Tibbs v. Florida: The Weight-Sufficiency Distinction Gains Too Much Weight

I. Introduction

A principle which has long been accepted in American jurisprudence is that the double jeopardy clause[1] prevents the retrial of a criminal defendant once he has been acquitted in the trial court.[2] Whether the double jeopardy clause prevents the retrial of a defendant who is convicted, but whose conviction is later reversed by an appellate court, is a question which has generated a number of Supreme Court decisions narrowly construing the double jeopardy clause's prohibition against successive trials for the same offense.[3] These decisions unanimously permitted a defendant's retrial if the defendant had been successful in getting his conviction reversed.[4]

In 1978 the Supreme Court expounded a broader view of the purpose of the double jeopardy clause with its decision in *Burks v. United States.*[5] In *Burks*, the Court held that a defendant cannot be retried after his conviction is reversed because of insufficient evidence.[6] This decision had the effect of putting appellate reversals for insufficient evidence on the same level as trial court acquittals.

Recently, the Supreme Court has narrowly limited its holding in *Burks*. In *Tibbs v. Florida*,[7] the Court held that a retrial does not violate the double jeopardy clause when an appellate court reverses a defendant's conviction on the ground that the verdict is against the weight of the evidence.[8] The Court's weight-sufficiency distinction in *Tibbs* is superficially consistent with the holding in *Burks*, which is

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[1]U.S. Const. amend. V provides in part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

[2]See United States v. Ball, 163 U.S. 662 (1896), where the Supreme Court held that a "verdict of acquittal was final, and could not be reviewed, . . . without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." *Id.* at 671. *See also* United States v. Scott, 437 U.S. 82 (1978); Arizona v. Washington, 434 U.S. 497 (1978); North Carolina v. Pearce, 395 U.S. 711 (1969); Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam); Kepner v. United States, 195 U.S. 100 (1904).

[3]*See, e.g.*, Forman v. United States, 361 U.S. 416 (1960); Bryan v. United States, 338 U.S. 552 (1950); United States v. Ball, 163 U.S. 662 (1896).

[4]*See* cases cited *supra* note 3.

[5]437 U.S. 1 (1978). One case has noted that "[i]n 1977 and 1978 . . . the Supreme Court broadened the scope of [a] defendant's double jeopardy protection . . . ." Lydon v. Justices of Boston Mun. Court, 698 F.2d 1, 3 (1st Cir. 1982) (referring to Burks v. United States, 437 U.S. 1 (1978) and Jackson v. Virginia, 443 U.S. 307 (1979)).

[6]437 U.S. at 18.

[7]457 U.S. 31 (1982).

[8]*Id.* at 32.

limited to reversals for insufficient evidence.[9] However, the added significance which *Tibbs* gives to the weight-sufficiency distinction is inconsistent with the broader view of the purposes underlying the double jeopardy clause expressed in *Burks*.[10] The effect of *Tibbs* is to place a reversal based on the weight of the evidence on the same level as a reversal based on trial error.

This Note questions the validity of placing weight reversals on the same level as trial error reversals in a double jeopardy context. The focus of this Note will be on whether the weight-sufficiency distinction is a proper line of demarcation in making a determination of which defendants will be acquitted and which defendants will be retried. Particularly, this Note will call into question the ability of appellate courts to make clear-cut decisions about how much evidence satisfies the sufficiency of the evidence standard, how much satisfies the weight of the evidence standard, and the difficulty inherent in making an objective determination one way or the other when a decision means either retrial or acquittal.

II. BACKGROUND: *Tibbs* IN CONTEXT

A. The Flawed Analysis Prior to Burks

1. Trial Error v. Sufficiency Reversals.—The pre-*Burks* decisions had unanimously permitted the retrial of a defendant who had succeeded in getting his conviction set aside.[11] However, as *Burks* recognized, these prior decisions suffered from two essential flaws in reasoning. The first was the Court's failure to distinquish reversals based on trial error from reversals based on insufficient evidence.[12] A trial error reversal, according to *Burks*, "implies nothing with respect to the guilt or innocence of the defendant"[13] nor does it "constitute a decision to the effect that the government has failed to prove

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[9]437 U.S. at 5. *See also* United States v. DiFrancesco, 449 U.S. 117, 131 (1980).

[10]In *Burks*, the Court stated:

> The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."

437 U.S. at 11 (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

[11]*See, e.g.*, Forman v. United States, 361 U.S. 416 (1960); Bryan v. United States, 338 U.S. 552 (1950); *cf.* Sapir v. United States, 348 U.S. 373 (1955) (per curiam) (Court did not permit retrial but did not pass upon the double jeopardy question).

[12]437 U.S. at 14-15. The Court stated that "the failure to make this distinction [between trial error and insufficient evidence] has contributed substantially to the present state of conceptual confusion existing in this area of the law." *Id.* at 15.

[13]*Id.*

its case."[14] Rather, such a reversal indicates merely that the defendant was convicted through a defective judicial process.[15] A retrial following such a reversal benefits both the defendant and society. A retrial benefits the defendant inasmuch as it permits him to obtain a fair adjudication of his innocence or guilt in a proceeding free from error.[16] A retrial benefits society in that it prevents a guilty defendant from escaping punishment merely because a trial error disrupted the first proceeding.[17]

But the same rationale does not apply to a reversal based on insufficient evidence. A reversal in that circumstance "means that the government's case was so lacking that it should not have even been *submitted* to the jury."[18] Thus, when an appellate court reverses a decision because of insufficient evidence, the appellate court is saying that the prosecution has failed to prove its case beyond a reasonable doubt and that, as a matter of law, the jury could not have returned a guilty verdict.[19] While some writers had long-favored such a distinction,[20] *Burks* marked the first time that the Court considered it to be a constitutional necessity.

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[14]*Id.*

[15]*Id.*

[16]*Id.* Of course, an argument can be made that retrial should be barred even where the reversal results from trial error. See Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal*, 8 IND. L. REV. 497 (1975), where the author asserts:

> The underlying policy of the double jeopardy clause is to preclude multiple prosecutions for the same offense without regard to the question of guilt. If it is indeed true that in criminal prosecution the Government assumes the risks of all the errors of the prosecuting attorney and the trial judge, the ground for reversal would be immaterial.

Id. at 506 n.24. *See generally* Comment, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. CHI. L. REV. 365 (1964) [hereinafter cited as Comment, *Double Jeopardy*].

[17]437 U.S. at 15. The Court recognized that " '[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.' " *Id.* (quoting United States v. Tateo, 377 U.S. 463, 466 (1964)).

[18]437 U.S. at 16. The standard for determining the sufficiency of the evidence is the same regardless of whether it is the trial court or the appellate court which is making the determination. 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURES § 467, at 655-56 (1982). That standard is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

[19]437 U.S. at 16.

[20]*See* Thompson, *supra* note 16, at 519-20; Note, *Double Jeopardy: The Prevention of Multiple Prosecutions*, 54 CHI.[-]KENT L. REV. 549 (1977); Comment, *Double Jeopardy*, *supra* note 16, at 370-72. See also the concurring opinion in Sapir v. United States, 348 U.S. 373 (1955) (per curiam), where Justice Douglas stated that, "[i]f . . . the trial judge . . . render[s] a verdict of acquittal, the guarantee against double jeopardy would

2. The Waiver Theory.—The second area of flawed reasoning existing prior to *Burks* centered around the Court's reliance on the waiver theory. Under this theory, a defendant seeking reversal of his conviction was said to have waived his double jeopardy defense to retrial by taking affirmative steps to have his conviction set aside.[21] Two related principles tended to support this theory. The first was an appellate court's broad statutory authority to order further proceedings as may have been necessary and just under the circumstances.[22] Second was a defendant's procedural maneuver of accompanying his motion for a judgment of acquittal with an alternative motion for a new trial.[23] So, the argument went, by remanding for a second trial, the appellate court ordered the only just relief and merely gave the defendant/appellant what he had asked for.

