

priate federal rule, explicitly based on the judgment that the government had not proved facts constituting the offense.¹⁰⁹ Even if, as happened in *Sanabria v. United States*,¹¹⁰ the trial judge erroneously excludes evidence and then acquits on the basis that the remaining evidence is insufficient to convict, the judgment of acquittal produced thereby is final and unreviewable.¹¹¹

Some limited exceptions exist with respect to the finality of trial judge acquittal. First, because a primary purpose of the Due Process Clause is the prevention of successive trials and not of prosecution appeals *per se*, it is apparently the case that, if the trial judge permits the case to go to the jury, which convicts, and the judge thereafter enters a judgment of acquittal, even one founded upon his belief that the evidence does not establish guilt, the prosecution may appeal, because the effect of a reversal would be not a new trial but reinstatement of the jury's verdict and the judgment thereon.¹¹² Second, if the trial judge enters or grants a motion of acquittal, even one based on the conclusion that the evidence is insufficient to convict, then the prosecution may appeal if jeopardy had not yet attached in accordance with the federal standard.¹¹³

Trial Court Rulings Terminating Trial Before Verdict.—

If, after jeopardy attaches, a trial judge grants a motion for mistrial, ordinarily the defendant is subject to retrial;¹¹⁴ if, after jeopardy attaches, but before a jury conviction occurs, the trial judge acquits, perhaps on the basis that the prosecution has presented insufficient evidence or that the defendant has proved a requisite

¹⁰⁹ 430 U.S. at 570–76. See also *United States v. Scott*, 437 U.S. 82, 87–92 (1978); *Smalis v. Pennsylvania*, 476 U.S. 140 (1986) (demurrer sustained on basis of insufficiency of evidence is acquittal).

¹¹⁰ 437 U.S. 54 (1978).

¹¹¹ See also *Smith v. Massachusetts*, 543 U.S. 462 (2005) (acquittal based on erroneous interpretation of precedent).

¹¹² In *United States v. Wilson*, 420 U.S. 332 (1975), following a jury verdict to convict, the trial judge granted defendant's motion to dismiss on the ground of prejudicial delay, not a judgment of acquittal; the Court permitted a government appeal because reversal would have resulted in reinstatement of the jury's verdict, not in a retrial. In *United States v. Jenkins*, 420 U.S. 358, 365 (1975), the Court assumed, on the basis of *Wilson*, that a trial judge's acquittal of a defendant following a jury conviction could be appealed by the government because, again, if the judge's decision were set aside there would be no further proceedings at trial. In overruling *Jenkins* in *United States v. Scott*, 437 U.S. 82 (1978), the Court noted the assumption and itself assumed that a judgment of acquittal bars appeal only when a second trial would be necessitated by reversal. *Id.* at 91 n.7.

¹¹³ *Serfass v. United States*, 420 U.S. 377 (1975) (after request for jury trial but before attachment of jeopardy judge dismissed indictment because of evidentiary insufficiency; appeal allowed); *United States v. Sanford*, 429 U.S. 14 (1976) (judge granted mistrial after jury deadlock, then four months later dismissed indictment for insufficient evidence; appeal allowed, because granting mistrial had returned case to pre-trial status).

¹¹⁴ See "Reprosecution After Reversal on Defendant's Appeal," *supra*.