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**A TRIAL ATTORNEY'S DILEMMA:
HOW STORYTELLING AS A TRIAL STRATEGY CAN
IMPACT A CRIMINAL DEFENDANT'S SUCCESSFUL
APPELLATE REVIEW**

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ABSTRACT

Over the past thirty years, a canon of scholarship has emerged on the use of narrative in the law. Most of the work produced in this area endorses the use of narrative, either by arguing its importance or by focusing on how best to employ narrative as a form of advocacy. The scholarship to date has not focused on how the criminal defendant's use of storytelling at trial can adversely impact appellate review when sufficiency-of-the-evidence and weight-of-the-evidence claims are raised on appeal. This Article posits that in addition to advising a criminal defendant on the potential merits of testifying at trial, the trial attorney should also inform his client of the potential adverse impact certain types of narratives will have on appeal. By demonstrating how the criminal defendant's storytelling at trial can negatively impact the defendant's appeal, this Article provides a counter-point to the ever-growing focus on the use of storytelling as an essential component of criminal-trial practice.

Part I of this Article sets forth the relevant legal framework and standards of review when sufficiency and weight claims are raised on appeal following a criminal conviction. Part II of this Article explores how the crim-

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inal defendant's storytelling at trial can negatively impact appeals based upon a sufficiency-of-the-evidence claim. If the criminal defendant provides a narrative at trial and, in doing so, admits to an element of the crime charged – an element which would not have otherwise been proven by the prosecution's evidence – an appeal arguing insufficient evidence will be unsuccessful. Part III of this Article explores how the criminal defendant's storytelling at trial can negatively impact appeals based upon a weight-of-the-evidence claim. If the defendant tells a story at trial and that story admits to, or corroborates, the weakest part of the prosecution's case, the defendant cannot successfully claim on appeal the verdict is against the weight of the evidence. Parts II and III of this Article are of particular relevance to the criminal law practitioner when advising his client concerning the merits of testifying at trial. Unlike the civil defendant, the Fifth Amendment's protections against self-incrimination provide the criminal defendant the luxury of choosing whether to testify and therefore tell a story at all.

This Article concludes by making clear that the use of storytelling by the criminal defendant at trial can eliminate two potentially fruitful avenues of appellate review. The criminal-defense attorney should not simply focus on how the defendant tells his story at trial, but on whether the defendant should tell his story at all.

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INTRODUCTION

The medium of storytelling is an important form of human communication that has existed since members of our species were first able to communicate.¹ In fact, storytelling as an important form of communication between humans existed approximately 100,000 years before the earliest signs of literacy.² It has been confirmed that storytelling is such an important form of human communication that our brains have even evolved in such a way that we understand the world in terms of stories.³ As a result, we actively seek out the most compelling narratives as a way to make sense of the world in which we live.⁴ We have come to expect that the world exists as a stage on which various narratives with familiar structures play themselves out.⁵ The world is composed of heroes and villains, and the human condition is defined by "a hill to be climbed or a battle to be fought."⁶ This need to understand the world through stories impacts our worldview, from everyday social interactions, to our opinion of the President of the United States.⁷ Storytelling is such a deeply ingrained aspect of human nature that "[c]hildren crave bedtime stories; the holy books of the three great monotheistic religions are written in parables; and as research in cognitive science has shown, lawyers whose closing arguments tell a story win jury trials against their legal adversaries who just lay out 'the facts of the case.'"⁸

Storytelling as an effective medium of communication has been around since man could talk, thus the reliance on storytelling as a

1. See KENDALL HAVEN, *STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY* 3-4 (2007) (setting forth evidence that storytelling predates language and has long been the preferred mode of communication).

2. *Id.* at 3.

3. *Id.* at 4.

4. For the purposes of this Article the words "story" and "narrative" are used interchangeably. "A story, or, better, a narrative (because 'story' suggests a short narrative), is a true or fictional account of a sequence of events unfolding in time, the events being invented, selected, emphasized, or arranged in such a way as to explain, inform, or edify." Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 737-38 (1997); see also PETER BROOKS & PAUL GERWITZ, *The Law as Narrative & Rhetoric*, in *LAW STORIES: NARRATIVE AND RHETORIC IN THE LAW*, 14, 17 (Peter Brooks & Paul Gerwitz eds., 1996) (explaining how effective narratives "are formed and explain events").

5. Drew Westen, *What Happened to Obama?*, N.Y. TIMES, Aug. 6, 2011, http://www.nytimes.com/2011/08/07/opinion/sunday/what-happened-to-obamas-passion.html?_r=1&pagewanted=all.

6. *Id.*

7. See *id.*

8. *Id.*

means to communicate is not new to the law.⁹ Storytelling is so widely accepted as part of the practice of law that it is the subject of entire law school courses.¹⁰ In light of the above, the modern storytelling movement has focused on the most effective ways for the practitioner to tell his or her client's story.¹¹ This is particularly true

9. Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2225-30 (1989). Winter explains through a concept called "Midrash" that early Jewish law was handed down orally and has its origins in ancient stories and rabbinic parables. See *id.* at 2226 n.4.

10. See generally Phillip N. Meyer, *Convicts, Prisoners, and Outlaws: A Course in Popular Storytelling*, 42 J. LEGAL EDUC. 129 (1992) (discussing an experimental course, Law and Popular Storytelling, taught at the University of Connecticut School of Law). Rutgers Law School-Camden also created a course entitled "Advanced Legal Writing: Constructing Narratives." See *Advanced Legal Writing: Constructing Narratives*, Rutgers-Camden School of Law, <http://camlaw.rutgers.edu/cgi-bin/course-description.cgi?class=539> (last visited Apr. 5, 2012) (providing a description of course). Further, whole volumes devoted to the pedagogy of effective legal teaching have been dedicated exclusively to the subject of storytelling. See, e.g., Symposium, *Of Pedagogy of Narrative*, 40 J. LEGAL EDUC. 1, (1990).

