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FIFTH AMENDMENT—TWICE JEOPARDIZING THE RIGHTS OF THE ACCUSED: THE SUPREME COURT'S *TIBBS* AND *KENNEDY* DECISIONS

Tibbs v. Florida, 102 S. Ct. 2211 (1982); Oregon v. Kennedy, 102 S. Ct 2083 (1982).

I. INTRODUCTION

The double jeopardy clause of the fifth amendment[1] continues to be the subject of much litigation. The Supreme Court decided two cases involving double jeopardy claims last term—*Tibbs v. Florida*,[2] involving a conviction reversed on appeal, and *Oregon v. Kennedy*,[3] involving a mistrial. Although the cases arose out of very different factual and procedural contexts, they both represent the Court's attempt to limit the protection that the double jeopardy clause offers to defendants in criminal proceedings.

II. DOUBLE JEOPARDY IN THE CONTEXT OF APPELLATE REVERSAL: *TIBBS V. FLORIDA*

The Supreme Court held in *Tibbs v. Florida* that an appellate reversal based on the weight of the evidence, unlike that based on the sufficiency of the evidence, does not bar retrial.[4] In so holding, the Court drew a sharp legal distinction between weight and sufficiency of evidence,[5] and refused to expand the double jeopardy defense. By thus confining double jeopardy protection, criminal defendants will continue to face retrial after their convictions have been reversed on grounds of evidentiary weight.

A. BACKGROUND OF *TIBBS*

Delbert Lee Tibbs was indicted in 1974 for first degree murder, felony murder and rape. A man in a green truck had picked up two

[1] The double jeopardy clause provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

[2] 102 S. Ct. 2211 (1982).

[3] 102 S. Ct. 2083 (1982).

[4] 102 S. Ct. at 2213.

[5] *Id.* at 2218.

hitchhikers, male and female, near Ft. Myers, Florida, and then drove into a field, shot the man, and raped the woman. The rape victim escaped and gave police a description of the assailant. Based on this description,[6] Tibbs was arrested and charged with the crimes. The rape victim was the chief prosecution witness and only eyewitness to the crimes.[7] The jury convicted Tibbs of first degree murder and rape, and recommended the death penalty.

On appeal, the Florida Supreme Court reversed and remanded for a new trial, holding that the trial record left the court with considerable doubt about the guilt of the accused;[8] the court identified six weaknesses in the State's case.[9] On remand, the trial court dismissed the indictment, basing its decision on the United States Supreme Court decisions in *Burks v. United States*[10] and *Greene v. Massey*[11] barring retrial after rever-

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[6] The Supreme Court noted that the rape victim's initial identification of the accused was somewhat irregular, because rather than being asked to pick his picture out of a group of photographs, she was shown only pictures of Tibbs taken when he was first questioned. Because the identification process was not included in his basis for appeal, it was not considered in the Court's opinion. *Id.* at 2213-14 n.2.

[7] Under Florida law, no corroborative evidence is required in a rape case where the victim is able to testify directly and identify her assailant. However, where the victim is the sole witness, her testimony must be carefully scrutinized "to avoid an unmerited conviction." Tibbs v. State, 337 So. 2d 788, 790 (Fla. 1976) (quoting Thomas v. State, 167 So. 2d 309, 310 (Fla. 1964)). Other witnesses in *Tibbs* included law enforcement agents, a man who had previously picked up the hitchhikers, the homeowner who called the police for the rape victim, acquaintances of the murder victim, the doctor who examined the rape victim, the doctor who performed the autopsy and a convicted rapist who was Tibbs' cellmate while Tibbs was awaiting trial. 102 S. Ct. at 2214 n.3.

[8] Tibbs v. State, 337 So. 2d at 790 (Fla. 1976). Under Florida law, the Florida Supreme Court must review convictions where the death penalty has been imposed, to determine whether the interests of justice require a new trial. FLA. STAT. § 921.141(4) (1975), FLA. APP. RULE 6.16(b) (1962) (Rule 9.140(f) (1977)).

[9] No evidence was introduced to place Tibbs in the Fort Myers area at any time, and the defense produced evidence that he had been in another part of the state the day before and three days after the crimes. Prosecutors introduced a signature card from a Salvation Army shelter in Orlando, the closest the State could place Tibbs to Fort Myers. The green truck, car keys and murder weapon were never found. Tibbs was stopped and questioned three times before being arrested and cooperated fully each time. He voluntarily waived extradition from Mississippi where he was finally arrested. No evidence was introduced to cast doubt on Tibbs' veracity, he had no previous criminal record, and several people from his hometown testified that he was a law-abiding citizen.

In contrast, the rape victim's testimony was cast in doubt by her claim that the crimes took place during the day when all other evidence indicated that they occurred after dark. She admitted using marijuana immediately prior to the crimes. The manner in which she identified Tibbs from photographs suggested a less than reliable identification. In addition, the Florida Supreme Court wholly discounted the testimony of Tibbs' cellmate, who testified that Tibbs had confessed to the crime, because the testimony appeared to the court to be the product of purely selfish considerations, i.e., leniency in exchange for his testimony. Tibbs v. State, 337 So. 2d at 790-91.

[10] 437 U.S. 1 (1978).

[11] 437 U.S. 19 (1978).

sal for insufficient evidence.[12] The Florida District Court of Appeals reversed and remanded because it disagreed with the trial court's application of *Burks* and *Greene* to *Tibbs*, finding that *Tibbs* was reversed on the weight of the evidence while *Burks* and *Greene* applied only to reversals for insufficient evidence.[13] The Florida Supreme Court affirmed,[14] explicitly holding that its previous reversal of Tibbs' conviction was based on the weight, rather than the sufficiency of the evidence.[15] Finally, the United States Supreme Court affirmed the Florida Supreme Court's decision.