Burks soundly rejected the waiver theory, holding that, whether or not a defendant has moved for a new trial, he cannot be retried when his conviction is reversed because of insufficient evidence.[24]

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prevent a new trial of the old offense. I see no difference when the appellate court orders a judgment of acquittal for lack of evidence." 348 U.S. at 374 (Douglas, J., concurring).

[21]*See, e.g.*, Bryan v. United States, 338 U.S. 552, 560 (1950) (citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947)). For a critical discussion of the waiver theory, see Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 U.C.L.A. L. REV. 81 (1967); Comment, *Double Jeopardy*, *supra* note 16, at 367-72.

[22]28 U.S.C. § 2106 (1976) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

[23]*See, e.g.*, Yates v. United States, 354 U.S. 298, 328 (1957) (court may remand criminal cases for retrial even where the evidence is deemed "palpably insufficient" if the defendant asked for a new trial in the alternative). Even Justice Douglas' concurring opinion in Sapir v. United States, 348 U.S. 373 (1955) (per curiam), which was the first indication that at least one Justice would be willing to use double jeopardy principles to prevent a retrial after an appellate court finding of insufficient evidence, stated that a defendant who asks for a new trial is not protected against double jeopardy, "for then the defendant opens the whole record for such disposition as might be just." 348 U.S. at 374 (Douglas, J., concurring).

[24]437 U.S. at 17-18. The underlying fallacy of the waiver theory is well stated in Note, *Double Jeopardy: When is an Acquittal an Acquittal?*, 20 B.C.L. REV. 925 (1979) [hereinafter cited as Note, *Acquittal*]:

> Under the waiver theory, a defendant would have to refrain from making a new-trial motion when challenging evidentiary sufficiency on appeal if the defendant were to be sure of avoiding a second trial following a successful appeal. . . . [U]nder normal circumstances one would expect a realistic defendant to seek any relief possible, including a new trial. . . . [T]he "waiver" theory presumes an element of volition on the part of the defendant. . . . Frankly, it is hard to imagine that, as a rule, defendants knowingly weigh the risks of reprosecution when new-trial motions are made in their behalf.

Id. at 947.

B. Burks v. United States

In *Burks*,[25] the defendant was convicted of robbing a federally insured bank. On appeal, the Sixth Circuit Court of Appeals reversed the conviction on the ground that the prosecution's evidence, even when considered in the light most favorable to the government, did not rebut Burks' proof of insanity.[26] The court then remanded the case to the district court for a determination of whether the defendant should be acquitted or retried.[27] On appeal the Supreme Court reversed and, in a unanimous opinion written by Chief Justice Burger, held that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient."[28] The Court reasoned that an appellate reversal for insufficient evidence is tantamount to a jury verdict of acquittal and should be accorded the same finality.[29] This decision substantially changed the law as it stood at that time.[30]

Although *Burks* is noteworthy for having placed appellate reversals on the same level as trial court acquittals,[31] it is perhaps most striking for its use of broad double jeopardy language. In supporting its conclusions, the Court in *Burks* expounded principles which suggested that the double jeopardy clause, at least in the context of appellate reversals, had been given a renewed vitality, free from any procedural niceties[32] that might impair its protection. The Court stated:

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State

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[25]437 U.S. 1 (1978). For a more detailed analysis of *Burks*, see Comment, *Constitutional Law—Fifth Amendment—Double Jeopardy Implications of Appellate Reversal for Insufficient Evidence*—Burks v. United States, 25 N.Y.L. Sch. L. Rev. 119 (1979). *See also* Note, *Acquittal*, *supra* note 24; Note, Burks v. United States: *Redrawing the Lines in Double Jeopardy*, 1979 Det. C.L. Rev. 193 (1979); Note, *Constitutional Criminal Law—Double Jeopardy—Appellate Court Acquittal Accorded Same Finality as Trial Court Acquittal; Retrial Permitted After Defendant Seeks Dismissal*, 53 Tul. L. Rev. 598 (1979).

[26]United States v. Burks, 547 F.2d 968, 970 (6th Cir. 1976), *rev'd*, 437 U.S. 1 (1978).

[27]Prior to *Burks*, courts routinely sent the case back to the trial court after a finding of insufficient evidence. *See supra* notes 3-4 and accompanying text.

[28]437 U.S. at 18.

[29]*Id.* at 16.

[30]*See supra* notes 11-24 and accompanying text.

[31]It is beyond contention that a defendant acquitted in the first instance, that is, in the trial court, may not constitutionally be retried. *See* United States v. Scott, 437 U.S. 82 (1978); North Carolina v. Pearce, 395 U.S. 711 (1969); Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam); Green v. United States, 355 U.S. 184 (1957); Kepner v. United States, 195 U.S. 100 (1904); United States v. Ball, 163 U.S. 662 (1896).

[32]*See supra* notes 11-24 and accompanying text.

> . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy'was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."[33]

Additionally, the Court expressed concern that "the purposes of the Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.' "[34]

A clear picture of these historical strands which preceded *Burks*, and which *Burks* untangled to some extent, is necessary to an understanding of what occurred in *Tibbs*. At least two things were clear when *Tibbs* went before the Supreme Court. First, the difference between trial error and insufficient evidence meant the difference between constitutionally permissible retrial and constitutionally impermissible retrial.[35] Second, a defendant who sought a reversal of his conviction and asked for a new trial in the alternative was not always desirous of undergoing a second trial.[36] *Burks*, however, did not decide the effect of a reversal based on the weight of the evidence.

C. Examination of Double Jeopardy Principles and Evidentiary Standards

1. Double Jeopardy.—Although this Note makes no attempt to delineate the rather complex history of double jeopardy and its underlying policy rationale, some discussion of recurring themes is necessary.[37]

A literal reading of the double jeopardy clause may convey the notion that all retrials of a criminal defendant, regardless of how they arise, are violative of the constitution. Judicial interpretations of the clause, while never explicitly going this far, may produce the same

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[33]437 U.S. at 11 (footnote omitted) (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

[34]437 U.S. at 17.

[35]*Id.* at 15-16.

[36]*Id.* at 17.

[37]Of course, a tremendous body of authority exists in the area of double jeopardy. For a varied view of its purpose, see United States v. Scott, 437 U.S. 82 (1978); United States v. Wilson, 420 U.S. 332 (1975); Green v. United States, 355 U.S. 184 (1957); United States v. Ball, 163 U.S. 662 (1896); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873). *See also* Thompson, *supra* note 16, at 502-07; Note, *Double Jeopardy: The Prevention of Multiple Prosecutions*, 54 CHI.[-]KENT. L. REV. 549 (1977); Comment, *Double Jeopardy*, *supra* note 16; Recent Development, *Emerging Standards in Supreme Court Double Jeopardy Analysis*, 32 VAND. L. REV. 609 (1979); Note, *Twice in Jeopardy*, 75 YALE L. J. 262 (1965). *See generally* J. SIGLER, DOUBLE JEOPARDY ch. 1 (1969) (tracing elaborately the development of double jeopardy principles in Anglo-American law).

notion.[38] Usually, however, a court will balance what it believes to be the purpose of the double jeopardy clause with other societal interests[39] to determine whether the double jeopardy clause applies.