11. See, e.g., Michael N. Burt, *The Importance of Storytelling at All Stages of a Capital Case*, 77 UMKC L. REV. 877, 879 (2009) (arguing that a "mitigation counter-narrative" should be used in death penalty trials to counter the conventional "crime master narrative" most likely offered by the prosecution and which most jurors are predisposed to believe); Gerald Reading Powell, *Opening Statements, The Art of Storytelling*, 31 STEINSON L. REV. 89, 98 (2001) (positing that often times jury trials are won by whatever attorney tells the jury the most persuasive story during opening statements); Ruth Anne Robbins, *Harry Potter, Ruby Slippers, and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 769 (2006) (arguing that lawyers can most persuasively advocate for their clients when "subtly portraying their individual clients as heroes on a particular life path"); Richard K. Sherwin, *Law Frames: Historical Truth Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 39 (1994) (arguing that attorneys should employ "affirmative post modern storytelling" as an alternative to the manner in which most stories are told, as "orthodox linear narratives"); Sunwolf, *Talking Story in Trial: The Power of Narrative Persuasion*, CHAMPION, Oct. 2000, at 26 (positing that the most successful trial advocates are the best storytellers because factfinders organize and interpret trial evidence by using story structures); Sunwolf, *Toxic Words Poison: How Courts Co-Opt Defense Attorneys into Using Language that Facilitates Conviction*, CHAMPION, Aug. 2001, at 28 (arguing that prosecutors tell a story about the defendant by using certain words which subtly communicate to the factfinder the story of the defendant's guilt). Sunwolf identifies "the rape kit," "the guilt phase," and "not guilty"—as toxic words defense attorneys should never use. *Id.* at 29; see also Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS'N LEGAL WRITING DIRS. 63, 64, 67 (2010) (suggesting that in a legal context truth matters, but a story's credibility often turns on its coherence more than its truth); Richard A. Kaplan, *A Business School Model for Presenting Your Case*, 24 UTAH BAR J. 14, 14 (2011) (arguing that an effective advocate must present to factfinders the "big picture" and then marshal all of the evidence in the case to conform with that picture); Stephen P. Lindsay, *Storytelling: Why We Do It & How To Do It Better*, CHAMPION, Dec. 1999, at 30 (arguing when properly utilized, storytelling creates a bond between lawyer and jury that is essential to obtaining a successful verdict); Ann M. Roan, *Building the Persuasive Case for Innocence*, CHAMPION, Mar. 2011, at 18 (suggesting that lawyers best advocate for their clients when they tell a narrative that is designed to prove the client's innocence, as opposed to a legalist argument focusing on the specific elements of each crime). Roan refers to this as building a "positive case for innocence" as opposed to

in the context of criminal trials, "a domain which adjudicates narratives of reality, and sends people to prison, even to execution, because of the well-formedness and force of the winning story."¹²

However, this Article offers a counter-point to the commonly held belief within the practicing bar that "law lives on narrative."¹³ Part I of this Article sets forth the relevant legal framework and standards of review when sufficiency and weight claims are raised on appeal following a criminal conviction. Part II of this Article explores how the criminal defendant's storytelling at trial can negatively impact appeals based upon a sufficiency-of-the-evidence claim. Part III of this Article explores how the criminal defendant's storytelling at trial can negatively impact appeals based upon a weight-of-the-evidence claim. Parts II and III of this Article are of particular relevance to the criminal law practitioner when providing his client with advice concerning the merits of testifying at trial. The Fifth Amendment's protections against self-incrimination provide the criminal defendant the luxury of choosing whether to testify.¹⁴ However, no such protections exist for civil defendants when there is almost no probability that their testimony will lead to criminal sanctions.¹⁵ As a result, the focus of the practicing civil attorney is principally concerned with *how* to tell a client's story at trial. This Article concludes by positing that—when advising a criminal defendant on the potential merits of testifying at trial—the trial attorney should not only focus on the persuasiveness of the client's narrative at the trial stage, but also should inform his client of the po-

"negative case analysis." *Id.* at 19; see also Lenora Ledwon, *The Poetics of Evidence: Some Applications from Law & Literature*, 21 QUINNIPIAC L. REV. 1145, 1151 (2003) (identifying seven subcategories of writings on storytelling). Under a section of the article entitled "Trials and Storytelling," Ledwon states that

[t]here is a rich and varied literature here, and the citations are just the tip of the iceberg. These studies emphasize the importance of storytelling as an essential tool for the effective litigator. Such studies may reference drama, poetry, semiotics, literary devices such as metaphor and imagery, and the like, all in the general service to the quest to assist lawyers in storytelling practices at trial.

Id. at 1152.

12. Peter Brooks, *Narrativity of the Law*, 14 LAW & LITERATURE 1, 2 (2002).

13. See ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110 (2000).

14. The Fifth Amendment provides, "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V. The Fifth Amendment guarantee against self-incrimination has been incorporated against the states. See *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

15. The Fifth Amendment privilege against self-incrimination "applies alike to civil and criminal proceedings." *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924). In the civil context, the privilege applies only when a witness's testimony might incriminate him in later criminal proceedings. See *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

tential adverse impact certain types of narratives will have on successful appellate review. By demonstrating how the criminal defendant's storytelling at trial can negatively impact successful appellate review, this Article makes clear that the criminal-defense attorney should not simply focus on how the defendant tells his story at trial, but *if* the defendant should tell his story at all.