B. ESTABLISHING A CLEAR PRECEDENT

In reaching its decision in *Tibbs*, the Supreme Court followed the Florida Supreme Court's carefully elaborated distinction between a reversal stemming from insufficient evidence and one prompted by the weight of the evidence.[16] Writing for the majority,[17] Justice O'Connor refused to equate reversals based on the weight of the evidence with reversals based on insufficient evidence.[18] The Court had held previously, in *Burks v. United States*[19] and *Greene v. Massey*,[20] that a reversal for

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12 *Burks* and *Greene* were companion cases. *Greene* applied the *Burks* decision to the states.

13 Tibbs v. State, 370 So. 2d 386, 388 (Fla. Dist. Ct. App. 1979), *aff'd per curiam*, 397 So. 2d 1120 (Fla. 1981), *aff'd*, 102 S. Ct. 2211 (1982).

14 Tibbs v. State, 397 So. 2d 1120 (Fla. 1981)(per curiam), *aff'd*, 102 S. Ct. 2211 (1982).

15 The Florida Supreme Court interpreted *Burks* and *Greene* to bar retrial after conviction only where the reversal was based on evidentiary insufficiency. *Id.* at 1127.

16 Justice O'Connor noted that:

> As the [Florida Supreme] court explained, a conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the appellate court into questions of credibility. The "weight of the evidence" refers to a "determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other."

102 S. Ct. 2211, 2216 (1982), (quoting Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981)(per curiam)).

17 Chief Justice Burger and Justices Powell, Rehnquist, and Stevens joined in the majority opinion. Justice White filed a dissenting opinion in which Justices Brennan, Marshall, and Blackmun joined.

18 102 S. Ct. at 2218.

19 437 U.S. 1 (1977). *Burks* reversed a line of cases dating from 1950 which held that retrial after the reversal of a conviction for any reason was not barred by double jeopardy principles if the defendant had requested a new trial in his appeal. The Court apparently applied a waiver theory in these cases, reasoning that since the defendant appealed, thus calling his conviction into question, he waived his right to double jeopardy protection. Other theories advanced to justify retrial included the "clean slate" theory and the "continuing jeopardy" theory. The clean slate theory held that "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." North Carolina v. Pearce, 395 U.S. 711, 720-21 (1969). The continuing jeopardy theory held that retrial of a defendant whose conviction was reversed is a continuation of the original jeopardy. Jeopardy attaches when the first trial begins, and does not end until a final judgment is entered. A conviction

insufficient evidence has the same effect as a verdict of not guilty: retrial is barred because this type of reversal means that no rational factfinder could reasonably have found the defendant guilty beyond a reasonable doubt.[21]

Justice O'Connor set forth what she deemed to be two policy reasons for the narrow exception recognized in *Burks* and *Greene*.[22] First, the double jeopardy clause attaches special weight to judgments of acquittal;[23] a verdict of not guilty absolutely bars a defendant from retrial.[24] Justice O'Connor noted that a reversal based on insufficient evidence has the same effect as a verdict of acquittal because a reversal on insufficiency grounds means that no rational factfinder could have convicted the defendant.[25] Second, the double jeopardy clause prohibits a second trial for the purposes of affording the prosecution an opportunity to hone its strategies, perfect its evidence, or introduce new evidence which it failed to muster in the first proceeding.[26] Where a reversal rests upon insufficiency grounds, the double jeopardy clause bars giving the prosecution a second opportunity to persuade the factfinder.[27]

These policies do not have the same force when a judge disagrees with the jury's resolution of conflicting evidence, according to Justice O'Connor, because in the situation of a reversal based on evidentiary

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which the defendant appeals is not considered to be a final judgment. The Supreme Court never completely adopted either theory. *See* Price v. Georgia, 398 U.S. 323, 326-29 (1970); Green v. United States, 355 U.S. 184, 193-97 (1957); Kepner v. United States, 195 U.S. 100, 134-37 (1904) (Holmes, J., dissenting). *See generally*, Comment, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. CHI. L. REV. 365 (1964).

20 437 U.S. 19 (1978).

21 *Burks* divided reversals into two categories—reversal for trial error and reversal for insufficient evidence, and held that because a reversal for insufficient evidence is equivalent to acquittal, retrial is absolutely prohibited. Chief Justice Burger made the distinction based on what each type of reversal implies about the guilt or innocence of the defendant. A reversal for error means only that the accused has been convicted through a defective judicial process and guilt has not yet been firmly established. The accused has as much interest as does the State in a fair and error-free retrial to determine guilt or innocence. In contrast, where a conviction has been overturned for insufficient evidence, the State has had one full and fair chance to bring its proof forward, but that proof is insufficient as a matter of law. This type of appellate reversal means that the State's case was so lacking that it should not even have been submitted to the jury; rather, it should have ended with a directed verdict of acquittal. *Burks*, 437 U.S. at 15-16. For a discussion of *Burks* and prior holdings, 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).

22 102 S. Ct. at 2218.

23 *Id.*

24 The general rule that after acquittal retrial is absolutely barred by the double jeopardy clause was first enunciated in United States v. Ball, 163 U.S. 662, 671 (1892).

25 102 S. Ct. at 2218.