The double jeopardy clause has varying, interrelated purposes. It is designed to protect the defendant from the expense, embarrassment and strain of a second trial.[40] Additionally, the clause is designed to prevent the insecurity which a defendant must undergo when a second trial is ordered.[41] Finally, the clause is designed to prevent the state, with its superior resources, from wearing down the defendant so that a defendant is not convicted simply because of repeated governmental attempts at prosecution.[42]

While these purposes appear broad enough to preclude all second trials, the courts have recognized other countervailing interests and have refused to apply the double jeopardy clause so as to prevent all second trials.[43] An example of this recognition is found in the statement:

> Undeniably the framers of the Bill of Rights were concerned to protect defendants from oppression and from efforts to secure, through the callousness of repeated prosecutions, convictions for whose justice no man could vouch. On the other hand, they were also aware of the *countervailing interest* in the vindication of criminal justice, which sets outer *limits to the protections for those accused of crimes.*[44]

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[38]*See, e.g.*, Green v. United States, 355 U.S. 184 (1957). Justice Black, writing for the majority in *Green*, stated:

> The underlying idea [of double jeopardy], 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.

Id. at 187-88.

[39]A concise discussion of this balancing process is found in Note, *Acquittal*, *supra* note 24, at 948-49.

[40]Green v. United States, 355 U.S. 184, 187-88 (1957).

[41]*Id. See* Note, *Acquittal*, *supra* note 24, at 949.

[42]Green v. United States, 355 U.S. 184, 187-88; *see also* Burks v. United States, 437 U.S. 1, 11 (1978) (the clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding).

[43]The Supreme Court has recognized that judicial decisions do not go as far as the language of the double jeopardy clause might permit. In Crist v. Bretz, 437 U.S. 28 (1978), Justice Stewart, writing for the majority, noted that "[t]he Double Jeopardy Clause of the Fifth Amendment is stated in brief compass . . . . But this deceptively plain language has given rise to problems both subtle and complex, problems illustrated by no less than eight cases argued here this very Term." *Id.* at 32 (footnote omitted).

[44]Green v. United States, 355 U.S. 184, 218-19 (1957) (Frankfurter, J., dissenting)

Until *Burks v. United States*,[45] these countervailing interests were considered sufficiently great to permit a defendant's retrial after he had succeeded in getting his conviction reversed on appeal.[46] *Burks* recognized that the purposes of the double jeopardy clause outweighed other societal interests where a defendant's conviction is reversed because of insufficient evidence. The Court left until a later decision the impact of these societal interests on a conviction which is reversed because of the weight of the evidence.

2. Weight and Sufficiency.—In *Tibbs v. Florida*,[47] the Supreme Court decided that the distinction between a reversal based on the sufficiency of the evidence and a reversal based on the weight of the evidence is important enough to prohibit retrial after one, while permitting retrial after the other.[48]

Theoretically, an appellate court is faced with differing considerations when reversing because of insufficent evidence on the one hand, and reversing because of the weight of the evidence on the other.[49] A defendant in a federal district court challenges the sufficiency of the evidence by making a Rule 29 motion for judgment of acquittal.[50] The standard for passing on such a motion requires that the court view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.[51] The standard is the same

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(emphasis added). *See also* Wade v. Hunter, 336 U.S. 684, 689 (1949) (a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments).

[45]437 U.S. 1 (1978).

[46]*See* North Carolina v. Pearce, 395 U.S. 711 (1969); Forman v. United States, 361 U.S. 416 (1960); Yates v. United States, 354 U.S. 298 (1957); Bryan v. United States, 338 U.S. 552 (1950); United States v. Ball, 163 U.S. 662 (1896).

[47]457 U.S. 31 (1982).

[48]*Id.* at 32.

[49]3 C. WRIGHT, *supra* note 18, § 553, at 245.

[50]FED. R. CRIM. P. 29(a) states in part:

> The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

If the jury has already been discharged or has already returned a verdict, Rule 29(c) applies.

For the purposes of this discussion, the weight and the sufficiency of the evidence are examined in the context of the Federal Rules of Criminal Procedure. The states may vary in their treatment of the weight and the sufficiency of the evidence. For example, some states do not permit their appellate tribunals to reweigh the evidence addressed at the trial. *See, e.g.*, Tibbs v. State, 397 So. 2d 1120, 1125 (Fla. 1981) (Florida law).

[51]Jackson v. Virginia, 443 U.S. 307, 319 (1979).

for both the trial court and the appellate court.[52] An appellate court's determination that the evidence is insufficient to sustain the conviction means that the government's case was so lacking that it should never have been sent to a jury.[53] When passing on a motion for judgment of acquittal, the reviewing court is not to substitute its judgment of what the verdict should be for that of the jury.[54] Thus, the court may not weigh the evidence or assess the credibility of the witnesses because such a weighing process is the jury's function.[55]

An appellate weighing process does occur, however, when a defendant challenges the validity of his conviction on the grounds that it is against the weight of the evidence. A defendant seeking this relief must make a Rule 33 motion for a new trial.[56] The court passing on the Rule 33 motion has much broader discretion than does the court passing on a motion for a judgment of acquittal. The court may weigh the evidence and consider the credibility of witnesses, and the court need not view the evidence in the light most favorable to the prosecution.[57] This standard differs from the standard used when passing on a motion for a judgment of acquittal:

> The question is not whether the defendant should be acquitted outright, but only whether he should have a new trial. . . . If the court concludes that, despite the abstract sufficiency of the evidence . . . 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.[58]

The defendant making a motion for a new trial faces a heavy burden because the power to grant a new trial is "invoked only in exceptional cases in which the evidence preponderates heavily against the verdict."[59]

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[52]2 C. WRIGHT, *supra* note 18, § 467, at 655-56; *see also* United States v. Lincoln, 630 F.2d 1313, 1316-17 (8th Cir. 1980).

[53]Burks v. United States, 437 U.S. 1, 16 (1978).

[54]Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); Burks v. United States, 437 U.S. 1, 16 (1978).

[55]2 C. WRIGHT, *supra* note 18, § 467, at 663.

[56]FED. R. CRIM. P. 33 provides in part that "[t]he court on motion of a defendant may grant a new trial to him if required in the interest of justice."

[57]*See* 3 C. WRIGHT, *supra* note 18, § 553, at 245-46.

[58]United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980). It is often said that the court acts as a "thirteenth juror" in such an instance. *See* 3 C. WRIGHT, *supra* note 18, § 553, at 247; United States v. Turner, 490 F. Supp. 583, 593 (E.D. Mich. 1979), *aff'd*, 633 F.2d 219 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

[59]3 C. WRIGHT, *supra* note 18, § 553, at 248; *see, e.g.*, Harper v. United States, 296 F.2d 612 (9th Cir. 1961) (new trial not required even where judge disagreed with jury on credibiliity of principal prosecution witness).

This background discussion shows the various competing considerations present when *Tibbs* came before the Court: the sufficiency of the evidence rule laid down in *Burks*; the balancing process which courts use to determine whether the double jeopardy clause precludes retrial; and the weight-sufficiency distinction governing appellate reversals, perhaps insignificant until *Burks*.[60]

II. *Tibbs:* Variation on a Double Jeopardy Theme

A. Factual and Procedural History

Delbert Tibbs was tried on a three-count indictment charging rape, first degree murder, and felony murder. The jury in a Florida trial court found Tibbs guilty of all three. The Florida Supreme Court reversed the conviction,[61] enumerating six infirmities in the trial court's decision which left the supreme court with "considerable doubt that . . . Tibbs [was] the man who committed the crimes for which he [was] convicted."[62] The court reversed pursuant to a Florida procedural rule which made obligatory the supreme court's review of a conviction for which the death sentence was imposed.[63] Under this rule, the court was to review the evidence on the entire record to determine whether "the interests of justice" required a new trial.[64] Significantly, the supreme court, at the time, gave no indication of the basis for its reversal; that is, the court did not state whether it was reversing

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[60]See Tibbs v. State, 397 So. 2d 1120, 1122 (Fla. 1981), where the Florida Supreme Court stated that "the distinction between an appellate reversal based on evidentiary weight and one based on evidentiary sufficiency was never of any consequence until *Burks*."