I. SUFFICIENCY OF THE EVIDENCE AND WEIGHT OF THE EVIDENCE – THE LEGAL STANDARDS

A. *Sufficiency of the Evidence*

In the case of *In re Winship*, the United States Supreme Court held that the United States Constitution provides that no criminal conviction can be sustained unless proof of guilt has been established beyond a reasonable doubt.¹⁶ Moreover, the Court held that the prosecution's burden to establish proof beyond a reasonable doubt applies to each element of a crime.¹⁷ Following *Winship*, the Court further clarified its holding in *Jackson v. Virginia* by defining what constitutes sufficient evidence to sustain a criminal conviction.¹⁸ In *Jackson*, the Court held that for the prosecution to meet its burden of proof beyond a reasonable doubt, an appellate court is not required to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt."¹⁹ Instead, the appellate court must be satisfied, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."²⁰ Essentially, a review based upon a sufficiency-of-the-evidence claim examines the "quantity" of evidence presented by the prosecution and determines whether the prosecution has presented enough evidence to make out each element of the crime or crimes charged.²¹

16. *In re Winship*, 397 U.S. 358, 361–64 (1970).

17. *Id.* at 361. In *Winship*, the United States Supreme Court held that the state must prove every element of the crime beyond a reasonable doubt in both adult criminal proceedings and juvenile delinquency proceedings. *Id.* at 364, 368.

18. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979).

19. *Id.* at 318–19 (quoting *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 282 (1966) (emphasis in original)).

20. *Id.* at 319 (emphasis in original).

21. Michael Seward, Comment, *The Sufficiency-Weight Distinction – A Matter of Life or Death*, 38 U. MIAMI L. REV. 147, 153 (1983).

An important aspect of the standard of appellate review created by the Supreme Court is that "[i]n evaluating the evidence the government is entitled to the benefit of all inferences which the jury could have reasonably relied."²² Under a sufficiency-of-the-evidence review, the appellate court is aware the prosecution has prevailed at trial. Therefore, such a review is weighted so that the conviction should only be overturned when, "viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime [established] beyond a reasonable doubt."²³ Consequently, by applying the rule that all evidence and all inferences are to be reviewed in the light most favorable to the prosecution, the reviewing court presumably only overturns the conviction when the factfinder could not have reached its determination based on the evidence in the record.²⁴ Based upon this reasoning, the Supreme Court held in *Burks v. United States* that when a criminal conviction has been reversed by an appellate court on the grounds that the evidence presented at trial was deemed insufficient, retrial is barred by the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.²⁵ The Court reasoned that retrial was barred because a conviction is overturned for insufficient evidence when the government has failed to prove the defendant is guilty beyond a reasonable doubt.²⁶ In this regard, a reversal on the grounds of insufficient evidence "means that the government's case is so lacking that it should not have been submitted to the jury"²⁷ As a result, the Double Jeopardy Clause forbids the government from taking another bite of the apple.²⁸

Further, a claim that a criminal defendant has been convicted of a crime based on insufficient evidence has an additional constitutional dimension.²⁹ A conviction based on legally insufficient evidence

22. *United States v. Jones*, 605 F. Supp. 513, 514-15 (S.D.N.Y. 1984) (citing *United States v. Rodriguez*, 702 F.2d 38, 41 (2d Cir. 1983)).

23. *Jackson*, 443 U.S. at 319 (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)).

24. Deborah L. Schmitt, *Fifth Amendment—Twice Jeopardizing the Rights of the Accused: The Supreme Court's Tibbs and Kennedy Decisions*, 73 J. CRIM. L. & CRIMINOLOGY 1474, 1483 (1982).

25. *Burks v. United States*, 437 U.S. 1, 18 (1978). The relevant portion of the Fifth Amendment of the United States Constitution provides that "nor shall any person be subject for the same offence, to be twice put in jeopardy of life or limb" U.S. CONST. amend. V.

26. *Burks*, 437 U.S. at 16.

27. Schmitt, *supra* note 24, at 1479 (quoting *Burks*, 437 U.S. at 16 (emphasis in original)).

28. Seward, *supra* note 21, at 152.

29. *Tibbs v. Florida*, 457 U.S. 31, 45 (1982) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

constitutes a violation of due process.³⁰ As a result, a defendant can appeal his conviction based on insufficient evidence in both federal and state courts.³¹ Because an appeal based on insufficient evidence falls within the purview of federal-constitutional protections, the standard of review articulated by the United States Supreme Court in *Jackson* is the same standard of review applied to insufficiency claims when raised in either federal or state courts.³²

B. Weight of the Evidence

Despite repeated clouding of the issue, a verdict against the weight of the evidence is not the same as a verdict based on insufficient evidence.³³ When a weight-of-the-evidence claim is made on appeal, the defendant has conceded the evidence is sufficient to sustain the conviction.³⁴ In this regard, the defendant is acknowledging

30. *Id.*

31. *Jackson v. Virginia*, 443 U.S. 307, 316–18 (1979). As the Court explained,

The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact-finder will rationally apply that standard to the facts in evidence. A ‘reasonable doubt,’ at a minimum, is one based upon ‘reason.’ Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. Under *Winship*, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand.

Id.

32. The relevant standard of review articulated by the Supreme Court in *Jackson* provides that the appellate court is not required to “ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.” *Jackson*, 443 U.S. at 318–19 (quoting *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 282 (1966)). Instead, the appellate court must be satisfied that, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 319.

33. Mark Bankston, Case Note, *Criminal Law – Appellate Review – Forty Nuns Can’t Be Wrong: Reviewing Factual Sufficiency of Evidence Without the Light Most Favorable to the Prosecution*, *Clewis v. State*, 922 S.W. 2d 126 (Tex. Crim. App. 1996), 38 S. TEX. L. REV. 263, 268 (1997). Bankston writes at length about two types of Texas appellate standards of review: “legal” and “factual” inconsistency, which are functionally the same as a review based on insufficient evidence and weight of the evidence respectively. *Id.* at 264. *But see* Schmitt, *supra* note 24, at 1482 (stating that the distinction between weight and sufficiency of the evidence is “not entirely clear or easily made”).

