“In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.” (citation omitted)); [Georgia v. Brailsford](#), 3 U.S. (3 Dall.) 1, 4 (1794) (“It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide.”); James B. Thayer, “Law and Fact” in [Jury Trials](#), 4 *Harv. L. Rev.* 147, 147 (1890) (“[M]atters of law are for the court, and matters of fact for the jury....”). Summary judgment in a criminal case should not be a substitute for the trial of disputed factual issues by the jury.

[FN176]. [Orloff v. Allman](#), 819 F.2d 904 (9th Cir. 1987).

[FN177]. *Id.* at 905.

[FN178]. See *id.* at 905, 907.

[FN179]. *Id.* at 906.

[FN180]. See *id.* at 907.

[FN181]. See *id.* at 905, 907-08. The United States Court of Appeals for the Ninth Circuit affirmed, finding that, in order to demonstrate that Allen was an aider and abettor, the Orloffs would have had to prove that he had actual knowledge of the fraudulent investment scheme and that he substantially assisted that fraud. See *id.* at 907. The court of appeals concluded that they had fallen short of making the requisite showing of Allen's culpability. *Id.* at 908.

[FN182]. [United States v. Souder](#), 666 F. Supp. 2d 534 (M.D.N.C. 2009).

[FN183]. *Id.* at 538-39.

[FN184]. *Id.* at 541.

[FN185]. *Id.* at 543, 549.

[FN186]. See *id.* at 541; Order Setting Conditions of Release at 1, Souder, 666 F. Supp. 2d 534 (No. 1:08-CR-136-1); Order Setting Conditions of Release at 1, Souder, 666 F. Supp. 2d 534 (No. 1:08-CR-136-2); Order Setting Conditions of Release at 1, Souder, 666 F. Supp. 2d 534 (No. 1:08-CR-136-3).

[FN187]. See Order Setting Conditions of Release at 2, Souder, 666 F. Supp. 2d 534 (No. 1:08-CR-136-2).

[FN188]. See Order Setting Conditions of Release at 2, Souder, 666 F. Supp. 2d 534 (No. 1:08-CR-136-1).

[FN189]. Souder, 666 F. Supp. 2d at 541.

[FN190]. *Id.* See Fed. R. Crim. P. 29 (governing motions for a judgment of acquittal).

[FN191]. Souder, 666 F. Supp. 2d at 541. See also Fed. R. Crim. P. 33 (governing a defendant's motion for a new trial).

[FN192]. The mail fraud statute provides, in pertinent part,

Whoever, having devised or intending to devise any scheme or artifice to defraud...for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service [shall be guilty of an offense against the United States.]

18 U.S.C. §1341 (2006).

[FN193]. See Souder, 666 F. Supp. 2d at 541, 551, 554.

[FN194]. *Id.* at 549-50, 555, 558.

[FN195]. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977) (“We thus conclude that judgments under Rule 29 are to be treated uniformly and, accordingly, the Double Jeopardy Clause bars appeal from an acquittal entered under Rule 29(c) after a jury mistrial....”). Rule 29(c) provides that a defendant may move for a judgment of acquittal “after a guilty verdict or after the court discharges the jury.” Fed. R. Crim. P. 29(c)(1).

[FN196]. *State v. Taylor*, 810 A.2d 964 (Md. 2002).

[FN197]. *Id.* at 966.

[FN198]. *Id.*

[FN199]. *Id.*

[FN200]. *Id.*

[FN201]. *Id.*

[FN202]. *Id.* at 967.

[FN203]. *Id.* at 967 n.4 (internal quotation marks omitted).

[FN204]. *Id.* at 967-68.

[FN205]. *Id.* at 968, 974.

[FN206]. See *id.* at 968-69.

[FN207]. *Id.* at 969-70.

[FN208]. *Id.*

[FN209]. *Id.*

[FN210]. *Id.*

[FN211]. *Id.* at 970.

[FN212]. *Id.*

[FN213]. *Id.*

[FN214]. *Id.*

[FN215]. *Id.*

[FN216]. *Id.* at 967 n.5, 970 n.10. See also [Md. Code Ann., Cts. & Jud. Proc. §12-302\(c\)\(1\)](#) (LexisNexis 2006 & Supp. 2010); [Md. Code Ann., Cts. & Jud. Proc. §12-401\(b\)\(1\)\(ii\)](#) (LexisNexis 1974).

[FN217]. [Taylor](#), 810 A.2d at 979.