[61]Tibbs v. State, 337 So. 2d 788 (Fla. 1976). This decision is referred to as *Tibbs I*.

[62]*Id.* at 790. The infirmities which the court listed were: first, the prosecution's complete failure, apart from the testimony of the prosecutrix, to place Tibbs anywhere near the scene of the crimes on the date in question; second, the failure to find the truck which Tibbs was allegedly driving at the time the crimes were committed; third, the failure to find a gun (the alleged murder weapon) or car keys in Tibbs' possession, at the scene of the crime, or anywhere else; fourth, Tibbs' full cooperation with the police during the investigatory process; fifth, the prosecution's failure to introduce any testimony casting doubt on Tibbs' veracity, coupled with the fact that Tibbs had no prior criminal record; and finally, the prosecutrix's damaged credibility, resulting from several inconsistencies in her testimony as well as from her admission that she used marijuana throughout the day of, and immediately prior to the crimes. *Id.* at 790-91.

[63]Fla. R. App. P. 6.16(b), Florida Rules of Court (West 1976), provided in part: "Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not." The rule has been substantively recodified since the *Tibbs* decision. *See* Fla. R. App. P. 9.140(f).

[64]Fla. R. App. P. 6.16(b), Florida Rules of Court (West 1976).

because of insufficient evidence or because the verdict was contrary to the weight of the evidence. Citing defects in the prosecutor's case,[65] the court reversed and ordered a new trial "[r]ather than risk the very real possibility that Tibbs had nothing to do with [the] crimes."[66] A concurring opinion indicated that the weakness of the evidence against Tibbs might require that he be released without further litigation.[67]

The trial court, on remand, balked at the idea of retrying Tibbs because, in the interim, the United States Supreme Court decided that the double jeopardy clause precludes the retrial of a defendant whose conviction is later reversed because of insufficient evidence.[68] A Florida appellate court disagreed,[69] holding the *Burks* rationale inapplicable where a conviction is reversed because an appellate court finds that it is against the weight of the evidence.[70] The Florida Supreme Court affirmed the appellate court's decision and again remanded the case for retrial.[71]

The United States Supreme Court, in a 5-4 decision written by Justice O'Connor, affirmed the Florida Supreme Court's decision and held that where a reversal is based on the weight, rather than the sufficiency, of the evidence, a retrial is not barred by the double jeopardy clause.[72] Hence, Delbert Tibbs was once again sent back to the trial court to await a new trial.

B. The Supreme Court's Holding and Analysis

In *Tibbs v. Florida*,[73] the Supreme Court was presented with the issue of "whether the Double Jeopardy Clause bars retrial after a state appellate court sets aside a conviction on the ground that the verdict was against 'the weight of the evidence.' "[74] The Court found that "[a]fter examining the policies supporting the Double Jeopardy Clause, we hold that a reversal based on the weight, rather than the sufficiency, of the evidence permits the State to initiate a new prosecution."[75]

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[65]*See supra* note 62.

[66]337 So. 2d at 791.

[67]*Id.* at 792. (Boyd, J., concurring specially). Justice Boyd reluctantly concurred in the majority opinion providing for a new trial because of his understanding that Florida law permitted such a new trial. *Id.*

[68]Burks v. United States, 437 U.S. 1 (1978). Green v. Massey, 437 U.S. 19 (1978), was decided the same day as *Burks* and made *Burks* applicable to the states.

[69]State v. Tibbs, 370 So. 2d 386 (Fla. Dist. Ct. App. 1979).

[70]*Id.* at 388.

[71]Tibbs v. State, 397 So. 2d 1120 (Fla. 1981). This case is referred to as *Tibbs II*.

[72]Tibbs v. Florida, 457 U.S. 31 (1982).

[73]457 U.S. 31 (1982).

[74]*Id.* at 32 (footnote omitted).

[75]*Id.*

The Court began its analysis of the problem by noting that *Burks v. United States*[76] "carved a narrow exception" to the general rule that the double jeopardy clause does not protect a defendant who has succeeded in getting his first conviction set aside.[77] The Court stated that this exception—that a defendant whose conviction is reversed because of legally insufficient evidence may not be retired—rests on two closely related policies.[78] The first policy is the special weight which the double jeopardy clause attaches to judgments of acquittal.[79] In *Burks*, the Court held that an appellate reversal for insufficient evidence meant that the jury should never have been given the case for determination, as acquittal was the only proper verdict.[80] Because a jury's verdict of acquittal is final, the Court reasoned, a decision that the jury could not have returned any verdict other than acquittal is also final.[81]

The Court in *Tibbs* stated that the second policy supporting the *Burks* exception concerned the principle that " '[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' "[82] Justice O'Connor, writing for the majority in *Tibbs* elaborated on this principle: "This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance."[83]

Although this language appears to include retrials after weight reversals as well as retrials after insufficiency reversals, the majority opinion in *Tibbs* read *Burks* as permitting retrial under the circumstances. The Court, relying on dictum in a case decided in the previous term, held that the two policies supporting the *Burks* principle "do not have the same force when a judge disagrees with a jury's resolution of conflicting evidence and concludes that a guilty verdict is against the weight of the evidence."[84] The Court gave two bases

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[76]437 U.S. 1 (1978).

[77]457 U.S. at 40.

[78]*Id.* at 41.

[79]*Id.* (citing United States v. DiFrancesco, 449 U.S. 117, 129 (1980); United States v. Scott, 437 U.S. 82, 91 (1978); Arizona v. Washington, 434 U.S. 497, 503 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam)).

[80]437 U.S. at 16.

[81]457 U.S. at 41 (citing Burks v. United States, 437 U.S. 1, 11 (1978)).

[82]457 U.S. at 41 (quoting Burks v. United States, 437 U.S. 1, 11 (1978)).

[83]457 U.S. at 41.

[84]*Id.* at 42 (citing Hudson v. Louisiana, 450 U.S. 40, 44-45 n.5 (1981)). In the footnote cited, the Court in *Hudson* stated that it was not deciding

whether the Double Jeopardy Clause would have barred [the state] from re-

for its conclusion. First, the Court held that a reversal based on the weight of the evidence does not mean that acquittal was the only proper verdict. Rather, such a reversal means only that the appellate court, which sits as a "thirteenth juror," disagrees with the jury's resolution of conflicting evidence.[85] Thus, the Court held, an appellate court's reversal based on the weight of the evidence means nothing more than a disagreement among the jurors themselves.[86] The Court then referred to its long-standing rule of permitting retrial following a deadlocked jury.[87]

As a second basis for its conclusion that the double jeopardy clause does not have the same force when a reversal is based on the weight of the evidence, the Court reasoned that a weight reversal can occur only after the state has both presented sufficient evidence to support conviction and has persuaded the jury to convict.[88] The Court failed to note that the jury has also been convinced when a conviction is reversed because of insufficient evidence.