34. The United States Supreme Court in *Tibbs v. Florida* stated that a reversal based on weight of the evidence can only occur only after “the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict.” *Tibbs*, 457 U.S. at 42–43; *see also* *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980) (stating that, for a motion for a new trial based on a verdict being contrary to the weight of evidence, “If the court con-

that the evidence presented is of sufficient quantity to prove each element of the crime charged.³⁵ However, although the evidence may be sufficient to sustain the verdict in the "abstract," when a weight-of-the-evidence claim is raised on appeal, the court is asked to reevaluate the evidence as though it were the thirteenth juror.³⁶ The defendant is asking the court not to review the quantity of the evidence, but instead to review the quality of the evidence.³⁷ As a result, when an appellate court is reviewing a weight-of-the-evidence claim, the court will often times look at many of the same factors as a jury in evaluating the quality of the evidence, including the credibility and veracity of the witnesses before it.³⁸ However, the court's role as the thirteenth juror comes with a substantial caveat.³⁹ If an appellate court was able to overturn the conviction of a factfinder simply because it would have reached a different conclusion, the court would be able to easily usurp the traditional function of the jury and essentially become "the real trier of fact."⁴⁰ As a result, when a criminal defendant asks an appellate court to reverse a conviction because it is against the weight of the evidence, most appellate courts will do so only in the most exceptional cases.⁴¹ Examples of such circumstances occur when the appellate court finds that letting the conviction stand "shocks one's sense of justice,"⁴² "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered,"⁴³ or when "the evidence preponderates heavily against the verdict."⁴⁴

Additionally, a weight-of-the-evidence claim differs from an appeal based on sufficiency of the evidence in another important re-

cludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.").

35. *Commonwealth v. Sullivan*, 820 A.2d 795, 806 (Pa. Super. Ct. 2003).

36. *Tibbs v. Florida*, 457 U.S. at 42; *see also Lincoln*, 630 F.2d at 1319.

37. *Seward*, *supra* note 21, at 153.

38. *Id.*

39. *Id.* at 154.

40. *Id.*

41. *Id.* at 154-55.

42. *Commonwealth v. Sullivan*, 820 A.2d 795, 806 (Pa. Super. Ct. 2003). This is the standard of review in Pennsylvania when weight claims are raised on appeal.

43. *State v. Myers*, No. 2006 CA 00141, 2006 WL 3833596, at *3 (Ohio Ct. App. Dec. 28, 2006) (quoting *State v. Martin*, 485 N.E.2d 717, 720 (Ohio Ct. App. 1983). This is the standard of review in Ohio when weight claims are raised on appeal.

44. *United States v. Robinson*, 71 F. Supp. 9, 10-11 (D.D.C. 1947). This is the standard of review in place in the Eighth Circuit when weight claims are raised on appeal.

spect. An appeal based on weight of the evidence is not based on constitutional guarantees.⁴⁵ Because an appeal taken based on weight of evidence does not implicate federal-constitutional issues, the appeal is only possible in jurisdictions that recognize this type of appeal as an allowable form of appellate relief.⁴⁶ Because an appeal based on weight of the evidence is essentially a matter for state courts, states are free to create their own standards of review.⁴⁷ Further, unlike when a conviction is overturned based on insufficient evidence, when a conviction is overturned based on weight of the evidence, a retrial is allowed and is not deemed a violation of defendant's double jeopardy rights because no federal-constitutional issues are implicated.⁴⁸

II. SUFFICIENCY OF THE EVIDENCE ON APPEAL

When a defendant does not testify at trial (and does not offer any additional evidence and no confession is entered) the appellate court's review of the trial record is limited to the evidence produced by the prosecution. In this regard, by not telling a story at trial and later raising a sufficiency claim on appeal, the defendant is asking the appellate court to review a trial record which consists only of the evidence offered by the prosecution. As previously indicated, when making a claim that the factfinder's verdict of guilt is based upon insufficient evidence, the defendant is asking the appellate court to review the "quantity" of evidence produced at trial.⁴⁹ In essence, the defendant is telling the appellate court that the prosecution has not produced enough evidence to prove all of the elements of the al-

45. *Day v. Timmerman-Cooper*, No. 3:10-cv-206, 2010 U.S. Dist. LEXIS 110294, at *14-15 (S.D. Ohio Sept. 20, 2010). In *Day*, the United States District Court for the Southern District of Ohio was presented with a habeas corpus petition stemming from a conviction under state law. *Id.* at *1. Petitioner complained that although the proper burden of proof had been applied, proof beyond a reasonable doubt, his conviction was based on insufficient evidence and was also against the weight of the evidence. *Id.* at *11. In dismissing the weight-of-the-evidence claim, the Court stated that "[w]hen a case reaches federal habeas corpus court, only the sufficiency of the evidence claim is available. To put it another way, the United States Constitution does not require conviction by the manifest weight of the evidence; instead, that is merely a matter of state law." *Id.*

46. *See, e.g., Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

47. *See supra* notes 42-44 and accompanying text (demonstrating that although the standards in existence vary on a state-by-state basis, these cited cases serve as equally burdensome examples, but differently worded standards of review exist in different states).

48. *Tibbs*, 457 U.S. at 47.

49. *Seward*, *supra* note 21, at 153.

leged offense beyond a reasonable doubt.⁵⁰ However, it is very important to note that if the defendant does provide a narrative at trial, and the defendant admits to an element of the crime charged—an element which would not have otherwise been proven by the prosecution's evidence—an appeal arguing insufficient evidence will be unsuccessful.

The two examples provided in this Part of this Article demonstrate how the defendant's testimony at trial can adversely impact an appeal based upon sufficiency of the evidence. Both examples are based on *Commonwealth v. Armstead*, a real case in which the Pennsylvania Supreme Court reversed the defendant's conviction, finding the evidence offered at trial insufficient to prove guilt.⁵¹ The first example explores the process of appellate review when sufficiency of the evidence is raised on appeal and the defendant does not testify. This example focuses on the actual facts of the case and examines the court's holding. The second example demonstrates how a defendant providing a narrative at trial can negatively impact a sufficiency claim on appeal. This is best illustrated by considering how the defendant's hypothetical testimony would have impacted appellate review.