[FN218]. *Id.* Maryland's rules of criminal procedure echo the federal rules in that they provide mechanisms for pretrial dismissal of a charging document that fails to charge an offense. Compare Md. R. Crim. P. 4-252(a)(2), with [Fed. R. Crim. P. 12\(b\)\(3\)\(B\)](#). Maryland's rules also include a mid- or posttrial judgment of acquittal. Compare Md. Rule Crim. P. 4-324(a), with [Fed. R. Crim. P. 29](#). The state lacks a mechanism for a pretrial ruling on the sufficiency of the evidence (what this Article terms “defensive summary judgment”), however. See [Taylor](#), 810 A.2d at 980 (explaining that there is no criminal analogue to the civil motion for summary judgment); [State v. Bailey](#), 422 A.2d 1021, 1025 (Md. 1980) (“[T]he motion to dismiss attacks the sufficiency of the indictment, not the sufficiency of the evidence.”).

[FN219]. [Taylor](#), 810 A.2d at 979-80.

[FN220]. *Id.* at 982.

[FN221]. See *infra* Part VII.

[FN222]. See U.S. Const. amend. V (guaranteeing that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb”).

[FN223]. See [United States v. Martin Linen Supply Co.](#), 430 U.S. 564, 569 (1977) (“The protections afforded by the [Double Jeopardy] Clause are implicated only when the accused has actually been placed in jeopardy. This state of jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence.” (citations omitted)).

[FN224]. *Id.* at 576.

[FN225]. *Id.* at 571.

[FN226]. *Id.* at 573 n.12.

[FN227]. See *United States v. Scott*, 437 U.S. 82 (1978).

[FN228]. *Id.* at 95.

[FN229]. See *id.* at 98-99; *Wilkett v. United States*, 655 F.2d 1007, 1012 (10th Cir. 1981) (holding that the trial court's termination of Wilkett's trial based on the government's failure to prove venue was not an acquittal under *Scott* because venue was a "procedural" rather than "substantive" element of the offense charged).

[FN230]. *Scott*, 437 U.S. at 95-96.

[FN231]. *Id.* at 91.

[FN232]. *Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986) (holding that a ruling on a demurrer under Pennsylvania's rules of criminal procedure that the state's evidence was insufficient as a matter of law to establish Smalis's factual guilt constituted an acquittal for double jeopardy purposes).

[FN233]. *Smith v. Massachusetts*, 543 U.S. 462 (2005).

[FN234]. *Id.* at 464.

[FN235]. *Id.* at 465.

[FN236]. *Id.* at 464-65.

[FN237]. *Id.* at 465.

[FN238]. *Id.* (internal quotation marks omitted).

[FN239]. *Id.* at 466.

[FN240]. *Id.* at 474.

[FN241]. *Id.* at 473.

[FN242]. *Id.* at 467-68 (citations omitted).

[FN243]. *Id.* at 468.

[FN244]. *Id.* at 467 (citations omitted).

[FN245]. *Id.* at 437 n.7.

[FN246]. *Smalis v. Pennsylvania*, 476 U.S. 140, 144 n.7 (1986) (alterations in original) (citations omitted) (internal quotation marks omitted).

[FN247]. *United States v. Ogles*, 440 F.3d 1095, 1103 (9th Cir. 2006) (en banc).

[FN248]. *Wright, Miller & Kane*, supra note 39, §2712. See also *Flores v. Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d

773, 775-76 (5th Cir. 1984); *Prakash v. Am. Univ.*, 727 F.2d 1174, 1182 (D.C. Cir. 1984); *Jackson v. Hayakawa*, 605 F.2d 1121, 1125 (9th Cir. 1979); *Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F.2d 710, 715-16 (2d Cir. 1977) (holding that summary judgment granted to Lafayette Towers on the ground that a New Jersey statute barred Weston Funding's claim seeking a real estate commission precluded Weston Funding's subsequent action to recover the commission under the quantum meruit theory); *Hoke v. Retail Credit Corp.*, 521 F.2d 1079, 1081 n.3 (4th Cir. 1975) (finding that a district court had subject matter jurisdiction and therefore its summary judgment ruling precluded the issue); *Air-Lite Prods., Inc. v. Gilbane Bldg. Co.*, 347 A.2d 623, 630 (R.I. 1975); *Coronado Oil Co. v. Grieves*, 603 P.2d 406, 415 (Wyo. 1979). But see *Bricklayers & Allied Craftsmen Local 14 v. Russell Plastering Co.*, 755 F. Supp. 173 (E.D. Mich. 1991) (holding that an order granting summary judgment against the local union in a prior case did not bar arbitration of the union's breach-of-contract claims, because the summary judgment order was "based solely on the failure of [the local union] to submit to arbitration" of a clearly arbitrable dispute and was not based on the merits of the underlying dispute or on the union's timeliness in filing its grievance).