In the course of its opinion, the Court in *Tibbs* suggested two interrelated benefits which a defendant would derive from the Court's holding. First, a state may choose whether or not it will permit its appellate courts to reweigh evidence; if a reversal based on of the weight of the evidence had the effect of precluding retrial of a defendant, then a state may simply prohibit its appellate courts from reweighing the evidence.[89] Thus, the Court's holding in *Tibbs* supposedly increases the likelihood of the defendant's conviction being reversed because states will be more willing to permit the weight of the evidence to remain as a ground for reversal. Secondly, the Court stated that a reversal based on the weight of the evidence "simply affords the defendant a second opportunity to seek a favorable judgment."[90]

> trying [the defendant] if the trial judge had granted a new trial in [his] capacity [as "thirteenth juror"], for that is not the case before us. We note, however, that *Burks* precludes retrial where the State has failed as a matter of law to prove its case despite a fair opportunity to do so. By definition, a new trial ordered by a trial judge acting as a "13th juror" is not such a case. Thus, nothing in *Burks* precludes retrial in such a case.

450 U.S. at 44-45 n.5 (citation omitted). The Court did not discuss the effect of an appellate tribunal's reweighing of the evidence.

[85]457 U.S. at 42. *See generally* 3 C. WRIGHT, *supra* note 18, § 553.

[86]457 U.S. at 42.

[87]*Id.* Of course, strong double jeopardy arguments can be made against permitting retrial following a hung jury. At least one author has severely criticized the Court's holdings in this area. *See* Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem,* 129 U. PA. L. REV. 701 (1981).

[88]457 U.S. at 42-43.

[89]*Id.* at 45 n.22. The Court stated: "We note that a contrary rule, one precluding retrial whenever an appellate court rests reversal on evidentiary weight, might prompt state legislatures simply to forbid those courts to reweigh the evidence." *Id.*

[90]*Id.* at 43.

Finally, the Court rejected the contention that the distinction between the weight and sufficiency of the evidence "will undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence."[91] The Court rejected this contention for two reasons. First, the Court placed confidence in the ability of appellate judges to apply correctly the two evidentiary standards.[92] Second, the Court stated that the *Jackson v. Virginia* test for the sufficiency of the evidence imposes a "limit on an appellate court's definition of evidentiary sufficiency."[93] The *Jackson v. Virginia* test is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[94]

After examining these policies, the Court concluded that the double jeopardy clause does not bar retrial under the circumstances.

C. Burks *Limited: The Court Restricts Double Jeopardy Applicability in the Context of Appellate Reversals*

1. Trial Error v. Weight Reversals.—An analysis of the Supreme Court's reasoning in *Tibbs* reveals several problems with making the weight-sufficiency distinction a constitutional dichotomy. The majority opinion in *Tibbs* read *Burks* as permitting retrial where a conviction is reversed because of evidentiary weight.[95] The Court placed great emphasis on the fact that the holding in *Burks* did not go beyond prohibiting retrial in the limited circumstance of an insufficiency reversal.[96] Actually, *Burks* provides no clear answer of how to treat an appellate reversal which is based on the weight of the evidence rather than the sufficiency of the evidence. There is a slight semantic, yet great substantive difference in saying, on the one hand, that *Burks* decided *that only* appellate reversals for insufficient evidence invoke the protection of the double jeopardy clause, and saying, on the other, that *Burks* decided *only that* appellate reversals for insufficient evidence invoke double jeopardy's protections. Under the first reading, double jeopardy is not invoked unless the defendant is acquitted or has his conviction set aside because of what is later determined to be legally insufficient evidence. Under the second reading, retrial is barred following a sufficiency reversal, and may also be

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[91] *Id.* at 44.

[92] *Id.* at 44-45.

[93] *Id.* at 45 (footnote omitted).

[94] 443 U.S. 307, 319 (1979).

[95] 457 U.S. at 40-45.

[96] *Id.* at 40. The Court stated that *Burks* "carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial." *Id.*

barred under circumstances which the Court did not pass upon at that time. Given the fact that the Court in *Burks* discussed only trial error and insufficient evidence in its opinion, the latter reading seems more plausible.[97] Thus, the exception carved by *Burks* need not be as narrow as the Court in *Tibbs* held it to be.

Further, distinguishing trial error reversals from sufficiency reversals presents fewer conceptual difficulties than does distinguishing sufficiency reversals from weight reversals. A reversal for trial error does not require that in a retrial, the prosecution must hone its trial strategies in order to find a way to convict the defendant. Rather, such a reversal means that the prosecution has probably presented sufficient evidence on which to base a conviction, the jury has weighed such evidence correctly, but that its verdict of guilty was obtained through some defect. The only problem is that some type of error prevented the defendant's conviction from being fairly obtained. It is important to recognize, as the Court did in *Burks*, that a trial error reversal does not relate to guilt or innocence.[98]

It can hardly be said, however, that an appellate court reversal which is based on a belief that the jury's verdict is against the weight of the evidence does not, in some way, relate to a determination of guilt or innocence. When the Florida Supreme Court first reversed Tibbs' conviction, it did so because it had serious doubts that Tibbs committed the crime for which the jury had convicted him.[99] These serious doubts usually will not plague a court that reverses for some error in the proceedings. A court that reverses because of trial error is saying that the defendant is probably guilty,[100] but that it would prefer to give him a trial free from error, just to make sure. A court that reverses because it believes that the jury improperly weighed the evidence, a belief which may leave the court with serious doubts about a defendant's guilt, is saying that it thinks that the defendant is probably not guilty, and that it will allow another trial, just to make sure.[101] The Court in *Burks* emphasized that a trial error reversal does

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[97]The Court in *Burks* stated that a reversal for trial error did not constitute a decision to the effect that the government failed to prove its case. 437 U.S. at 15. Such a statement seems peculiarly limited to reversals for trial error.

[98]*Id. See supra* notes 12-20 and accompanying text.

[99]Tibbs v. State, 337 So. 2d 788, 790 (Fla. 1976).

[100]*See* Comment, *Double Jeopardy*, *supra* note 16, at 370.

> Underlying the idea that the objective of protecting society from those guilty of crime would be substantially frustrated by releasing those defendants whose convictions have been reversed for error is the belief that errors which courts hold to be reversible may have little or no relation to the issue of guilt or innocence.

Id.

[101]*See, e.g.*, Tibbs v. State, 337 So. 2d 788, 791 (Fla. 1976). The Florida Supreme Court ordered a retrial for Tibbs rather than risking the very real possibility that

not go to the guilt or innocence of a defendant.[102] It must be remembered that a reversal based on the weight of the evidence occurs only in exceptional circumstances.[103] Such a reversal, then, obviously does go to a defendant's guilt or innocence.[104] Thus, while *Burks* effectively distinguishes a trial error reversal from an insufficiency reversal, its analysis tacitly places weight reversals on a higher level than trial error reversals.

By permitting a criminal defendant to be retried after his conviction has been reversed because of the weight of the evidence, the Supreme Court has placed weight reversals and trial error reversals in the same category. The Court's failure to recognize the distinction between trial error reversals and weight reversals undermines the foundation of the holding in *Burks*. For if the prosecution, in a proceeding free from error, can introduce no more evidence than that which leaves considerable doubt in the mind of the appellate judges, then the only purpose of retrial is to allow the government an attempt to bolster its weak case.[105] While it is true, as the Court in *Tibbs* mentioned, that such a rule may make it easier for the defendant to obtain an acquittal upon retrial, because the government's case may be more difficult to assemble after the long process of trial-reversal-retrial,[106] this possibility does not seem strong enough to justify the risk that a defendant may be convicted through "repeated prosecutorial sallies."