A. Successful Review of a Sufficiency-of-the-Evidence Claim Raised on Appeal – The Defendant Does Not Testify

The matter of *Commonwealth v. Armstead*, in which the Pennsylvania Supreme Court reversed a conviction for unlawful possession of a firearm,⁵² is perhaps the clearest illustration of a sufficiency-of-the-evidence claim. In *Armstead*, Philadelphia police officers stopped a car in which Christopher Armstead was a passenger.⁵³ Another man, Thomas McIntyre, was driving the car.⁵⁴ Both Armstead and the driver were asked to get out of the car, at which point the police officer making the request did not observe a handgun.⁵⁵ However, after Armstead was removed from the car, a second police officer arrived on the scene.⁵⁶ This officer later testified that he observed one door of the car open and that the interior lights of the car were illu-

50. *Id.*

51. 305 A.2d 1, 2 (Pa. 1973).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

minated.⁵⁷ At this point the police officer observed a .38 caliber handgun lying in the middle of the front seats of the car between the driver and the defendant.⁵⁸ The defendant did not testify at trial.⁵⁹

The trial court convicted Armstead of unlawful possession of a firearm, but the Supreme Court of Pennsylvania reversed the conviction, finding the prosecution presented insufficient evidence to prove the defendant possessed the handgun in question.⁶⁰ In order to sustain a conviction of unlawful possession of a firearm under Pennsylvania law, the prosecution was required to prove beyond a reasonable doubt that the defendant, in fact, possessed the handgun in question.⁶¹ In order to prove possession, the prosecution was required to show the defendant had "the power of control over the weapon and the intention to exercise this control."⁶² The court pointed out that the prosecution had no direct proof that the defendant ever possessed the firearm.⁶³ The firearm was not found on the defendant, and the defendant never motioned in any way toward the firearm, never made any statements indicating he had possession of the firearm, and never fled the scene, which would indicate consciousness of guilt.⁶⁴ Instead, the firearm in question was found between both the driver and passenger in the middle of the car.⁶⁵ The court concluded that based on these facts alone, the prosecution could not prove that the defendant knew of the presence of the weapon, much less had the intention to exercise dominion and control over it.⁶⁶ In holding the evidence presented by the prosecution was insufficient to prove the element of possession, the court stated that "[a]n equally logical argument can be made that the weapon was on the person of the driver during the time appellant

57. *Id.*

58. *Id.*

59. *See id.*

60. *Id.*

61. *See id.* The actual statute in question reads, in relevant part, as follows:

Firearms not to be carried without a license. (a) Offense Defined. (1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

18 PA. CONS. STAT. § 6106 (a)(1) (2008).

62. *Commonwealth v. Armstead*, 305 A.2d 1, 2 (Pa. 1973) (citing *Commonwealth v. Tirpak*, 441 Pa. 534 (1971)).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

was a passenger, and that the driver discarded the weapon as he got out of the car."⁶⁷ In other words, the prosecution failed to present the quantity of evidence necessary to prove it was the defendant who in fact possessed the weapon. Therefore, the evidence presented was insufficient to prove the element of possession beyond a reasonable doubt.

*B. Unsuccessful Review of a Sufficiency-of-the-Evidence Claim
Raised on Appeal – The Defendant Does Testify*

For the purposes of this Article, what is noteworthy about the above case is that the defendant, Christopher Armstead, never testified.⁶⁸ Rather than present the court with a compelling narrative that explained what he was doing in the car, whether he knew the weapon was there, and if he in fact possessed it, the defendant said nothing.⁶⁹ Obviously, we have no idea what the defendant's narrative would have been had he chosen to testify. Armstead could very well have been the actual possessor of the weapon. In light of that fact, he may have chosen to exercise his Fifth Amendment right not to testify, rather than take the stand and foolishly inculcate himself in the commission of the crime charged by admitting to possession of the weapon.⁷⁰ However, to illustrate how the defendant's decision to testify at trial can adversely impact appellate review, suppose that Christopher Armstead did in fact possess the firearm, but that he could tell the court a compelling and exculpatory narrative that would provide a legal justification for why he was in possession of the gun.

To explore this hypothetical further, suppose Christopher Armstead happens to be walking down the street peacefully when a man wielding a handgun approaches him. The man walks up to Armstead and points the gun at his head and demands money. Armstead has no money on his person and is unsure how the robber will respond if he tells him this. Fearing for his life, with a gun pointed at his head, and a split second to decide what to do next, Armstead grabs the gun from the man. A struggle ensues, in which he is able to wrestle the gun away from the robber. Seconds after gaining possession of the firearm, Armstead's friend who he has known for

67. *Id.*

68. *See id.*

69. *See id.*

70. *See supra* note 14.

years, Thomas McIntyre, is driving down the street. Armstead fears the robber will continue to attack him and might regain possession of the firearm. As a result, he runs after the car being driven by his old friend. McIntyre sees Armstead and stops. Armstead gets in the car, with the gun in his hand. Shortly after getting in the car it is pulled over by police.⁷¹ After being stopped by the police, Armstead places the firearm in between the two front seats of the car. He does not tell the police what just occurred or how he came into possession of the firearm because he does not think the police will believe him. Instead, he believes that his story will simply alert the police to the fact that he is in possession of a firearm for which he does not have a license to carry. As a result, he believes he has a better chance of avoiding being arrested if he says nothing to the police and hopes the police never see the weapon.

