acterized the "waiver" theory as "totally unsound and indefensible," [126] the Court has been hesitant in formulating a new theory in maintaining the practice.[127]

An exception to full application of the retrial rule exists, however, when defendant on trial for an offense is convicted of a lesser offense and succeeds in having that conviction set aside. Thus, in *Green v. United States*,[128] the defendant had been placed on trial for first degree murder but convicted of second degree murder; the Court held that, following reversal of that conviction, he could not be tried again for first degree murder, although he certainly could be for second degree murder, on the theory that the first verdict was an implicit acquittal of the first degree murder charge.[129] Even though the Court thought the jury's action in the first trial was clearly erroneous, the Double Jeopardy Clause required that the jury's implicit acquittal be respected.[130]

Still another exception arises out of appellate reversals grounded on evidentiary insufficiency. Thus, in *Burks v. United States*,[131] the appellate court set aside the defendant's conviction on the basis that

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[126] Green v. United States, 355 U.S. 184, 197 (1957). The more recent cases continue to reject a "waiver" theory. *E.g.*, United States v. Dinitz, 424 U.S. 600, 609 n.11 (1976); United States v. Scott, 437 U.S. 82, 99 (1978).

[127] Justice Holmes, dissenting in Kepner v. United States, 195 U.S. 100, 134 (1904), rejected the "waiver" theory and propounded a theory of "continuing jeopardy," which also continues to be rejected. *See* discussion, *supra*. In some cases, a concept of "election" by the defendant has been suggested, United States v. Scott, 437 U.S. 82, 93 (1978); Jeffers v. United States, 432 U.S. 137, 152–54 (1977), but it is not clear how this formulation might differ from "waiver." Chief Justice Burger has suggested that "probably a more satisfactory explanation" for permissibility of retrial in this situation "lies in analysis of the respective interests involved," Breed v. Jones, 421 U.S. 519, 533–35 (1975), and a determination that on balance the interests of both prosecution and defense are well served by the rule. *See* United States v. Tateo, 377 U.S. 463, 466 (1964); Tibbs v. Florida, 457 U.S. 31, 39–40 (1982).

[128] 355 U.S. 184 (1957).

[129] The decision necessarily overruled Trono v. United States, 199 U.S. 521 (1905), although the Court purported to distinguish the decision. Green v. United States, 355 U.S. 184, 194–97 (1957). *See also* Brantley v. Georgia, 217 U.S. 284 (1910) (no due process violation where defendant is convicted of higher offense on second trial).

[130] *See also* Price v. Georgia, 398 U.S. 323 (1970). The defendant was tried for murder and was convicted of involuntary manslaughter. He obtained a reversal, was again tried for murder, and again convicted of involuntary manslaughter. Acknowledging that, after reversal, Price could have been tried for involuntary manslaughter, the Court nonetheless reversed the second conviction because he had been subjected to the hazard of twice being tried for murder, in violation of the Double Jeopardy Clause, and the effect on the jury of the murder charge being pressed could have prejudiced him to the extent of the second conviction. *But cf.* Morris v. Mathews, 475 U.S. 237 (1986) (inadequate showing of prejudice resulting from reducing jeopardy-barred conviction for aggravated murder to non-jeopardy-barred conviction for first degree murder). "To prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." Id. at 247.

[131] 437 U.S. 1 (1978).