An additional problem with the Court's failure to distinguish weight reversals from trial error reversals concerns the competing policies to which a court looks in determining whether the double jeopardy clause bars retrial.[107] Before the *Burks* decision, the Court regularly permitted retrial of a defendant after his conviction was

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Tibbs was innocent. *Id.* Of course, the argument can be made that retrial after trial error reversal also offends double jeopardy. *See* Thompson, *supra* note 16, at 506 n.24. "It could well be argued that retrial should be barred even when the reversal is grounded upon a procedural irregularity. . . . The underlying policy of the double jeopardy clause is to preclude multiple prosecutions for the same offense without regard to the question of guilt." *Id.*

[102]437 U.S. at 15.

[103]*See* 3 C. WRIGHT, *supra* note 18, § 553, at 248.

[104]*See supra* note 97 and accompanying text.

[105]Justice White voiced this concern in his dissent in *Tibbs*. He stated that, "[i]f the state presents no new evidence, the defendant has no new or additional burden to meet in successfully presenting a defense . . . ." 457 U.S. at 48 (White, J., dissenting).

[106]*Id.* at 43-44 n.19. The Court's rationale on this point could lead to the effective dismantling of all double jeopardy protection; a retrial following a defendant's acquittal would be permissible because of the possibility that the prosecution's case will be weaker the second time.

[107]*See supra* notes 38-46 and accompanying text.

reversed because of the following often cited language from *United States v. Tateo*:[108]

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.[109]

While this language may well provide a justifiable basis for permitting retrial following a trial error reversal, it does not support retrial following a reversal based on the weight of the evidence. The only defect in this instance is the government's failure to bring forth enough evidence to convince the appellate court of the defendant's guilt. The Court in *Tibbs* cited the *Tateo* language but nevertheless failed to distinguish the two bases of reversals.

The Court did suggest a similarity between a trial error reversal and a weight reversal. It reasoned that the reversal based on the weight of the evidence "simply affords the defendant a second opportunity to seek a favorable judgment."[110] The problem with this reasoning is that it tends to revive the waiver theory, thought to be discarded by *Burks*.[111] Under the waiver theory, appellate courts ordered a new trial after reversing a defendant's conviction because the defendant waived his double jeopardy claim by seeking a review of his conviction.[112] The Court in *Tibbs* explicitly referred to the second chance it was giving the defendant.[113] The Court neglected to mention that a defendant who gets his conviction reversed because of insufficient evidence is also getting a second chance through retrial. *Burks*, however, decided that this second chance is not always in the defendant's best interests.[114] Thus, the Court in *Tibbs* seems to have reverted to the old fallacy of simply giving the defendant what he requested. Yet, because it is the prosecution's evidence which the appellate court finds lacking when it reverses because of the weight of the evidence, the question must be asked: Who is getting the second chance, the defendant or the prosecution?

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[108]377 U.S. 463 (1964).

[109]*Id.* at 466, *cited in* Tibbs v. Florida, 457 U.S. 31, 40 (1982); Burks v. United States, 437 U.S. 1, 15 (1978).

[110]457 U.S. at 43. As *Burks* stated, this second opportunity benefits the defendant who succeeds in obtaining a trial error reversal. 437 U.S. at 15.

[111]437 U.S. at 17. *See supra* notes 21-24 and accompanying text.

[112]*See* cases cited *supra* note 11.

[113]457 U.S. at 44.

[114]437 U.S. at 17. *See supra* notes 21-24 and accompanying text.

2. Weight and Sufficiency Revisited.—In *Tibbs*, the Supreme Court decided that appellate reversals based on the weight of the evidence do not cloak the defendant with the same double jeopardy protection that a defendant receives when his conviction is reversed because of insufficient evidence.[115] The Court in part based its conclusion upon the reasoning that, because "the Double Jeopardy Clause attaches special weight to judgments of acquittal,"[116] the clause does not protect a defendant whose conviction is reversed because of the weight of the evidence. The Court concluded that the double jeopardy policies "do not have the same force."[117]

The problem with this reasoning is that it implies that only judgments of acquittal invoke the protection of the double jeopardy clause. However, as Justice White noted in his dissenting opinion, neither the weight nor the sufficiency reversal involves a judgment of acquittal.[118] Yet the double jeopardy clause now protects a defendant whose conviction is reversed because of insufficient evidence.[119] Further, although a sufficiency reversal means that acquittal was the only proper verdict,[120] double jeopardy considerations should not, as Justice White stated, be made to "depend upon a determination that an 'acquittal was the only proper verdict.' The fact remains that the State failed to prove the defendant guilty in accordance with the evidentiary requirements of state law."[121] Surely the double jeopardy clause can attach special weight to a judgment of acquittal and still protect a defendant whose conviction is reversed because of the weight of evidence, that is, because the state failed to generate enough evidence to satisfy an appellate tribunal. A weight reversal may not be tantamount to an acquittal, but its similarity merits similar double jeopardy consideration.[122]

The Court in *Tibbs* also decided that the policy prohibiting the prosecution from supplying "evidence which it failed to muster in the first proceeding"[123] does not have the same force when applied to a weight reversal.[124] The Court's reasoning appears to ignore the pur-

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[115]457 U.S. at 32.

[116]*Id.* at 41 (citing United States v. DiFrancesco, 449 U.S. 117, 129 (1980); United States v. Scott, 437 U.S. 82, 91 (1978); Arizona v. Washington, 434 U.S. 497, 503 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam)).

[117]457 U.S. at 42.

[118]*Id.* at 49 (White, J., dissenting).

[119]Burks v. United States, 437 U.S. 1 (1978).

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

[121]457 U.S. at 49 (White, J., dissenting).

[122]Again, as the point bears repeating, a reversal based on the weight of the evidence occurs only in circumstances where the evidence preponderates heavily against the verdict. *See* 3 C. WRIGHT, *supra* note 18, § 553, at 248.

[123]457 U.S. at 41 (quoting Burks v. United States, 437 U.S. 1, 11 (1978)).

[124]457 U.S. at 42.

poses of the double jeopardy clause.[125] If, as has been suggested, the double jeopardy clause protects these interests of the defendant by preventing the government, with its superior resources, from wearing down the defendant through sheer governmental perseverance,[126] then it is difficult to see how a reversal based on the weight of the evidence differs from a reversal based on insufficient evidence. All of the often stated hazards are present in both instances. In his dissent in *Tibbs*, Justice White stated that "the only point of any second trial in this case is to allow the State to present additional evidence to bolster its case. If it does not have such evidence, reprosecution can serve no purpose other than harassment."[127] Moreover, society's "countervailing interest in the vindication of criminal justice"[128] seems no greater here than when a conviction is reversed because of insufficient evidence. The Court, however, decided otherwise.

In order to justify making the weight-sufficiency distinction a constitutional line of demarcation, the Court in *Tibbs* emphasized that a reversal based on the weight of the evidence means that "the appellate court sits as a 'thirteenth juror' and disagrees with the jury's resolution of conflicting testimony."[129] The Court decided that this disagreement does not have the same force as an appellate court determination that the evidence should not even have been submitted to the jury.[130]

It is true that under modern appellate procedure in federal courts the appellate court sits as a "thirteenth juror" when passing on a defendant's motion for a new trial.[131] As such, the appellate court may reweigh the evidence and take into account the credibility of the witnesses, something it may not do when it is testing the sufficiency of the evidence.[132] If the appellate court decides that a miscarriage of justice may have occurred or if it has serious doubts about a particular defendant's guilt, the appellate court may set the conviction aside and order a new trial.[133]

The sufficiency of the evidence standard is different insofar as appellate courts may not reweigh the evidence or assess the credibility

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[125]*See supra* notes 38-42 and accompanying text.