When the case is called to trial, Christopher Armstead testifies to the above narrative. He has advanced a classic justification defense.⁷² It is the factfinder's prerogative "to believe all, part, or none of the [offered testimony]."⁷³ However, the factfinder does not be-

71. For the purposes of this hypothetical, assume there are no Fourth Amendment issues with respect to the stop of the car and, therefore, no issues relating to a potential suppression of the firearm will come into play. The Fourth Amendment of the United States Constitution provides, in relevant part,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. In *Weeks v. United States*, the United States Supreme Court adopted the federal exclusionary rule providing that evidence obtained in violation of the Fourth Amendment is inadmissible from trial against a defendant in the prosecution's case-in-chief. 232 U.S. 383, 393 (1914). In *Mapp v. Ohio*, the Court began applying the same rule to the states through the Fourteenth Amendment. 367 U.S. 643, 656 (1961).

72. The American Law Institute's Model Penal Code defines the legal defense of justification as follows:

Justification Generally: Choice of Evils: (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

MODEL PENAL CODE § 3.02(1)(a)-(c) (2010).

73. *Commonwealth v. Taylor*, 831 A.2d 661, 663 (Pa. Super. Ct. 2003) (quoting *Commonwealth v. DiStefano*, 782 A.2d 574, 582 (Pa. Super. Ct. 2001)). This standard has long been recognized as an important component of American jurisprudence. In *Aetna Life Ins. Co. v. Ward*, the United States Supreme Court concluded:

There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the ques-

lieve the entirety of Armstead's story. The factfinder believes Armstead, in fact, possessed the firearm, but lied about the circumstances surrounding how he came into possession of the weapon. He is convicted of unlawfully possessing the firearm without a license.

On appeal, the hypothetical narrative told by the defendant will have profound consequences. In the actual *Armstead* case, the evidence offered by the prosecution was insufficient to prove that the defendant actually possessed the handgun.⁷⁴ However, if the hypothetical Armstead case went before the Pennsylvania Supreme Court, the court could not reach the same conclusion. The reason for this is that the defendant's testimony that he in fact possessed the firearm proves the element of possession that the actual *Armstead* fact pattern lacked. In this regard, the juxtaposition of the real *Armstead* fact pattern that did not involve the defendant's story, and the hypothetical Armstead fact pattern which does, clearly illustrates that whatever benefits may be gained by the defendant providing his own narrative at trial are not without negative ramifications on appeal. Put simply, if the story told by the defendant on trial admits to an element of the charged offense, an avenue of appeal based on insufficient evidence will be closed.

III. WEIGHT OF THE EVIDENCE ON APPEAL

As indicated in Part I, unlike an appeal based upon sufficiency of evidence, the appeal of a guilty verdict as against the weight of the evidence does not ask the appellate court to review the "quantity" of the evidence, but rather the "quality" of the evidence.⁷⁵ In this regard, the defendant is acknowledging that the evidence was sufficient as a matter of law to establish the elements of the crime.⁷⁶ If the defendant does not testify at trial, the appellate court's review is limited to the evidence produced by the prosecution. Although the

tioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case, such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and, so long as we have jury trials, they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function.

140 U.S. 76, 88 (1891).

74. See *supra* text accompanying notes 66-67.

75. Seward, *supra* note 21, at 153.

76. See *Tibbs v. Florida*, 457 U.S. 31, 42-43 (1982); *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980) ("The question is not whether the defendant should be acquitted outright, but only whether he should have a new trial.").

prosecution's evidence may prove the elements of the offense in question, the evidence may also be so weak that it prevents a finding of the defendant's guilt. As such, the appellate court would conclude that the verdict was against the weight of the evidence. However, if the defendant tells a story at trial and that story admits to or corroborates the weakest part of the prosecution's case, the defendant cannot then successfully claim on appeal the verdict is against the weight of the evidence.

Two examples have been chosen to demonstrate this point. As with the examples above, a real case and a hypothetical example based on that case are used to illustrate how a weight-of-the-evidence claim is evaluated on appeal, and how the defendant's story telling can adversely affect appellate review. Both examples are based on the matter of *People v. Loguirato*.⁷⁷ In *Loguirato*, a New York appeals court reversed a guilty verdict, finding it was against the weight of the evidence.⁷⁸ The first example examines the facts of the actual case and the court's holding. The defendant did not testify. The second example, by using the defendant's hypothetical testimony, demonstrates how the defendant's storytelling at trial can foreclose the possibility of prevailing on appeal when a weight-of-the-evidence claim is raised.

A. Successful Review of a Weight-of-the-Evidence Claim Raised on Appeal – The Defendant Does Not Testify

The matter of *People v. Loguirato* is a clear example of a weight-of-the-evidence claim made on appeal.⁷⁹ When a criminal defendant makes a weight-of-the-evidence claim on appeal, the defendant will most likely be unsuccessful because of the extremely high burden the defendant must overcome as described in Part I.⁸⁰ However, *Loguirato* is a rare example of a successful weight-of-the-evidence

77. 929 N.Y.S.2d 202 (2011).

78. *Id.* at 202.

79. *Id.*

80. See, e.g., *United States v. Robinson*, 71 F. Supp. 9, 10-11 (D.D.C. 1947) (noting the standard of review in place in the Eighth Circuit when weight claims are raised on appeal and that it should be "invoked only in exceptional cases"); *State v. Myers*, No. 2006 CA 00141, 2006 WL 3833596, at *3 (Ohio Ct. App. Dec. 28, 2006) (noting that inconsistencies in testimony "do not render defendant's conviction against the manifest weight or sufficiency of the evidence"); *Commonwealth v. Sullivan*, 820 A.2d 795, 805 (Pa. Super. Ct. 2003) (holding that in order for a defendant to prevail on a weight claim in Pennsylvania courts, his verdict must be "so contrary to the evidence as to shock one's sense of Justice").

claim on appeal.⁸¹ In *Loguirato*, the defendant was convicted after a non-jury trial of petit larceny for stealing his neighbor's shrub.⁸² At trial the complainant testified that the shrub belonged to him, that it was in his yard, and that he never gave anyone permission to take it.⁸³ At this point, the evidence was sufficient as a matter of law to find the defendant guilty because the complainant's testimony made out all of the essential elements of the offense charged.⁸⁴ However, the appellate court reversed the conviction, holding that the identification of Loguirato as the person responsible for the theft of the shrub was against the weight of the evidence.⁸⁵ The identification testimony presented at trial consisted of the complainant and his wife testifying that they observed the defendant remove the shrub from their yard.⁸⁶ However, their testimony was based on observations made from a video recording that was not preserved for trial.⁸⁷ The court found that the identification testimony presented was against the weight of the evidence for three reasons.⁸⁸ First, the complainant's testimony regarding the contents of the videotape contradicted that of his wife and that of a police officer who also

81. *Loguirato*, 929 N.Y.S.2d at 202.