26 *Id.*

27 Justice O'Connor noted that this prohibition lies at the core of double jeopardy protection. *Id.*

weight, acquittal is not the only proper verdict.[28] She characterized the judge's role as that of a "thirteenth juror"[29] who disagrees with the jury's resolution of conflicting evidence.[30] She then equated this kind of reversal with the case of a deadlocked jury which does not result in an acquittal barring retrial.[31] In cases where evidence is legally sufficient to sustain a conviction, acquittal is not the only proper verdict; it is a possible or probable verdict based on the weight of the evidence. The "thirteenth juror" may be a lone holdout, or may be the juror whose beliefs convince the other previously deadlocked jurors to acquit.

Justice O'Connor justified her resolution of the double jeopardy claim arising out of a reversal based on the weight of the evidence by the policy of affording special weight to judgments of acquittal. By asserting that there is a clear distinction between an acquittal (or its equivalent—a reversal based on insufficient evidence) and a reversal based on the weight of the evidence,[32] Justice O'Connor was able to remove the central justification for providing double jeopardy protection to a defendant whose conviction was reversed on the weight of the evidence. In so doing, she could logically invoke the countervailing considerations which support the rule that a defendant who successfully appeals a conviction generally remains subject to retrial—considerations such as the high price that society would pay if every accused who succeeded in having his conviction overturned because of error were immune to retrial.[33]

The majority treated reversals based on evidentiary weight in the same way that reversals for error are treated.[34] This approach is justifi-

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[28] *Id.*

[29] Other courts have also characterized the role of the reviewing court as that of a thirteenth juror. *See, e.g.*, 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); United States v. Felice, 481 F. Supp. 79, 90 (N.D. Ohio 1978), *aff'd*, 609 F.2d 276 (6th Cir. 1979). *But see* United States v. Birnbaum, 373 F.2d 250, 257 (2d Cir. 1967), *cert. denied*, 389 U.S. 837 (1967) (when evidence is sufficient to warrant submission to the jury, the reviewing court must take care not to sit as a super jury reevaluating credibility or reweighing evidence).

[30] 102 S. Ct. at 2218.

[31] 102 S. Ct. at 2218 n.17. The rule that a defendant may be retried after a deadlocked jury is discharged dates from the Court's decision in United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

[32] See Haddad and Mulock, *Double Jeopardy Problems in the Definition of the Same Offense: State Discretion to Invoke the Criminal Process Twice*, 22 U. FLA. L. REV. 515, 544 n.124 (1970), which discusses degrees of sufficiency.

[33] 102 S. Ct. at 2217. As Justice Harlan wrote in the United States v. Tateo, 377 U.S. 463, 466 (1964): "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."

[34] The Court held in United States v. Tateo, 377 U.S. at 463, that the retrial of a defendant whose conviction is set aside on collateral attack for error in the proceedings leading to conviction is not barred by the double jeopardy clause. The double jeopardy clause "imposes

able, however, only if the difference between a judgment of acquittal, or a reversal based on insufficient evidence, and a reversal based on the weight of the evidence is not merely a wooden distinction.

A reversal for insufficient evidence means that no rational factfinder could have found the defendant guilty beyond a reasonable doubt,[35] while a reversal based on the weight of the evidence means that the evidence was legally sufficient to sustain a conviction, but the prosecution failed to convince the reviewing court of the defendant's guilt beyond a reasonable doubt. By contrasting the two, the Court was able to establish the similarity between an insufficient evidence reversal and acquittal, while asserting the dissimilarity between a weight of the evidence reversal and acquittal. Before double jeopardy protection is triggered, the prosecution's failure must be clear.[36] Because the insufficient evidence standard "means that the government's case was so lacking that it should not have even been *submitted* to the jury,"[37] the failure is clear in an insufficient evidence reversal, but not in a weight of the evidence reversal.

The dissimiliarty between a reversal based on the weight of the evidence and a reversal based on insufficient evidence, however, is not necessarily as clear as Justice O'Connor believed. In either case, the reviewing court is not convinced beyond a reasonable doubt that the defendant is guilty.[38] Only in the second case does the Court afford the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. Dissenting, Justice White pointed out that the majority failed to explain why the prosecution should be allowed another try when, in both cases, the state failed to present evidence adequate to sustain the conviction.[39] Apparently, Justice White felt that the Court's distinction between a reversal for insufficient evidence and a reversal based on the weight of the evidence was a distinction without a difference.[40]

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no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside." North Carolina v. Pearce, 395 U.S. 711, 720 (1980) (trial error).

35 102 S. Ct. at 2218.

36 *Id.* (citing Burks v. United States, 437 U.S. at 17).

37 102 S. Ct. at 2217-18 (quoting Burks v. United States, 437 U.S. at 16).

38 Justice White, in his dissent, concluded that "[i]n each instance, a reviewing court decides that, as a matter of law, the decision of the factfinder cannot stand . . . . [t]he fact remains that the state failed to prove the defendant guilty in accordance with the evidentiary requirements of the law." 102 S. Ct. at 2222 (White, J., dissenting).

39 *Id.*

40 Justice White also pointed out that although the majority conceded that the double jeopardy clause would bar reprosecution if the State's evidence failed to meet the federal due process standard of evidentiary insufficiency, the majority failed to explain why the state should be allowed another try where its proof has been held inadequate on state law grounds, when it could not do so were its proof inadequate on federal law grounds. Justice White felt

A reversal based on the weight of the evidence is also not necessarily incompatible with the standard of acquittal. In many trials resulting in acquittal, the evidence may be legally sufficient to convict,[41] but the jury may not have believed that the defendant was guilty. Our legal system does not permit inquiry into the reasons for acquittal, nor can acquitted defendants be retried for the same offense[42] no matter what the reason may have been for the acquittal.[43] Thus, although the weighing of evidence traditionally has been the unique function of the factfinder,[44] different treatment of a case when the decision is made by a reviewing court rather than by a jury seems arbitrary and unfair.[45]

The majority ignored any similarities and instead concluded that a reversal of a conviction based on the weight of the evidence "simply affords the defendant a second opportunity to seek a favorable judgment."[46] This, of course, would also be true if retrial were allowed in a case where a conviction was reversed for insufficient evidence. Although the Court conceded in a footnote[47] that a second chance for the defendant inevitably affords the prosecution a second chance as well, Justice O'Connor dismissed this concern by rationalizing that the passage of time may not necessarily strengthen the prosecution's case but may weaken it.[48] The passage of time may also weaken the defendant's

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that the Court made an artificial distinction and treated similar cases very differently. 102 S. Ct. at 2222 (White, J., dissenting).