[126]*See* Tibbs v. Florida, 457 U.S. 31, 41 (1982); Burks v. United States, 437 U.S. 1, 11 (1978); Green v. United States, 355 U.S. 184, 187-88 (1957).

[127]457 U.S. at 48 (White, J., dissenting).

[128]Green v. United States, 355 U.S. 184, 219 (1957) (Frankfurter, J., dissenting). *See supra* note 44 and accompanying text.

[129]457 U.S. at 42.

[130]*Id.*

[131]*See, e.g.*, United States v. Turner, 490 F. Supp. 583, 593 (E.D. Mich. 1979), *aff'd*, 663 F.2d 219 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

[132]*See* 3 C. WRIGHT, *supra* note 18, § 553, at 245-46.

[133]*Id.* at 246.

of witnesses,[134] but must take all of the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt.[135]

Apart from any double jeopardy considerations, this distinction between the weight and the sufficiency of the evidence presents few problems. The government must present legally sufficient evidence in order to avoid a judgment of acquittal.[136] If it does, the sufficiency test is satisfied. But the government must go further. It must present the evidence in such a manner as to permit the jury to fairly conclude guilt upon a weighing of all the evidence or risk an appellate court reversal.[137]

Though the distinction between the weight and the sufficiency of the evidence may be easy to understand in an abstract setting, its application to specific fact situations is often much more difficult. The majority in *Tibbs* proceeded on the assumption that the distinction is easily applied,[138] but, ironically, Tibbs' procedural path to the Supreme Court does not support such a conclusion. In fact, the Florida Supreme Court's struggle with *Tibbs v. State (I and II)*[139] is a strong indication that making the weight-sufficiency distinction a constitutional line of demarcation creates conceptual confusion.

In *Tibbs I*,[140] the Florida Supreme Court reversed Tibbs' conviction "in the interests of justice."[141] The court did not state whether it thought that the evidence was legally insufficient to sustain the conviction, or whether the conviction was against the weight of the evidence. Language in the opinion lends support to the idea that the court had both in mind.[142] The court did reweigh the evidence and examine the credibility of the witnesses. However, the court cited language to the effect that a conviction cannot be sustained where the evidence "is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt."[143] This is, of

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[134]*See* United States v. Thevis, 665 F.2d 616, 648 (5th Cir. 1982); United States v. Lincoln, 630 F.2d 1313, 1316 (8th Cir. 1980); United States v. Artuso, 618 F.2d 192, 195 (2d Cir.), *cert. denied*, 449 U.S. 861 (1980); United States v. Beck, 615 F.2d 441, 448 (7th Cir. 1980); United States v. Turner, 490 F. Supp. 583, 588 (E.D. Mich. 1979), *aff'd*, 633 F.2d 219 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *see also* 2 C. WRIGHT, *supra* note 18, § 467, at 663-64.

[135]Jackson v. Virginia, 443 U.S. 307, 319 (1979). *See* cases cited *supra* note 134.

[136]*See* FED. R. CRIM. P. 29(a).

[137]*See* FED. R. CRIM. P. 33.

[138]457 U.S. at 44-45.

[139]Tibbs v. State, 337 So. 2d 788 (Fla. 1976) (*Tibbs I*); Tibbs v. State, 397 So. 2d 1120 (Fla. 1981) (*Tibbs II*).

[140]337 So. 2d 788 (Fla. 1976).

[141]*Id.* at 790.

[142]*See id.* at 790-91.

[143]337 So. 2d at 791 (quoting McNeil v. State, 104 Fla. 360, 361, 139 So. 791, 792 (1932)).

course, the federal evidentiary standard for testing the sufficiency of the evidence.[144] The United States Supreme Court touched on this problem briefly in a footnote to its opinion in *Tibbs v. Florida*, but found the quotation, when put in context, to be consistent with a weighing of the evidence.[145]

Noting the ambiguities in *Tibbs I*, the Flordia Supreme Court, in *Tibbs II*, attempted to clarify its earlier reversal: "Only by stretching the point, however, could we possibly use an 'insufficiency' analysis to characterize our previous reversal of Tibbs' convictions."[146] Chief Justice Sundberg dissented vigorously. He contended that the first reversal of Tibbs' conviction could not have been based on the weight of the evidence since Florida law permitted only sufficiency reversals.[147] The Florida Supreme Court, in order to rid itself of the difficult determination of whether a reversal was based on evidentiary weight or evidentiary sufficiency, decided that it would never again permit its appellate courts to reweigh evidence.[148]

The Florida Supreme Court's struggle was the result of the difficulty of drawing a line between evidentiary weight and evidentiary sufficiency. The problem lies in the fact that the *Jackson v. Virginia* standard for testing the sufficiency of the evidence—whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt—[149]inevitably leads an appellate court to make some subjective determination as to the weight of the evidence.[150] The pro-

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[144]2 C. WRIGHT, *supra* note 18, § 467, at 655-56.

[145]457 U.S. at 46 n.23. The Court stated that the quotation from *McNeil v. State*, when read in context, did not support the conclusion that the Florida Supreme Court used the *McNeil* standard when it reversed Tibbs' conviction. Even if the language from the *McNeil* decision was not the sole basis of the Florida Supreme Court's decision, it was in the justices' minds, which demonstrates that the weight and sufficiency standards are not always susceptible to strict categorization.

[146]Tibbs v. State, 397 So. 2d 1120, 1126 (Fla. 1981).

[147]*Id.* at 1127 (Sundberg, C.J., dissenting in part).

[148]*Id.* at 1125. The fact that the basis for the previous reversal was even a point of contention shows the possible problems involved in attempting to make double jeopardy protection rest on a classification of weight or sufficiency.

[149]443 U.S. at 319.

[150]For a critical analysis of the subjectivity inherent in the *Jackson v. Virginia* test, see Comment, *The* Jackson v. Virginia *Standard for Sufficiency of the Evidence*, 65 IOWA L. REV. 799 (1980). The author of this Comment states that

> the "rational fact finder" standard [of *Jackson v. Virginia*] requires the appellate court to ask whether a hypothetical trier of fact, rather than the appellate court itself, acting reasonably, would have found the defendant guilty beyond a reasonable doubt. However, when an appeals court determines whether the fact finder has acted reasonably, it must inevitably make some determination as to the weight of the evidence, even while giving the trial court very broad discretion. This necessarily results in some substitution of the appellate court's judgment for that of the trial court.

Id. at 807 (footnotes omitted).

cedural posture in *Tibbs* provides a good illustration of the inherent subjectivity of the sufficiency of the evidence standard. At the trial court level, the jury could have chosen to believe the uncorroborated testimony of the prosecutrix. The majority of the Florida Supreme Court decided that this alone was sufficient to satisfy the sufficiency of the evidence standard.[151] Justice Boyd, however, wrote a persuasive dissenting opinion in which he observed that "when an appellate court judges the sufficiency of evidence to support a criminal conviction, it does so upon the whole record, and will therefore not always be bound by such general rules of sufficiency as the one pertaining to the uncorroborated testimony of a rape victim."[152] Thus, some appellate judges believe that a determination of the sufficiency of the evidence must involve consideration of the whole record, while others believe that once the evidence is technically sufficient with regard to any aspect of the case, the inquiry into evidentiary sufficiency ceases. The weakness of the state's evidence presented in *Tibbs*[153] forced the Florida Supreme Court to make subjective determinations to such an extent that its members could not decide which evidentiary standard formed the basis of its reversal.

