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Fifth Amendment--Affording Society's Interest Greater Protection in Double Jeopardy Analysis

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FIFTH AMENDMENT—AFFORDING SOCIETY'S INTEREST GREATER PROTECTION IN DOUBLE JEOPARDY ANALYSIS

Lockhart v. Nelson, 109 S. Ct. 285 (1988).

I. INTRODUCTION

In *Lockhart v. Nelson*,[1] the Supreme Court faced the double jeopardy issue of whether retrial is precluded where an appellate court reversed a conviction because of trial error that left the state with insufficient evidence for conviction. The Court held that the fifth amemdment's double jeopardy clause[2] did not bar retrial in this situation where the totality of the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a conviction.[3]

This Note contends that the principle established in *Lockhart* adequately serves the state's law enforcement interest by assuring the state a fair chance to punish a defendant whose guilt is clear. Further, this Note observes that the *Lockhart* principle effectively replicates the balancing of the defendant's and society's interests that exist at the trial level. In this sense, the *Lockhart* decision demonstrates an appreciation of the principles that underlie most double jeopardy jurisprudence.

II. BACKGROUND

The *Lockhart* case arose from a sentence enhancement proceeding against the defendant in an Arkansas state court.[4] In *Lockhart*,

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[1] 109 S. Ct. 285 (1988).

[2] The fifth amendment to the United States Constitution provides in pertinent part: "[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. Further, the fourteenth amendment to the United States Constitution, section 1, provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Supreme Court held in Benton v. Maryland, 395 U.S. 784, 794 (1969), that the fourteenth amendment made the fifth amendment's double jeopardy clause applicable to the states.

[3] *Lockhart*, 109 S. Ct. at 287.

[4] *Id.* at 287-88.

the state trial court erroneously admitted evidence against the defendant,[5] without which the state lacked sufficient evidence to support an enhanced sentence.[6] The federal district court held that, under such circumstances, the double jeopardy clause barred the state from subjecting Nelson to another enhanced sentencing hearing.[7] The Eighth Circuit affirmed the judgment of the district court.[8] The Supreme Court reversed the judgments of the district court and the Eighth Circuit because it found that the basis for reversing Nelson's enhanced sentence lay in the "trial error" of erroneously admitting a pardoned conviction, rather than on insufficient evidence.[9]

A line of cases, beginning with *United States v. Ball*,[10] firmly established that the double jeopardy clause's prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, due to some error in the proceedings leading to conviction.[11] The Court explained in *United States v. Tateo*[12] that the principle derived from the need to ensure the sound administration of justice.[13] The *Ball* principle furthers this aim by allowing society to punish one whose guilt is clear, even though a procedural defect tainted an earlier conviction.[14]

In *Burks v. United States*,[15] the Supreme Court carved out an exception to the general rule that the double jeopardy clause does not bar retrial where the defendant obtained reversal because of error in the proceedings below.[16] The Court held in *Burks* that the double jeopardy clause bars retrial where reversal by an appellate court

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5 *Id.* at 288. The state introduced evidence of a pardoned conviction at defendant Nelson's sentence enhancement hearing. *Id. See infra* notes 33-44 and accompanying text.

6 *Lockhart*, 109 S. Ct. at 289 (citing Nelson v. Lockhart, 828 F.2d 446, 449-50 (8th Cir. 1987)).

7 Nelson v. Lockhart, 641 F. Supp. 174, 185 (E.D. Ark. 1986).

8 *Nelson*, 828 F.2d at 451.

9 *Lockhart*, 109 S. Ct. at 290-91. The significance of this distinction is explained *infra*, notes 53-60 and accompanying text.

10 163 U.S. 662 (1896).

11 *Lockhart*, 109 S. Ct. at 289. The Court announced this rule first in *Ball*, 163 U.S. at 671-72, a case in which the Court allowed the state to reindict defendants after their convictions had been reversed on direct appeal because of defective indictment. *Id.* at 674 (The Court extended the *Ball* principle to include convictions declared invalid on collateral appeal.).

12 377 U.S. 463 (1964).

13 *Id.* at 466.

14 *Id.* The two chief interests that the *Ball* principle serves, society's and the defendant's, are detailed *infra* notes 89-117 and accompanying text.

15 437 U.S. 1 (1978).