82. *Id.*

83. *Id.*

84. Section 155.25 of the New York State Penal Code defines Petit Larceny as follows: "A person is guilty of petit larceny when he steals property." N.Y. PENAL LAW § 155.25 (McKinney 2011). In many respects, defining larceny in this manner raises more questions than answers. Because the word "steals" is used to define "larceny," and those words mean much the same thing, the statute provides almost no guidance to the reader. The statute basically defines larceny as the equivalent of saying a person "commits larceny when they have committed larceny." However, New York State Penal Law § 155.05(1), defining larceny, states in relevant part, "[a] person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof." *Id.* § 155.05(1). New York State's Penal Law states,

To 'deprive' another of property means (a) to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.

Id. § 155.00(3). New York State's Penal Law similarly provides that to "appropriate" property means, as here pertinent, "(a) to exercise control over it . . . permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit." *Id.* § 155.00(4).

85. *Loguirato*, 929 N.Y.S.2d at 202.

86. *Id.*

87. *Id.*

88. *Id.*

viewed it.⁸⁹ Second, the police officer who observed the video could not identify the defendant as the shrub stealer.⁹⁰ Third, the complainant's wife testified that she identified the defendant simply by his gait and walk.⁹¹ The court stated that "[s]uch evidence, in our view, did not establish beyond a reasonable doubt that it was the defendant who had stolen his neighbor's shrub."⁹² The appeals court found the verdict against the weight of the evidence because the quality of the evidence presented with regard to identification of the defendant was seriously lacking.⁹³

B. Unsuccessful Review of a Weight-of-the-Evidence Claim Raised on Appeal – The Defendant Does Testify

In *Loguirato* the defendant never testified.⁹⁴ However, to illustrate how a defendant's narrative at trial can impact a weight-of-the-evidence claim when raised on appeal, it is necessary to explore the hypothetical testimony of Steven Loguirato. For the purposes of this example, suppose the evidence offered by the prosecution in the hypothetical *People v. Loguirato* case was the same as the evidence offered in the actual case. Clearly, we have no way of knowing whether the real Steven Loguirato actually stole his neighbor's shrub or why he would want to do so. However, suppose Loguirato's neighbors owed him a debt. To satisfy this debt his neighbors told him he could come over to their property and take a shrub of his choosing. Loguirato enters his neighbor's yard and takes a shrub of his choosing per his discussion with the neighbors. The neighbors have a surveillance system set up on their property aimed at their yard. However, the surveillance system is not as effective as intended. Thus, when Loguirato enters the yard to take the shrub, his face is never recorded. Other than the taking of the shrub, the video captures Loguirato entering and leaving the yard, displaying only his "gait" and "walk."⁹⁵ Some time passes and after reflecting on the value of the debt owed and the value of the shrub given, the neighbors have come to believe the shrub Loguirato removed exceeded the value of the debt owed to him. Because of this, the neighbors ask

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.*

95. *Id.*

him to return the shrub, which he refuses to do. Angered over what they perceive as a grave injustice and motivated by revenge, the neighbors call the police. However, they cannot tell the police that they gave Loguirato the shrub because then no theft occurred and there would be no reason to arrest him. As a result, they tell the police Loguirato stole the shrub and produce the poorly recorded video as proof. If the case proceeds to trial and Loguirato tells his story, the neighbors will simply deny that any part of his story is true. They will rely on the video evidence produced and argue to the factfinder that the defendant's highly exculpatory story is simply being made up to avoid conviction. The defendant clearly has a motive to lie, and avoiding conviction is a rather compelling motive.

Nevertheless, Loguirato goes on to tell his story at trial. The factfinder chooses to believe he is telling the truth about being in the neighbors' yard, but does not believe he was given permission to take the shrub.⁹⁶ He is convicted of petit larceny. Appellate review of the prosecution's case against Loguirato has one grave and fundamental weakness: the quality of the identification testimony offered against him. In fact, in the actual *Loguirato* case, the appellate court believed the identification testimony offered at trial by the complainant and his wife was of such poor quality that the conviction was against the weight of the evidence.⁹⁷ However, if Loguirato told the above hypothetical story at trial, his admission to being the person who took the shrub would have effectively cured the weakest part of the prosecution's case. On appeal, Loguirato cannot expect to convince the appellate court that the complainant's identification of him as the person who took the shrub is against the weight of the evidence when he is, in fact, admitting to being the person who took the shrub. In this regard, the hypothetical example of Steven Loguirato's testimony clearly demonstrates that if the story told by the criminal defendant at trial admits certain facts, the absence of which represents a significant weakness in the prosecution's case, the defendant has effectively eliminated weight-of-the-evidence argument as an avenue of appellate review. In short, the defendant's

96. See generally *People v. Salters*, 428 N.Y.S.2d 293, 296 (N.Y. App. Div. 1980) (citing *People v. Asan*, 239 N.E.2d 913 (N.Y. 1968); *People v. Battle*, 239 N.E.2d 535 (N.Y. 1968) (standing for the proposition that "the jury is free to accept or reject part or all of the defense or prosecution evidence")); see also *Tibbs v. Florida*, 457 U.S. 31, 47 (1982) (affirming the Florida Supreme Court's ruling that a retrial based on a conviction that is against the weight of evidence was not barred by the Double Jeopardy clause).