41 For evidence to be legally sufficient to convict, the prosecution must present at least some evidence on each element of the offense. Jackson v. Virginia, 443 U.S. 307, 316 (1979).

42 In some cases, defendants can be retried on different charges arising out of the same incident. *See*, *e.g.*, Brown v. Ohio, 432 U.S. 161 (1977); Green v. United States, 355 U.S. 184 (1957).

43 *See* Sanabria v. United States, 437 U.S. 54 (1977) (defendant could not be retried after erroneous rulings of law led to acquittal).

44 As the Court stated in Glasser v. United States, 315 U.S. 60, 80 (1942), "[i]t is not for us to weigh the evidence or to determine the credibility of witnesses." *See* United States v. Sullivan, 618 F.2d 1290, 1295 (8th Cir. 1980) (questions as to the credibility of witnesses and the weight to be given to their testimony are for the jury and not for a reviewing court); United States v. Waldron, 568 F.2d 185, 187 (10th Cir. 1977) (it is not the task of the reviewing court to weigh the evidence or assess the credibility of the witnesses), *cert. denied*, 434 U.S. 1080 (1977); Watkins v. United States, 564 F.2d 201, 204 (6th Cir. 1977) (the reviewing court does not weigh the evidence, and the finding of the trial court must be sustained if there is substantial evidence to support it), *cert. denied*, 435 U.S. 976 (1977).

45 The same general rules and standards apply in cases where a defendant has been acquitted by a judge in a bench trial rather than by a jury. The major difference is that the reviewing court would be more likely to be aware of the reasons for acquittal. 102 S. Ct. at 2218. *See also* United States v. Martin Linen Supply, 430 U.S. 564 (1977) (government could not appeal acquittal entered after deadlocked jury was discharged; trial judge indicated evidence clearly insufficient to convict); Kepner v. United States, 195 U.S. 100 (1904) (government could not appeal defendant's acquittal in bench trial).

46 102 S. Ct. at 2219.

47 102 S. Ct. at 2219 n.19.

48 *Id.*

case,[49] however, a consideration which Justice O'Connor ignored. Furthermore, disproportionate government resources present an obvious danger that prosecutors will have an additional advantage when given a second chance at prosecution.[50]

Justice White criticized the majority's statement that the reversal simply affords the defendant a second opportunity to seek a favorable judgment, and called it a "mischaracterization of the appellate court's ruling."[51] He emphasized that the prosecution, not the defense, has the burden of coming forth with a new case on retrial.[52] The defendant has already demonstrated that the prosecutor's case, as it was presented at trial, was inadequate to sustain a conviction of guilt beyond a reasonable doubt. Whether the evidence was legally insufficient as a matter of law, or failed to convince the factfinder or reviewing court, should make no difference.[53] Justice White believed that, if the State has not sustained its burden of proof as to the defendant's guilt, then the double jeopardy clause should bar retrial. The thrust of Justice White's dissent was that the majority attempted to avoid one of the central policies of

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[49] For example, Justice O'Connor mentioned in footnote 19 that the memory of a prosecution witness could become impaired with the passage of time and affect the credibility of the witness' testimony. She failed to note that a faded memory also affects the credibility of defense witnesses. *Id.*

[50] As the Court noted in Green v. United States, 355 U.S 184, 187-88 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment 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.

[51] 102 S. Ct. at 2222 (White, J., dissenting). While Justice O'Connor saw a reversal based on the weight of the evidence as giving the defendant another chance which he would not otherwise have, Justice White viewed retrial under these circumstances as affording the prosecution another chance at conviction when it failed the first time—an opportunity to which the State is not constitutionally entitled. *Id.*

[52] Justice White assumed that if the State were to present the same evidence again, a state court would have to reverse any conviction based upon it. 102 S. Ct. at 2221. *See also* Tibbs v. State, 397 So. 2d at 1130 (Sundberg, C.J., dissenting), *aff'd*, 102 S. Ct. 2211 (1982). The State cannot logically be allowed to supplement its evidence at retrial without completely ignoring the kinds of problems the double jeopardy clause was designed to protect against. Justice O'Connor answered this criticism by emphasizing the "interests of justice," commenting that the reviewing court would have to confront an especially strong case in order to reverse a conviction based on evidentiary weight a second time. 102 S. Ct. at 2219 n.18.

[53] Justice White proposed a different distinction for use in determining when a reversal should bar retrial. He would make the relevant distinction between reversals based on evidentiary grounds and those based on procedural grounds. In contrast to the Florida court's characterization of *Tibbs* as a distinct third category, Tibbs v. State, 397 So. 2d at 1123, Justice White would include it in the evidentiary category. Only where reversal was based on procedural error would the State be allowed to retry the defendant. Once the State failed to make its proof, the double jeopardy clause would be an absolute bar to another trial on the same charges. 102 S. Ct. at 2223.

the double jeopardy clause—preventing the government from perfecting its case through successive attempts at prosecution.