16 *Lockhart*, 109 S. Ct. at 290 (citing *Burks*, 437 U.S. at 18).

rests on the ground that the evidence proved insufficient to sustain the jury's verdict.[17] The Court arrived at its decision in *Burks* by declaring appellate reversal for evidentiary insufficiency functionally equivalent to an acquittal by the trial court for insufficient evidence.[18]

An issue similar to that presented by *Burks* arose in *Greene v. Massey*,[19] a case decided on the same day as *Burks*. In *Greene*, the Court analyzed two opinions of the Florida Supreme Court. One was a per curiam opinion,[20] the other a "special concurrence" written by three of the four justices signing the per curiam opinion.[21] These opinions cited different reasons for reversal of the defendant's conviction. The per curiam opinion cited insufficient evidence to sustain conviction, while the "special concurrence" discussed only trial error.[22] The *Greene* Court noted that under a *Burks* analysis, only a reversal for insufficient evidence implicates the double jeopardy clause.[23] The United States Supreme Court remanded the case to the court of appeals to clarify which opinion accurately reflected the decision of the Florida Supreme Court.[24] Yet the Court also reserved the question of the double jeopardy implications for a holding that, without erroneously admitted evidence, the jury lacked sufficient evidence to convict.[25]

The situation present in *Lockhart* squarely posed the question the Court expressly reserved in *Greene*: whether the double jeopardy clause permits retrial where an appellate court identifies as grounds

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17 *Burks*, 437 U.S. at 18. The Court here also explicitly overruled a line of prior cases which suggested that when a defendant moved for a new trial he waived his right to an acquittal based on evidentiary insufficiency. *Id.*; *see, e.g.*, Bryan v. United States, 338 U.S. 552, 560 (1950); Forman v. United States, 361 U.S. 416, 425-26 (1960).

18 *Burks*, 437 U.S. at 11. The Court stated that an appellate reversal for insufficient evidence "unmistakably meant that the District Court had erred in failing to grant a judgment of acquittal." *Id.* Further, "such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury." *Id.* at 16 (emphasis in original). The appellate court decides in such instances that "the jury could not properly have returned a verdict of guilty." *Id.*

19 437 U.S. 19 (1978).

20 Sosa v. State, 215 So. 2d 736 (Fla. 1968) (per curiam).

21 *Id.* at 745.

22 *Greene*, 437 U.S. at 21, 22 (citing *Sosa*, 215 So. 2d at 736, 737, 745-46). The per curiam opinion in *Sosa* reflected the view that the state failed to produce evidence sufficient to establish beyond a reasonable doubt that the defendants committed first degree murder. *Sosa*, 215 So. 2d at 737 (per curiam). However, the special concurrence focused instead on certain trial errors, including the improper admission of certain hearsay evidence, as grounds for reversing the defendants' conviction. *Id.* at 745-46.

23 *Greene*, 437 U.S. at 24 (citing Burks v. United States, 437 U.S. 1, 16-17 (1979)). See *supra* notes 15-18 and accompanying text for a discussion of *Burks*.

24 *Greene*, 437 U.S. at 26 n.8.

25 *Id.* at 26 n.9.

for reversal of defendant's conviction the erroneous admission of evidence against him and draws the further conclusion that, without such evidence, the evidence was insufficient to sustain the conviction.[26] The Court granted certiorari in *Nelson*[27] to resolve this issue.[28]

III. FACTS

Respondent Johnny Lee Nelson pled guilty to burglary (a class B felony) and misdemeanor theft following the theft of forty-five dollars from a vending machine in 1979.[29] Under the Arkansas Habitual Offender Statute,[30] Nelson faced an enhancement of his sentence because of several prior felony convictions.[31] In order to obtain enhancement of a convicted felon's sentence, the state must prove beyond a reasonable doubt, at a separate sentencing hearing, that the defendant has at least four prior felony convictions.[32]

At Nelson's sentencing hearing, the prosecution introduced into evidence the certified copies of four prior felony convictions.[33] Although defense counsel failed to object at the time, Nelson himself balked at the admission of a 1960 conviction of assault with intent to rape because he believed it to be pardoned.[34] Upon Nelson's objection, the prosecutor and the trial judge tried to convince him that this conviction had actually been commuted to time

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26 Lockhart v. Nelson, 109 S. Ct. 285, 290 (1988).

27 828 F.2d 446 (8th Cir. 1987).

28 *Lockhart*, 109 S. Ct. at 289.

29 Nelson v. Lockhart, 641 F. Supp. 174, 175 (E.D. Ark. 1986).

30 ARK. STAT. ANN. § 41-1001(2)(b) (1977) (current version at ARK. CODE ANN. § 5-4-501 (1987)). This statute provides that a defendant who is convicted of a class B felony and "who has previously been convicted of . . . [or] found guilty of four [4] or more felonies," may be sentenced to an enhanced term of between 20 and 40 years. *Id.*

31 *See infra* note 33.

32 ARK. STAT. ANN. § 41-1005 (1977) (current version at ARK. CODE ANN. § 5-4-504 (1987)).

33 Lockhart v. Nelson, 109 S. Ct. 285, 288 (1988). The prosecution introduced evidence of the following convictions: 1) a 1960 conviction for assault with intent to rape, for which Nelson received a full pardon from Governor Faubus after serving seven years; 2) two separate 1972 convictions for possession of stolen property; and 3) a 1974 conviction for burglary and grand larceny. Nelson's record also shows two 1960 convictions—one for grand larceny and the other for robbery—which the prosecutor elected not to introduce at the enhanced sentence proceeding. Respondent's Brief at 5 n.1, Lockhart v. Nelson, 109 S. Ct. 285 (1988) (No. 87-1277).