The greatest problem flowing from this subjectivity is the possibility that in close cases, that is, cases in which reasonable persons could disagree as to whether the evidence is legally sufficient, a court faced with the possibility of reversing because of the sufficiency of the evidence, and thereby effectively acquitting the defendant under *Burks*, or reversing because of the weight of the evidence, and thereby subjecting the defendant to retrial under *Tibbs*, will invariably chose the latter so as to avoid the decision of acquitting the defendant.[154] At least one court has already expressed reluctance about

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See also Speigner v. Jago, 603 F.2d 1208 (6th Cir. 1979). The Court of Appeals for the Sixth Circuit showed its awareness of the often ambiguous distinction between the weight and the sufficiency of the evidence by stating: "[W]e are convinced that it is time to forthrightly recognize that the 'no evidence' standard of *Thompson,* as it prevails today, incorporates some notion of degree or weight of evidence." *Id.* at 1212 (footnote omitted) (referring to Thompson v. City of Louisville, 362 U.S. 199 (1960)).

It is noteworthy that the *Thompson* standard, to which the *Speigner* court alluded, was an even more restrictive sufficiency of the evidence standard than the one created in *Jackson v. Virginia.* The point is that the weight-sufficiency distinction is not always readily discernible and is certainly not always easily applied.

[151]Tibbs v. State, 397 So. 2d 1120, 1126 (Fla. 1981) (citing Thomas v. State, 167 So. 2d 309 (Fla. 1964)).

[152]397 So. 2d at 1130 (Boyd, J., dissenting).

[153]*See supra* note 62 and accompanying text.

[154]Of course, the converse of this is also a possibility. An appellate court which subjectively believes that a defendant is innocent may call the evidence insufficient so as to preclude a second trial, even though the evidence is technically sufficient. *Cf.* Tibbs v. Florida, 397 So. 2d 1120, 1130-31 (Fla. 1981) (Boyd, J., dissenting).

its power to acquit defendants by finding insufficient evidence on some element of the government's case.[155]

Justice White, dissenting in *Tibbs*, expressed the same concern that appellate "judges having doubts about the sufficiency of the evidence under the *Jackson* standard may prefer to reverse on the weight of the evidence, since retrial would not be barred."[156] The majority in *Tibbs* quickly dismissed this possibility. The Court placed confidence in trial and appellate judges' ability to distinguish between the weight and the sufficiency of the evidence.[157] Also, the Court stated, appellate courts could not disguise sufficiency reversals as weight reversals because of the constitutional standard of evidentiary sufficiency as announced by the Court in *Jackson v. Virginia*.[158]

The Court's reasoning on this point begs the question. The Court does not take into account the increased difficulty appellate judges will have in determining whether the evidence is sufficient where the decision will either effectively acquit the defendant or permit his retrial. Additionally, while the *Jackson v. Virginia* standard ensures somewhat against an arbitrary classification of evidentiary sufficiency, it also involves some subjective determination by the appellate court which includes a weighing of the evidence.[159]

3. Double Jeopardy After Tibbs.—In his dissent in *Tibbs II*, Chief Justice Sundberg of the Florida Supreme Court stated:

> I feel the majority in its efforts at drawing fine lines has lost sight of the central import of the double jeopardy clause. The question posed is simply whether Tibbs will suffer double jeopardy if retrial is allowed—yes or no, why or why not. The answer is ineluctably affirmative.[160]

The harms against which double jeopardy was designed to protect[161]

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[155]*See* Stacey v. Love, 679 F.2d 1209 (6th Cir. 1982). The court in *Stacey v. Love*, in reversing the conviction of a defendant who raised the insanity defense on which the prosecution presented no evidence, remarked that it was "deeply troubled by the implications of the case. . . . [and] acutely aware that overturning [the defendant's] conviction for insufficient evidence operates as an acquittal and thereby calls into effect the constitutional proscription against double jeopardy." *Id.* at 1212. Had any evidence been presented on the insanity defense, the court may have been more than willing to call its reversal one based on weight.

[156]457 U.S. at 51 (White, J., dissenting).

[157]*Id.* at 44-45.

[158]*But see supra* note 150 and accompanying text.

[159]*See* Comment, *supra* note 150, at 807. During oral argument before the Supreme Court in *Burks v. United States*, counsel for the government argued that "[t]he line [between weight and sufficiency of the evidence] is difficult to draw in some cases" and "[s]ometimes it cannot be determined where the basis for a reversal lies." Burks v. United States, 22 CRIM. L. REP. (BNA) 4117, 4118 (U.S. Nov. 28, 1977).

[160]Tibbs v. State, 397 So. 2d 1120, 1127 (Fla. 1981) (Sundberg, C.J., dissenting in part).

[161]*See supra* notes 38-46 and accompanying text.

are all present in both the evidentiary weight reversal and the evidentiary sufficiency reversal. At retrial in *Tibbs*, as Justice White noted, the state must present additional evidence to bolster its case; if it merely presented the same evidence at a second trial, then an appellate court would be compelled to reverse again.[162] This makes it appear that the only purpose of allowing retrial after a reversal based on the weight of the evidence is to give the government an opportunity to bolster its case against the defendant by supplying evidence which it "failed to muster" in the first proceeding.[163] Such an opportunity is the type of harm which double jeopardy is designed to prevent.[164]

IV. Conclusion

After *Tibbs*, appellate reversals which are based on the Court's belief that the verdict is against the weight of the evidence do not prohibit the state from conducting a second trial against the defendant. Such a reversal means that, even though the appellate court may be left in considerable doubt about the defendant's guilt, the defendant may be retried without violating the double jeopardy clause. Insofar as this decision places weight reversals on the same level as trial error reversals, it appears to be incongruous with the broad double jeopardy language in *Burks*, and also produces the erroneous notion that a weight reversal does not touch upon a defendant's guilt or innocence.

Further, the weight-sufficiency distinction, often difficult to apply, may encourage appellate courts which find the evidence arguably insufficient, to call it sufficient and choose to reverse the judgment based on a determination that the verdict is against the weight of the evidence, and thereby avoid deciding that the defendant should be acquitted. In order to eliminate the problem caused by the distinction between weight and sufficiency reversals, the double jeopardy clause should be read to prohibit retrial whenever an appellate court determines that the state has presented a substantive lack of evidence[165] in prosecuting its case. This would not create an inordinate number of acquittals because a reversal based on the weight of the

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[162]457 U.S. at 48 (White, J., dissenting). The majority addresses this point by stating that the weight of the evidence standard may be more restrictive after a second conviction, and thus an appellate tribunal may be more reluctant to reverse the second time around. *Id.* at 43 n.18. The Court's reasoning, while giving some assurance against triple jeopardy, still seems to lose sight of the purpose of the double jeopardy clause.

[163]*Id.* at 48 (White, J., dissenting). As Justice White noted, such a retrial serves only to harass the defendant if additional evidence is not permitted. *Id.*

[164]Burks v. United States, 437 U.S. 1, 11 (1978).

[165]*See* 457 U.S. at 39 n.13 (citing Tibbs v. Florida, 397 So. 2d 1120, 1128 (Fla. 1981) (Sundberg, C.J., dissenting in part)).

evidence occurs only in exceptional circumstances, when the evidence preponderates heavily against the verdict.[166]

In placing appellate reversals based on the weight of the evidence on the same level as trial errors reversals, the Supreme Court has lost sight of the central import of the double jeopardy clause by subordinating the strong policies supporting double jeopardy application to a technical evidentiary standard.

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[166]*See* 3 C. WRIGHT, *supra* note 18, § 553, at 247-48.