Despite the fact that the Supreme Court was sharply divided in *Tibbs* because of differing views on how to apply the policies underlying the double jeopardy clause, the Court established a clear precedent with its decision. Not so clear, however, is whether the holding in *Tibbs* will prove workable.

C. *TIBBS* AS A WORKABLE RULE

Courts must be able to distinguish between and apply the standards of insufficient evidence and evidentiary weight without confusion under the *Tibbs* rule. The Supreme Court of Florida in *Tibbs* discussed the difficulties in distinguishing between the weight and sufficiency of evidence,[54] and ruled that the decisions cited by the Florida District Court in its dismissal of Tibbs' indictment, cases which previously had been thought to involve reversals based on evidentiary weight, in fact involved evidentiary insufficiency instead.[55] As a practical matter, the distinction between weight and sufficiency of evidence is not entirely clear or easily made.[56] Yet, the Supreme Court dismissed Tibbs' argument that the distinction is unworkable[57] by noting that trial and appellate judges commonly distinguish between the two.[58]

More important than the question of whether *Tibbs* draws a workable distinction between weight and sufficiency of evidence is the decision's potential for abuse by appellate courts. There is a risk that the Court's distinction in *Tibbs* will undermine the *Burks* rule barring retrial after a reversal for insufficient evidence by encouraging appellate judges to base reversals not on the sufficiency of the evidence, but on the weight of the evidence in an effort to ensure that the defendant will be retried.

Justice O'Connor responded to this concern by making a weak ar-

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[54] Tibbs v. State, 397 So. 2d at 1123-25.

[55] The Florida Supreme Court, in Tibbs' second appeal, discussed seven cases which were ambiguous as to the reason for reversal and could be read as based either on the insufficiency of the evidence or the weight of the evidence. The court held that these cases all involved insufficient evidence. In only one case was the reversal held to be on grounds of evidentiary weight, and that reversal was overturned. *Id.* at 1124-25.

[56] The Supreme Court of Florida ruled that "[h]enceforth, no appellate court should reverse a conviction or judgment on the grounds that the weight of the evidence is tenuous or insubstantial." *Id.* at 1125. The court chided itself for its improper and erroneous reweighing of the evidence in its previous disposition of the case. The United States Supreme Court felt that the Florida Supreme Court's ruling did not diminish the importance of the issue in *Tibbs*, because other jurisdictions sometimes rely on the weight of the evidence to overturn convictions. 102 S. Ct. at 2216 n.12.

[57] 102 S. Ct. at 2219-20.

[58] 102 S. Ct. at 2220.

gument that *Jackson v. Virginia*[59] restrains the power of appellate courts to mask reversals based on legally insufficient evidence as reversals grounded on the weight of the evidence. The Court held in *Jackson* that the due process clause forbids any conviction to be based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt, thus setting a lower limit on an appellate court's definition of evidentiary sufficiency.[60] This lower limit, coupled with the Court's belief that state appellate judges faithfully will honor their obligations to enforce applicable state and federal law,[61] convinced the majority that their decision in *Tibbs* will not undermine *Burks* by permitting judges to mask their reasons for reversal.[62]

Putting aside intentional abuse, however, the holding in *Tibbs* will almost certainly encourage judges to use the weight of the evidence standard in reversing convictions whenever there is the slightest doubt about the insufficiency of the evidence. Just because *Jackson* set a lower standard for evidentiary sufficiency does not mean that appellate courts will be restrained.

D. CONCLUSION

Tibbs established a very clear rule strictly limiting the availability of double jeopardy protection to reversals based on evidentiary insufficiency. The Supreme Court justified its holding by drawing a sharp distinction between weight and sufficiency of evidence where, in practice, a bright line may not always exist. The decision creates a very real risk that appellate courts will use the weight of the evidence standard to overturn convictions based on insufficient evidence in order to ensure that defendants will be retried. The Court ignored the underlying policies which militate against allowing retrials after reversals based on evidentiary grounds. Prosecutors will now be able to hone their trial strategies and perfect their evidence as appellate court judges reverse cases for lack of evidentiary weight.

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59 443 U.S. 307 (1979). *Jackson* involved a federal habeas corpus proceeding brought by a convicted murderer who claimed that the evidence on the issue of premeditation was insufficient to establish his guilt.

60 *Id.* at 318.

61 In Oregon v. Kennedy, 102 S. Ct. 2083, 2090 (1982), Justice Rehnquist justified the restriction of double jeopardy protection in the context of mistrials by assuming that, without a very narrow rule, trial judges would be reluctant to grant mistrials. By comparing *Kennedy* with *Tibbs*, one can conclude that the United States Supreme Court trusts appellate judges to honor their obligations and conform to the law, but does not trust trial judges to follow the law.

62 102 S. Ct. at 2220.

III. Double Jeopardy in the Context of Mistrials Caused by Prosecutorial Misconduct

In *Oregon v. Kennedy*,[63] the Supreme Court held that where a defendant in a criminal trial successfully moves for a mistrial, the defendant can invoke the double jeopardy bar against retrial only if the conduct giving rise to the mistrial motion was prosecutorial or judicial misconduct *intended* to provoke the defendant into moving for a mistrial. The decision severely limits the protection of the double jeopardy clause in this context by placing the burden of establishing prosecutorial intent to cause a mistrial on the defendant. As a result of the Court's decision, successful double jeopardy claims in the mistrial context probably will be very rare.