34 *Lockhart*, 109 S. Ct. at 288. At the enhancement hearing Nelson expressed his belief, during cross-examination, that the conviction in question had been pardoned. *Id.* The prosecutor suggested to the trial court that Nelson was confusing a pardon with a commutation to time served. *Id.* The trial court found that, since Nelson himself described a commutation to time served, Nelson must never have received a pardon. Nelson v. Lockhart, 641 F. Supp. 174, 183 (E.D. Ark. 1986).

served.[35] Neither the court nor the prosecutor pursued any investigation of Nelson's claim.[36] A jury then sentenced Nelson to twenty years imprisonment under the Arkansas Habitual Offender Statute.[37]

Nelson petitioned the federal district court after the state courts upheld his conviction on direct and collateral review.[38] A subsequent investigation by the federal district court, ordered upon respondent's writ of habeas corpus, revealed that respondent actually received a pardon from the governor for that particular conviction.[39] Following this discovery by the federal district court, the state announced its intention to resentence the respondent as a habitual offender, relying on another prior conviction not introduced at the initial sentencing hearing.[40] However, the district court held that evidence of the pardoned conviction proved inadmissible under Arkansas law.[41] The court further reasoned that without such evidence the jury's finding lacked sufficient evidentiary basis, so the double jeopardy clause precluded another hearing on the issue.[42] The Court of Appeals for the Eighth Circuit affirmed, adopting a rationale similar to that of the district court.[43] The United States

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35 *Lockhart*, 109 S. Ct. at 288.

36 *Id.*

37 *Nelson*, 641 F. Supp. at 175. See *supra* note 30 for the pertinent part of the Arkansas Habitual Offender Statute.

38 *Lockhart*, 109 S. Ct. at 288-89. On direct appeal, Nelson challenged the use of the pardoned conviction to enhance his sentence. *Id.* at 288 n.4. The Arkansas Court of Appeals rejected Nelson's claim based upon the absence of any contemporaneous objection by Nelson to the use of the conviction. *Id.* (citing the unreported opinion of the Arkansas Court of Appeals, Nelson v. State, No. CA, CR 83-150 (May 2, 1984), App. 13). Likewise, the Arkansas Supreme Court denied Nelson relief because Nelson's "bare assertion" of a pardon, unaccompanied by any factual evidence, proved an insufficient ground for relief. *Id.* (citing the unreported opinion of the Arkansas Supreme Court, Nelson v. State, No. CR 84-133 (Nov. 19, 1984) App. 15).

39 *Lockhart*, 109 S. Ct. at 289.

40 *Id.* *See supra* note 33.

41 *Nelson*, 641 F. Supp. at 185.

42 *Id.*

43 Nelson v. Lockhart, 828 F.2d 447, 451 (8th Cir. 1987). The district court determined that the incorrect admission of the pardoned conviction could not constitute trial error because "[t]he question of the number of prior convictions is . . . a matter of evidentiary proof within the Arkansas statute." *Nelson*, 641 F. Supp. at 181. The district court further observed that "the trial court did not intervene here. It was not called upon to rule on the validity of the conviction." *Id.* The federal district court reversed Nelson's enhanced sentence because insufficient evidence existed to support the sentence. *Id.* at 185. The district court stated that "the failure of the prosecution to introduce four valid prior convictions results in an effective acquittal on the enhancement charge." *Id.*

In affirming, the Eighth Circuit declared that the state put forth insufficient evidence, asserting that "the facts here show that the state failed to prove that the defendant had been convicted of four felonies." *Nelson*, 828 F.2d at 449. The Eighth Circuit

Supreme Court granted certiorari to determine whether "the Double Jeopardy Clause allows retrial when a reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against him, and also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction."[44]

IV. THE SUPREME COURT DECISION

A. THE MAJORITY OPINION

The Court held that in cases where all the evidence admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the double jeopardy clause does not preclude retrial.[45] In an opinion delivered by Justice Rehnquist,[46] the Court declared the situation present in the *Nelson* case to be the sort of "trial error" identified in the *Burks* decision.[47] Thus, the Court concluded that the double jeopardy clause did not bar retrial of the defendant.[48]

Justice Rehnquist first examined the rationale for the general rule that "the double jeopardy clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction."[49] Justice Rehnquist looked to the high price society would pay if " 'every accused [were]

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also ruled out the possibility that Nelson obtained reversal because of trial error, stating, "[T]he admission of the pardoned conviction was not trial error; the trial court did not rule on the admissibility of the conviction that the defendant claimed was pardoned by Governor Faubus." *Id.*

44 *Lockhart*, 109 S. Ct. at 290.