[FN249]. See, e.g., *Serfass v. United States*, 420 U.S. 377, 389 (1975).

[FN250]. See, e.g., *Fed. R. Crim. P. 5.1(f)* ("If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense."); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977) ("The protections afforded by the Clause are implicated only when....[a] jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence." (citation omitted)).

[FN251]. See *Crist v. Bretz*, 437 U.S. 28, 29 (1978) ("The federal rule is that jeopardy attaches when the jury is empaneled and sworn...."); *Stewart v. Abraham*, 275 F.3d 220, 229 (3d Cir. 2001) ("There is no precedent...for the proposition that the federal Constitution prohibits the reinitiation of a criminal proceeding in such a manner where double jeopardy has not attached and no pattern of prosecutorial harassment has been alleged."); *Spencer v. State*, 640 S.E.2d 267, 268 (Ga. 2007) ("[I]n either the context of a constitutional claim or that under the extended state statutory protections, jeopardy does not attach in a jury trial until the jury is both impaneled and sworn.").

[FN252]. Ned Tompsett, Comment, *Necessary for Justice: Rearrests in Pennsylvania and the Fourth Amendment*, 76 *Temp. L. Rev.* 921, 924 (2003) ("A majority of states allow district attorneys to refile the same charges using the same evidence even after dismissal on probable cause."). Cf. *Jones v. State*, 481 P.2d 169, 171 (Okla. Crim. App. 1971) (permitting the prosecution to refile and seek a new preliminary hearing when it has new evidence that was not "known to the State at the time of the first preliminary [hearing] or which could have been easily acquired").

[FN253]. Generally, a grand jury's decision not to indict a prospective defendant is not dispositive. Assuming that there are no barriers posed by statutes of limitations, the prosecution may simply present the same case to another grand jury (or grand juries), although some jurisdictions require good cause, court approval, or both to do so. See Beale et al., *supra* note 76, §8.6 ("Approximately one-fourth of the states have statutes or court rules that restrict resubmission of criminal charges once a grand jury has returned a no bill or dismissed the charges. In absence of such a statutory restriction, most jurisdictions recognize that the prosecutor may resubmit charges to either the same grand jury or to a successor." (footnote omitted)); LaFave et al., *supra* note 76, §15.2(h) ("Jeopardy not having attached, a grand jury's refusal to indict does not inherently preclude returning to a new grand jury (or even the same grand jury) to seek an indictment. Jurisdictions vary in their treatment of the prosecutor's authority to resubmit a proposed indictment to a grand jury. The division here, as in the case of resubmission following a preliminary hearing dismissal, clearly favors unrestricted resubmission, but a significant minority group of jurisdictions do impose limitations." (footnotes omitted)). A grand jury's decision to

indict a defendant is also not reviewable on the merits. See [Costello v. United States](#), 350 U.S. 359, 363 (1956).

[FN254]. See [United States v. Navarro-Vargas](#), 408 F.3d 1184, 1201 (9th Cir. 2005) (“It is true that the district court may convene another grand jury and the prosecutor may seek another indictment....”).

[FN255]. Paston, *supra* note 41, at 26.

[FN256]. Compare [United States v. Ogles](#), 440 F.3d 1095, 1103 (9th Cir. 2006) (en banc) (holding that the district court's grant of John Ogles's motion for judgment of acquittal on the charge of selling firearms without a license, pursuant to [Federal Rule of Criminal Procedure 29](#), on the ground that the statute in question applied only to an unlicensed firearm dealer and Ogles was a licensed firearm dealer, functioned as a genuine acquittal because “the district court found the evidence legally insufficient to sustain a conviction”), and [Daff v. State](#), 566 A.2d 120, 126 (Md. 1989) (holding that a judge's dismissal of the charges constituted an acquittal when, on the date that Troy Daff's trial was set to begin, the state had not served any of its witnesses with subpoenas), with [Palazzolo v. Gorcyca](#), 244 F.3d 512, 514, 517 (6th Cir. 2001) (holding that, after a state trial court quashed the information charging Gerard Palazzolo with criminal sexual conduct because there was insufficient proof of penetration, the state's appeal was not barred by double jeopardy principles because Palazzolo, “like the defendant in Scott, voluntarily chose to terminate the prosecution...on a basis unrelated to factual guilt or innocence”), and [State v. Kruelski](#), 737 A.2d 377, 380-81 (Conn. 1999) (holding that the prohibition against double jeopardy did not bar Edward Kruelski's retrial after the trial court dismissed the charges at the close of the trial evidence on statute of limitations grounds). In [Ogles](#), the United States Court of Appeals for the Ninth Circuit specifically noted, “The Court's double jeopardy decisions do not...condition an acquittal under [Rule 29\(a\)](#) on the district court's examination of contested facts.” [Ogles](#), 440 F.3d at 1104.