A. Background of *Kennedy*

The defendant in *Kennedy* was accused of stealing an Oriental rug. One of the State's witnesses was an Oriental rug expert whom the prosecutor called to identify and value the rug in question. On cross-examination, the defense attorney attempted to demonstrate bias by establishing that the witness had previously filed a criminal complaint against the defendant. On redirect examination, the prosecutor attempted to establish the reason for the witness's filing of the complaint, but the defense blocked this line of questioning by an objection.[64] The prosecutor then asked the witness whether he had ever done business with the defendant. When the witness responded that he had not, the prosecutor asked, "[i]s that because he is a crook?"[65] The trial court then granted the defendant's motion for a mistrial.

On retrial, the defendant moved to dismiss the charges on double jeopardy grounds, but the court rejected the claim,[66] and the defendant was tried and convicted. The Oregon Court of Appeals reversed, sustaining the double jeopardy claim because the prosecutor's conduct amounted to "overreaching" and was "a direct personal attack on the general character of the defendant."[67] The Supreme Court reversed the Oregon court's decision and remanded the case.

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63 102 S. Ct. 2083 (1982).

64 The Court of Appeals later concluded that the trial judge was probably wrong to sustain this objection. State v. Kennedy, 49 Or. App. 415, 417, 619 P.2d 948, 949 (1980), *rev'd*, 102 S. Ct. 2083 (1982).

65 102 S. Ct. at 2086.

66 The trial court first held a hearing at which the prosecutor testified. The court found that the prosecutor had not intended to cause a mistrial. *Id.*

67 The Oregon Court of Appeals accepted the trial court's finding that the prosecutor did not intend to cause a mistrial. State v. Kennedy, 49 Or. App. at 418-19, 619 P.2d at 949-50.

B. RESTRICTING DOUBLE JEOPARDY PROTECTION

Justice Rehnquist, writing for a Court unanimous in its result but sharply divided in its reasoning and analysis,[68] discussed at some length the application of the double jeopardy defense to cases involving mistrials. [69] The double jeopardy defense can arise in the mistrial context either where the trial was terminated over the defendant's objection[70] or where mistrial was declared on the defendant's own motion. As a general rule, retrial is not barred in either case.[71] The Supreme Court

[68] Chief Justice Burger and Justices White, Powell and O'Connor joined the majority opinion. Justice Powell filed a short concurring opinion in which he emphasized that intent must be determined by the objective facts and circumstances of the particular case. Justice Brennan, joined by Justice Marshall, concurred in the judgment only, and wrote a short opinion noting his view that nothing in the Court's opinion would prevent the Oregon courts from concluding that retrial was barred by the double jeopardy clause of the Oregon Constitution. Justice Stevens, joined by Justices Brennan, Marshall and Blackmun, also filed an opinion concurring in the judgment, but disagreeing with the majority on the rule to be applied.

[69] The first issue addressed by the majority was whether the court of appeals' decision rested on an independent and adequate state ground. The Court concluded that the court below rested its decision solely on federal law and thus was able to reach the merits of the case. 102 S. Ct. at 2087.

[70] When a mistrial is declared on the motion of the judge or prosecutor or over the defendant's objection, a manifest necessity standard is applied to determine whether the interests of justice were served by the declaration of a mistrial. The standard was first set out in United States v. Perez, 22 U.S. (9 Wheat.) at 580, as an attempt to balance the competing interests of society in fair trials and of defendants in their right to be judged by their first tribunals. The Court in *Perez* stated that judges must have the "authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Id. Perez* involved a deadlocked jury, which has since been recognized as the classic case of manifest necessity. The standard has been considerably broadened so that if the decision to grant a mistrial is found to be "sound," the defendant may be retried. *See* Arizona v. Washington, 434 U.S. 497 (1978) (defendant could be retried after mistrial declared even though judge did not explicitly find manifest necessity when record provided sufficient justification for the ruling); Illinois v. Somerville, 410 U.S. 458 (1973) (defendant could be retried after first trial brought under defective indictment ended in mistrial over his objection because the mistrial furthered legitimate state policy). Trial judges are given broad discretion in applying the manifest necessity standard and only rarely is retrial barred. *See* Gori v. United States, 367 U.S. 364 (1961) (retrial permitted after mistrial declared by judge *sua sponte* even though no reason for the mistrial appeared in the record). *But see* United States v. Jorn, 400 U.S. 470 (1971) (retrial barred where judge abused his discretion in declaring mistrial where there was no manifest necessity; other options existed). *See generally* Comment, *Double Jeopardy: An Illusory Remedy for Governmental Overreaching at Trial*, 29 BUFF. L. REV. 759, 761-63 (1980).

[71] *See* United States v. Scott, 437 U.S. 82 (1978)(where defendant himself seeks to have his trial terminated without any submission to factfinder of his guilt, appeal by government and subsequent retrial is not barred); Lee v. United States, 432 U.S. 23 (1977)(retrial after dismissal of defective indictment at defendant's request not barred by double jeopardy); Jeffers v. United States, 432 U.S. 137 (1977)(defendant who requested separate trials on greater and lesser included offenses could not later claim double jeopardy protection against second trial); United States v. Dinitz, 424 U.S. 600 (1975)(retrial not barred where mistrial was granted at defendant's request even if necessitated by judicial or prosecutorial error).

has recognized a narrow exception to this rule,[72] however, which applies after a mistrial is granted at the defendant's request. The exception bars retrial in cases where prosecutorial or judicial misconduct is aimed at provoking the defendant into requesting a mistrial. Justice Rehnquist's opinion is an attempt to clarify and explain the exception.