97. *Loguirato*, 929 N.Y.S.2d at 202.

story will have provided the evidentiary weight that was previously lacking at the trial review.

One may argue in the above example that the defendant's testimony has not foreclosed the possibility of an appeal based on weight of the evidence in its entirety. This is technically correct. While the hypothetical defendant cannot win an appeal challenging the weight of the identification evidence that has been offered, he can still raise a weight-of-the-evidence claim by asking the court to find his narrative more credible than the evidence offered by the prosecution and reverse the conviction. In this sense, the defendant can still ask the appellate court to sit as the thirteenth juror and find in his favor.⁹⁸ However, it should be noted that in *Loguirato* the appellate court found the verdict was against the weight of the evidence when reviewing a number of objective factors.⁹⁹ The *Loguirato* court essentially assigned a certain value to several objective factors relevant to identification testimony such as ability to observe, quality of those observations, consistency in those observations among several witnesses, and whether any observations were made that were so unique that they identified one person in particular.¹⁰⁰

Although the *Loguirato* court did reverse the defendant's conviction, the court was not asked to make a credibility determination as to which witnesses to believe.¹⁰¹ If it had been, rather than review evidence presented from an objective perspective, the appellate court would have been asked to substitute its subjective opinion of the evidence for that of the factfinder. Appellate courts are loath to do this. As indicated in Part II, appellate courts do not want to usurp the traditional function of the jury and essentially become "the real trier of fact."¹⁰² For this reason, not only have appellate courts erected an incredibly high bar for the defendant in terms of standard of review, but "[g]reat deference is accorded to the factfinder's opportunity to view the witnesses, hear the testimony and observe demeanor."¹⁰³ Put quite simply, an appellate court is far more inclined to reverse a conviction that is against the weight of

98. See *Tibbs*, 457 U.S. at 42; *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980) (finding that the district court's ruling will only be reversed if ruling is clear abuse of discretion).

99. *Loguirato*, 929 N.Y.S.2d at 202.

100. *Id.*

101. *Id.*

102. Seward, *supra* note 21, at 154.

103. *People v. Mateo*, 811 N.E.2d 1053, 1069 (N.Y. 2004) (quoting *People v. Bleakley*, 69 N.Y.2d 490, 495 (N.Y. 1987)).

the evidence when the court is asked to review the quality of objective evidence (as in *Loguirato*) than to second guess the factfinder's decision about which witnesses are credible. In this regard, once the defendant has testified at trial and admits to certain facts that are objective in nature and represented weakness in the prosecution's case, while the defendant can still ask the court to review a weight-of-the-evidence claim, the nature of that review has changed from one the court may be more inclined to grant (based on objective facts) to one the court is not inclined to grant (second guessing the factfinder's determination of which witness to believe).

CONCLUSION

Frequently, trial attorneys view trial strategy through the lens of what is an effective narrative. The reasons for this are threefold. First, there exists an innate human tendency to understand the world through a narrative framework.¹⁰⁴ As author Reynolds Price observed,

A need to tell and hear stories is essential to the species of *Homo sapiens*—second in necessity apparently after nourishment and before love and shelter. Millions survive without love or home, almost none in silence; the opposite of silence leads quickly to narrative, and the sound of story is the dominant sound of our lives, from the small accounts of our days' events to the vast incommunicable constructs of psychopaths.¹⁰⁵

Second, because of this, tremendous focus has been placed on the best and most persuasive way for the trial attorney to communicate his or her client's story.¹⁰⁶ Third, the American legal system is constructed so that the factfinder must decide which side's story to believe.¹⁰⁷ It has been observed that "[t]he American legal system is an adversary system; for every story placed before the court there is a competing story."¹⁰⁸ As a result, lawyers often view themselves as storytellers or, as McKenzie notes, as

104. HAVEN, *supra* note 1, at 4.

105. REYNOLDS PRICE, *A PALPABLE GOD* 3 (1978).

106. Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 U. KAN. L. REV. 251, 253 (1992) ("Lawyers solve problems through the medium of storytelling, by creating a legal story that identifies the client's problem and suggests a solution.").

107. *See id.*

108. *Id.* at 255.

using stories as a means of solving problems for clients. Although lawyers tell stories in a variety of settings, the quintessential example of storytelling occurs in the courtroom, where two lawyers meet to tell opposing stories about 'what really happened on the night of June 12th.'¹⁰⁹

This Article suggests an alternative view to the importance of legal storytelling. Once a decision to proceed to trial is made, the criminal-trial practitioner has many different factors to consider in adopting a particular trial strategy and advising a client on the potential merits of testifying. These factors include, but are not limited to, the following: whether the factfinder is a judge or a jury; the attitude of the presiding judge; the composition of the jury; the quality of the opponent; who the witnesses are on each side; the quality of the defendant's narrative; and last, but certainly not least, the goals of the defendant himself. This Article suggests that, in addition to these factors, the trial attorney should also consider the potential consequences the criminal defendant's storytelling at trial may have on appellate review. No one can say for sure what will happen at trial prior to the defendant testifying. The narrative provided by the defendant may result in acquittal, or it may not. Trial attorneys do their best to predict which way the winds at trial will blow, but they can never be certain. However, if a criminal defendant tells a particular type of story at trial (two types of which are detailed in Parts II and III), the story itself will foreclose, with absolute certainty, the possibility of successful appellate review when sufficiency-of-the-evidence and weight-of-the-evidence claims are raised on appeal. In this regard, when trial attorneys advise clients on the potential merits of testifying, more emphasis should be placed on the consequences of the criminal defendant's trial narrative than has thus far been presented in the canon of legal storytelling.¹¹⁰ Maybe the defendant does not want to provide an opposing narrative to explain "what happened the night of June 12th" after all.¹¹¹

109. *Id.* at 251.

110. *Id.* at 253.

111. *Id.* at 251.