[FN257]. [Green v. United States](#), 355 U.S. 184, 187-88 (1957) (citation omitted).

[FN258]. [Finch v. United States](#), 433 U.S. 676 (1977) (per curiam).

[FN259]. [United States v. Finch](#), 395 F. Supp. 205, 207 (D. Mont. 1975), rev'd, 548 F.2d 822 (9th Cir. 1976), vacated, 433 U.S. 676 (1977).

[FN260]. [Finch](#), 395 F. Supp. at 207, 213.

[FN261]. [Finch](#), 433 U.S. at 677.

[FN262]. *Id.* (citation omitted). The Supreme Court reached a seemingly contradictory result, however, two years prior to its decision in [Finch](#) in [Serfass v. United States](#), 420 U.S. 377 (1975). [Serfass](#) was charged by indictment with willful draft evasion. *Id.* at 379. He filed a pretrial motion to dismiss the indictment, arguing that his local draft board had improperly refused to reopen his case. *Id.* In support of his motion, [Serfass](#) provided an affidavit alleging that he had applied for conscientious objector status and a copy of his selective service case file. *Id.* at 379-80. The district court dismissed the indictment on the basis of the affidavit, the case file, and oral stipulations made by counsel at the hearing. *Id.* at 380. The government appealed the dismissal to the United States Court of Appeals for the Third Circuit. *Id.* at 381. The Supreme Court held that the government's appeal was not barred by the Double Jeopardy Clause because jeopardy had not attached at the time of the dismissal and [Serfass](#) had not been “put to trial before the trier of facts.” *Id.* at 389 (citation omitted) (internal quotation marks omitted). Nonetheless, [Finch](#) would seem to be the more applicable precedent, since [Serfass](#) appears not to have contemplated an argument based on the *autrefois acquit*, as opposed to the prior-attachment, variety of double jeopardy.

[FN263]. [Brady v. Maryland](#), 373 U.S. 83 (1963).

[FN264]. *Id.* at 87.

[FN265]. Case law requires that the disclosure be made a sufficient period ahead of time to permit the defendant to make effective use of the disclosed material at trial. See, e.g., [United States v. Farley](#), 2 F.3d 645, 654 (6th Cir. 1993). Courts are often lenient in their interpretation of “sufficient,” however. See, e.g., [United States v. Kaplan](#), 554 F.2d 577, 578 (3d Cir. 1977) (holding that the government's belated provision of Brady material to Kaplan during trial did not warrant reversal). In [United States v. Coppa](#), 267 F.3d 132, 135 (2d Cir. 2001), the United States Court of Appeals for the Second Circuit addressed the question of whether due process required that the government disclose Brady and Giglio material immediately upon demand by a defendant. In reversing the district court's order that the government do so, the court of appeals noted that “as long as a defendant possesses Brady evidence in time for its effective use, the government has not deprived the defendant of due process of law.” *Id.* at 144.