Justice Rehnquist first noted that one of the principal rights embodied in the double jeopardy clause is the defendant's right to have his trial completed before the first jury empanelled to try him.[73] In most cases where the defendant has moved for a mistrial, he is deemed to have waived this right. The Court recognized, however, that if prosecutors could "goad the defendant into requesting a mistrial," the defendant's right would be a hollow shell.[74]

Despite this recognition of the government's ability to subvert defendants' double jeopardy rights, the Court refused to broaden the test from one of intent to provoke a mistrial motion to a more generalized standard of "bad faith conduct" or "harassment" on the part of a judge or prosecutor.[75] A previous Supreme Court decision, *United States v. Dinitz*,[76] had created an ambiguity as to what the standard should be. The

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[72] 102 S. Ct. at 2088; United States v. DiFrancesco, 449 U.S. 117, 130 (1980); United States v. Dinitz, 424 U.S. at 611; United States v. Jorn, 400 U.S. at 485; United States v. Tateo, 377 U.S. at 468 n.3.

[73] 102 S. Ct. at 2087. The competing interest is society's interest in fair trials ending in just judgments. *Id.* at 2093 (Stevens, J., concurring); Wade v. Hunter, 336 U.S. 684, 689 (1949).

[74] 102 S. Ct. at 2088 (quoting United States v. Dinitz, 424 U.S. at 611).

[75] United States v. Jorn, 400 U.S. at 485; Downum v. United States, 372 U.S. 734, 736 (1963).

[76] In *Dinitz*, the Court held that the double jeopardy clause "bars retrials where 'bad-faith conduct by judge or prosecutor,' threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution of a more favorable opportunity to convict' the defendant." 424 U.S. at 611 (citing United States v. Jorn, 400 U.S. at 485, and Downum v. United States, 372 U.S. at 736). The Oregon Court of Appeals relied on these cases in its decision. 49 Or. App. at 417-18, 619 P.2d at 949. Based on the language in *Dinitz*, some courts concluded that prosecutorial or judicial overreaching would bar retrial. The circuit courts of appeal were split on the proper test to be applied in these cases. While several of the circuits had limited *Dinitz* to circumstances where the prosecutor deliberately attempted to provoke the defendant into moving for a mistrial, the Fifth and Eighth Circuits broadened the test. The Fifth Circuit indicated in various contexts that gross negligence or prosecutorial overreaching, as well as intent to provoke a mistrial motion, could bar reprosecution on double jeopardy grounds. *See* United States v. Garza, 603 F.2d 578, 580 (5th Cir. 1979); United States v. Kessler, 530 F.2d 1246, 1255-56 (5th Cir. 1976); United States v. Beasley, 479 F.2d 1124, 1127 (5th Cir. 1973), *cert. denied*, 414 U.S. 924 (1973). *See generally* Comment, *supra* note 68 at 767-70.

The Supreme Court in Lee v. United States, 432 U.S. 23 (1977), probably added to the confusion. *Lee* involved a defendant who was tried and convicted on what was ultimately ruled to be a defective indictment. The trial court dismissed the indictment, and Lee argued that the double jeopardy clause prevented his reprosecution. The Court repeated the language of *Jorn* and *Dinitz* regarding bad faith conduct and harassment, and did not limit double jeopardy protection to prosecutorial misconduct designed to provoke a defense mis-

Kennedy opinion makes it very clear that the double jeopardy defense will protect a defendant who successfully moves for a mistrial only if a court finds that the misconduct giving rise to the motion was intended to provoke the mistrial motion.

Justice Rehnquist stated that the difficulty in applying more general standards permitting a broader exception is that they offer no manageable standards for their application.[77] He correctly pointed out that, given the complexity of the rules of evidence, it would be a rare trial where some error in the offer of evidence did not occur. Most errors can be cured simply by a court's refusal to admit the evidence or by an admonition to the prosecutor to halt a particular line of questioning. More serious infractions, however, may warrant a mistrial at the defendant's request.[78] Thus, where mere error occurs at trial, retrial will always be allowed.[79] Retrial is barred not in cases of error, but only in those cases where the government intentionally provokes a defense mistrial motion.[80]

Justice Rehnquist criticized Justice Stevens for urging upon the Court a more general test of overreaching or harassment for judging prosecutorial error which he claimed would require dismissal of indictments without supplying any guidelines for courts to assess the error.[81] Justice Rehnquist and Stevens recognized the same three categories: simple error, a broad intermediate category, and misconduct intended to provoke a mistrial.[82] However, the Justices disagreed on what rule to apply in cases where prosecutorial error or misconduct is serious but does not rise to the level of intentional provocation.

Justice Stevens recognized that much harm can be done to the defendant's rights even where prosecutorial misconduct falls far short of the standard of intentional provocation; a broad middle ground therefore would be preferable for deciding cases which do not clearly fall into either extreme category.[83] He pointed out that cases which call for a

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trial request. The Court held that the errors at Lee's trial were not "the product of the kind of overreaching outlined in *Dinitz*," thus implying that "overreaching" at least in some circumstances, might bar retrial. *Id.* at 34.

77 102 S. Ct. at 2089.

78 *Id.*

79 The rule is in harmony with the general rule that, where conviction is reversed for procedural error, retrial is permitted.

80 102 S. Ct. at 2089.

81 *Id.*

82 Justice Stevens also agreed with Justice Rehnquist on both the competing interests to be recognized in double jeopardy cases and the rule to be applied in cases at either extreme. At one end of the spectrum is simple error, in which case retrial is permitted. At the other extreme is clear prosecutorial intent to provoke a mistrial motion in which case retrial is barred.

83 102 S. Ct. at 2096-97.

balancing of competing interests can seldom be decided according to one established rule.[84]

Justice Rehnquist emphasized the relative ease in applying a test of prosecutorial or judicial intent. The test "merely calls for the court to make a finding of a fact. Inferring the existence or non-existence of intent from objective facts and circumstances is a familiar process in our criminal justice system."[85] Justice Stevens heavily criticized this aspect of the majority opinion. As a practical matter, Justice Stevens concluded, "[i]t is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial[86] instead of an intent simply to prejudice the defendant."[87] He also criticized the majority for limiting the double jeopardy clause to such a narrow class of cases when the exception to the rule that the double jeopardy clause is not a bar to retrial is directed at a wider range of cases than just the extreme case in which the prosecutor intentionally provokes the mistrial.[88] The exception should also apply, Justice Stevens argued, to cases in which "[a] prosecutor may be interested in putting the defendant through the embarassment, expense and ordeal of criminal proceedings, even if he cannot obtain a conviction," and commits repeated prejudicial error while being "indifferent between a mistrial . . . and an unsustainable conviction. . . ."[89] Or the prosecutor may seek "to inject enough unfair prejudice into the trial to ensure a

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84 *Id.*

85 *Id.* at 2089.

86 In 1967, a Pennsylvania court held that a mistrial intentionally caused by the prosecutor bars retrial. Commonwealth v. Warfield, 424 Pa. 555, 227 A.2d 177 (1967). This was a rare case, however, where prosecutors and defense counsel agreed beforehand in front of the judge that the prosecutor would commit prejudicial error and the defense would then move for a mistrial. Thus, the prosecutor's intent was clearly established.

87 102 S. Ct. at 2096. *See also* Green v. United States, 451 U.S. 929 (1980) (Marshall, J., dissenting in denial of certiorari). Justice Marshall pointed out that:

> Regardless of whether the Government's misbehavior was designed specifically to provoke a mistrial or was simply intended to reduce the chances of acquittal, the net effect on the defendant is the same; he is faced with the burdens and risks of a second trial solely because the Government has deliberately undermined the integrity of the first proceeding.

Id. at 931. Justice Marshall questioned:

> the assumption that the Goverment in such cases tailors its misconduct to achieve one improper result as opposed to another. It is far more likely that in cases such as this, where the prosecution is concerned that the trial may result in an acquittal, that the Government engages in misconduct with the general purpose of prejudicing the defendant. In this case, for example, the Government stood to benefit from [the] misconduct, regardless of whether it resulted in a guilty verdict or a mistrial. Moreover, even if such subtle differences in motivation do exist, I suspect that a defendant seeking to prevent a retrial will seldom be able to prove the Government's actual motivation.

Id.

88 102 S. Ct. at 2096.

89 *Id. See also* Shaw v. Garrison, 328 F. Supp. 390 (E.D. La. 1971), *aff'd*, 467 F.2d 113 (5th Cir. 1972), *cert. denied*, 409 U.S. 1024 (1972).

conviction, but not so much as to risk reversal of that conviction."[90] This kind of overreaching would not be covered by a standard that examines the prosecutor's intent, according to Justice Stevens, because the prosecutor's intent would be to obtain a conviction, not to provoke a mistrial.

Thus, Justice Stevens recognized that there is a need to extend double jeopardy protection to a broader class of cases where the prosecutor has acted unfairly. The broader standards of bad faith conduct, harassment of the accused, and prosecutorial overreaching[91] serve as checks on prosecutors who might otherwise be inclined to engage in prejudicial misconduct and who know that a defendant's burden of proof will be nearly impossible to meet.

Justice Rehnquist cautioned that the adoption of a broad and amorphous test such as the "overreaching" standard employed by the Oregon Court of Appeals would not help defendants and might even work to their detriment. A trial judge could be more reluctant to grant a defendant's motion for mistrial because the defendant's motion would "all but inevitably bring with it an attempt to bar a second trial on grounds of double jeopardy. . . ."[92]

The rigid rule laid down by the Court in *Kennedy*, however, may have as much potential for causing hardship to criminal defendants as the broader tests which Justice Rehnquist felt might work to their detriment. Instead of the presiding judge affecting the rights of the accused, prosecutors will be able to engage in unchecked prejudicial misconduct, risking only a mistrial. Severely prejudicial misconduct may force a mistrial, or the defendant may be convicted and have to appeal, then face another trial. Conceivably, trials could be repeated many times; each time the prosecutor could commit an error or engage in misconduct which does not demonstrate the kind of intent necessary for a court to find that the prosecutor has deliberately set out to provoke a defendant's mistrial motion. As Justice Rehnquist himself wrote so succinctly, "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause."[93]

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90 102 S. Ct. at 2096-97.

91 The "overreaching" standard originated in Justice Harlan's opinion in United States v. Jorn, 400 U.S. at 485 n.12 (1971). Although he never expressly defined the term, he characterized the standard in terms of "judicial or prosecutorial impropriety designed to avoid an acquittal."

92 102 S. Ct. at 2090.

93 *Id.* at 2089.

C. CONCLUSION

Justice Rehnquist wrote the opinion in *Kennedy* as a restatement and clarification of previous court opinions.[94] The strictness of the standard laid down is an obvious limitation on the flexibility of courts to use the double jeopardy clause to shield defendants from serious prosecutorial misconduct. Courts must now find prosecutorial intent to provoke a mistrial rather than mere prosecutorial intent to harass the defendant. By holding that a defendant must prove that the government intended to cause a mistrial, the Court has further limited the use of the double jeopardy clause for protecting the rights of the accused.

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[94] On two prior occasions, Justice Rehnquist used an intent standard similar to that announced in *Kennedy* in dismissing double jeopardy claims. *See* United States v. Scott, 437 U.S. 82 (1978) (government appeal of dismissal of two counts of indictment for prejudicial pre-trial delay not barred); Divans v. California, 434 U.S. 1303 (Rehnquist, Circuit Justice 1977) (denying stay of second state criminal trial).