[FN266]. See, e.g., [Boyette v. Lefevre](#), 246 F.3d 76, 92-93 (2d Cir. 2001) (granting Calvin Boyette a writ of habeas corpus because the state failed to produce evidence that impeached the victim's identification of Boyette and evidence pointing to alternate suspects); [Spicer v. Roxbury Corr. Inst.](#), 194 F.3d 547, 555-56, 562 (4th Cir. 1999) (affirming the district court's grant of Brady Spicer's writ of habeas corpus because the state failed to disclose conflicting statements made by the main prosecution witness); [United States v. Scheer](#), 168 F.3d 445, 457-58 (11th Cir. 1999) (reversing Dana Scheer's conviction for misuse of bank funds because the government failed to disclose threats to its witnesses); [Carriger v. Stewart](#), 132 F.3d 463, 479, 482 (9th Cir. 1997) (granting Paris Carriger's writ of habeas corpus because the prosecution failed to disclose a witness's prior criminal history); [United States v. Pelullo](#), 105 F.3d 117, 122-23, 127 (3d Cir. 1997) (reversing Leonard Pelullo's fraud convictions because the government withheld evidence of prior inconsistent statements, redactions in FBI incident reports, and internal contradictions relating to a key witness's credibility); [United States v. Brumel-Alvarez](#), 991 F.2d 1452, 1461, 1465 (9th Cir. 1992) (reversing Hector Brumel's drug trafficking convictions because the government failed to disclose a police report raising serious doubts about the truthfulness of one of its key witnesses); [United States v. Perdomo](#), 929 F.2d 967, 968, 969-70, 974 (3d Cir. 1991) (reversing Juan Perdomo's cocaine possession conviction because the government failed to disclose the prior criminal history of one of its witnesses); [Lindsey v. King](#), 769 F.2d 1034, 1042-43 (5th Cir. 1985) (granting Tyrone Lindsey's writ of habeas corpus and reversing his murder conviction because the prosecution failed to disclose a police report indicating that a key witness could not positively identify Lindsey as the shooter); [United States v. Sutton](#), 542 F.2d 1239, 1242-43 (4th Cir. 1976) (reversing Paul Sutton's conviction because the government failed to disclose that it induced its key witness's testimony with threats); [United States v. Pope](#), 529 F.2d 112, 114 (9th Cir. 1976) (per curiam) (reversing Thomas Pope's conviction because the government failed to disclose the plea bargain it made with a key witness). In one high-profile example in 2009, newly appointed Attorney General Eric Holder took the nearly unprecedented step of moving to set aside the conviction of and dismiss with prejudice the charges against former Senator Theodore Stevens of Alaska because of prosecutorial misconduct, including several serious Brady violations, which came to light only after an FBI agent filed a misconduct complaint and a new prosecution team was assigned to the case. Neil A. Lewis, Justice Dept. Moves to Void Stevens Case, *N.Y. Times*, Apr. 2, 2009, at A1.

[FN267]. See John G. Douglass, [Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining](#), 50 *Emory L.J.* 437, 443 (2001) (“Courts and scholars who so readily attach Brady to plea bargaining have failed to account for Brady's fundamental weakness: the Brady doctrine suffers from a severe case of ‘bad timing.’ Brady governs disclosure before a trial or plea; but courts almost always enforce Brady after-the-fact, when a defendant tries to overturn a conviction obtained without full disclosure by the prosecutor. In other words, Brady is a prospective rule, enforced only retrospectively.”); Laurie L. Levenson, [Unnerving the Judges: Judicial Responsibility for the Rampart Scandal](#), 34 *Loy. L.A. L.*

[Rev. 787, 792-93 \(2001\)](#) (“[J]udges often allow prosecutors to skirt their responsibility to turn over timely discovery so that there can be a full investigation that will provide evidence to challenge the police officer's allegations. The Brady standard set forth by the Supreme Court, which allows the disclosure of exculpatory and impeachment materials at any time before the conclusion of trial, has been too low of a bar to set for prosecutors' discovery compliance. By allowing prosecutors to delay discovery, judges have hampered defense counsel in their duties to investigate prosecution witnesses and evidence.”); Mary Prosser, [Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities](#), 2006 [Wis. L. Rev. 541, 566 \(2006\)](#) (“[T]he Court has failed to articulate when disclosure of favorable evidence must be made during the course of a prosecution, which implicitly encourages delay in disclosure by a reluctant prosecutor and increases the likelihood that convictions will rest on less than a full consideration of relevant facts.”).

[FN268]. See, e.g., [Crawford-El v. Britton](#), 523 U.S. 574, 599 n.20 (1998); [Plott v. Gen. Motors Corp., Packard Elec. Div.](#), 71 F.3d 1190, 1195 (6th Cir. 1995) (“Before ruling on summary judgment motions, a district judge must afford the parties adequate time for discovery, in light of the circumstances of the case.”).

[FN269]. See [United States v. Gamez-Orduño](#), 235 F.3d 453, 461 (9th Cir. 2000) (“The suppression of material evidence helpful to the accused, whether at trial or on a motion to suppress, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.”); [United States v. Barton](#), 995 F.2d 931, 935 (9th Cir. 1993) (“To protect the right of privacy, we hold that the due process principles announced in Brady and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant.”); [United States v. Lanford](#), 838 F.2d 1351, 1354-55 (5th Cir. 1988) (applying Brady to a suppression hearing). Even courts that have declined to apply Brady to suppression hearings have done so on the ground that suppression hearings do not involve determinations of guilt or innocence--an argument that would not be compelling in the context of summary judgment on the basis of legally insufficient evidence of guilt. See, e.g., [United States v. Bowie](#), 198 F.3d 905, 912 (D.C. Cir. 1999) (“[I]t is hardly clear that the Brady line of Supreme Court cases applies to suppression hearings. Suppression hearings do not determine a defendant's guilt or punishment, yet Brady rests on the idea that due process is violated when the withheld evidence is ‘material either to guilt or to punishment.’”).

[FN270]. See [United States v. Ruiz](#), 536 U.S. 622, 628-29 (2002) (noting that a plea agreement could require a defendant to waive his or her right to impeachment material under [Giglio v. United States](#), 405 U.S. 150 (1972)).

[FN271]. See Levenson, *supra* note 267, at 820 n.95 (“A common complaint by defense counsel is that they are often surprised before trial by the last-minute disclosures by prosecutors and law enforcement. There is no way of knowing how many defendants, concerned about the impact of last-minute evidence, chose to plead guilty because their lawyers may not be fully prepared at trial.” (citation omitted)).

[FN272]. See Model Rules of Prof'l Conduct R. 3.8(d) (2010) (“The prosecutor in a criminal case shall:...make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused....”); Standards for Criminal Justice: Prosecution Function & Def. Function 3-3.11(a) (3d ed. 1993) (“A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused....”). Several courts have noted that

the belated disclosure of Brady material “tend[s] to throw existing strategies and [trial] preparation into disarray.” It becomes “difficult[to] assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available.” ...It is not hard to imagine the many circumstances in which the belated revelation of Brady material might meaningfully alter a defendant's choices before and during trial: how to apportion time and resources to various theories when investigating the case, whether the defendant should testify, whether to focus the jury's attention on this or that defense, and so on.

[United States v. Burke](#), 571 F.3d 1048, 1054 (10th Cir. 2009) (alterations in original) (quoting [Leka v. Portuondo](#), 257 F.3d 89, 201 (2d Cir. 2001)).

[FN273]. Nationwide, approximately 40 percent of defendants charged with felony offenses are ordered detained pending trial. See LaFave et al., *supra* note 76, §12.1(b) (“Approximately 62% of felony defendants were released prior to the final disposition of their case.”); Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, Fed. Probation, Sept. 2009, at 3, 5 (“While approximately 60 percent of defendants prosecuted during the study period were ordered detained pending trial, of those released, conditions that included at least one alternative to detention were required for nearly three-quarters.”).

[FN274]. Numerous studies have shown a correlation between the amount of time a defendant spends in pretrial detention and the likelihood of conviction and length of the sentence ultimately imposed. See, e.g., Stevens H. Clarke & Susan T. Kurtz, *Criminology: The Importance of Interim Decisions to Felony Trial Court Dispositions*, 74 J. Crim. L. & Criminology 476, 502-05 (1983) (finding a strong correlation between the length of pretrial detention and the likelihood of conviction and long sentences in a study of North Carolina counties); Charles E. Frazier & Donna M. Bishop, *The Pretrial Detention of Juveniles and Its Impact on Case Dispositions*, 76 J. Crim. L. & Criminology 1132, 1145-46 (1985) (finding that, holding all other variables constant, detained juveniles were more likely to be convicted); John S. Goldkamp, *The Effects of Detention on Judicial Decisions: A Closer Look*, 5 Just. Sys. J. 234, 245-46 (1980) (finding a strong correlation between the length of pretrial detention and the likelihood of conviction and long sentences in a study of Philadelphia’s criminal justice system); Jeffrey Manns, [Liberty Takings: A Framework for Compensating Pretrial Detainees](#), 26 *Cardozo L. Rev.* 1947, 1972 (2005) (“Numerous empirical studies have suggested that the longer a person spends time in pretrial detention, the more likely she will be convicted and the more likely that the sentence will be severe.”). Cf., e.g., William M. Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. Legal Stud. 287, 333-35 (1974) (finding a strong correlation between the length of pretrial detention and sentence length in New York City, but attributing this fact to judges calculating bonds in ways that incorporate the probability of acquittal).

[FN275]. [Russell v. United States](#), 369 U.S. 749, 760 (1962).

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