45 *Id.* at 287.

46 Justices White, Stevens, O'Connor, Scalia, and Kennedy joined Justice Rehnquist in the majority opinion.

47 *Lockhart*, 109 S. Ct. at 290-91. See *infra* notes 66-77 and accompanying text for a discussion of the dissent. For a case involving three dissenting justices, the majority made an excessively strong claim regarding the ease of determining where *Lockhart* fits under a *Burks* analysis. The majority asserted, "It appears to us to be beyond dispute that this is a situation described in *Burks* as reversal for 'trial error'—the trial court erred in admitting a particular piece of evidence, and without it there was insufficient evidence to support a judgment of conviction." *Id.* at 290. This reasoning ignores the fact that the federal district court responsible for reversing Nelson's conviction, along with the Eighth Circuit, predicated their double jeopardy holdings on a finding of insufficient evidence. *Nelson*, 828 F.2d at 449-50; *Nelson*, 641 F. Supp. at 185.

48 *Lockhart*, 109 S. Ct. at 291. The Court stated that "[p]ermitting retrial in this instance is not the sort of government oppression at which the Double Jeopardy Clause is aimed." *Id.*

49 *Id.* at 289. *See supra* notes 10-11 and accompanying text.

granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.' "[50] Further, Justice Rehnquist noted that such a rule also worked to the defendant's benefit because if appellate courts realized that a reversal would put the accused beyond the reach of further prosecution, they likely would not be nearly as zealous in protecting against procedural error in the trial courts.[51] This predicted reluctance of the appellate courts would rest on society's interest in punishing the guilty.[52]

Justice Rehnquist then analyzed the Court's decision in *Burks*,[53] which created an exception to this general rule.[54] He noted that in *Burks*, the Court held that when an appellate court reverses a defendant's conviction on the sole ground that the evidence was insufficient to sustain the jury's verdict, the double jeopardy clause bars a retrial on the same charge.[55] Justice Rehnquist equated an appellate court's reversal for insufficient evidence with an acquittal of the accused.[56] He explained that such a reversal acts, in effect, as a finding that "the trial court should have entered a judgment of acquittal."[57]

Justice Rehnquist then drew a distinction between the reversal of Nelson's conviction and reversals based solely on evidentiary insufficiency.[58] Justice Rehnquist observed that the *Burks* Court distinguished between the double jeopardy significance of reversal based entirely on evidentiary insufficiency and reversal premised on "such ordinary 'trial errors' as the 'incorrect receipt or rejection of evidence.' "[59] Thus, he concluded, reversals for trial errors imply nothing with respect to the guilt or innocence of the defendant.[60]

The "trial error" in Nelson's case, according to Justice Rehnquist, lay in the court's erroneous admission of one piece of evi-

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50 *Lockhart*, 109 S. Ct. at 290 (quoting United States v. Tateo, 377 U.S. 463, 466 (1964)).

51 *Id.*

52 *Id.* (citing *Tateo*, 377 U.S. at 466). This assumes, however, that the appellate courts grant primacy to the societal interest in punishing the guilty over the defendant's interest in finality. See *infra* notes 89-117 and accompanying text for a discussion of these competing interests.

53 Burks v. United States, 437 U.S. 1 (1979).

54 *Lockhart*, 109 S. Ct. at 290. *See supra* notes 15-18 and accompanying text.

55 *Lockhart*, 109 S. Ct. at 290 (citing *Burks*, 437 U.S. at 18).

56 *Id.*

57 *Id.*

58 *Id.* The Court first drew this distinction in *Burks*. *See supra* notes 15-18 and accompanying text.

59 109 S. Ct. at 290 (quoting *Burks*, 437 U.S. at 14-16).

60 *Id.*

dence—the pardoned conviction.[61] Justice Rehnquist carefully noted that with the erroneously admitted evidence of the pardoned conviction, enough evidence existed to support the enhanced sentence.[62] Justice Rehnquist then contended that *Burks* made clear that reviewing courts "must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause."[63] As Justice Rehnquist detailed, most appellate courts subscribe to this reading of *Burks*.[64] Thus, the trial court's error in Nelson's sentencing hearing qualified as the "trial error" that, under the *Burks* decision, permitted retrial.[65]

B. THE DISSENTING OPINION

Justice Marshall, joined by Justices Brennan and Blackmun, dissented from the majority's holding, arguing that this case involved a reversal for insufficient evidence, rather than trial error.[66] Justice Marshall argued that the prosecution failed to present sufficient evidence of guilt in this case because, in relying on a pardoned conviction, the prosecution's evidence at the sentencing trial "was *at all times* insufficient to prove four valid convictions."[67]

Justice Marshall first looked to the effect of a pardoned conviction on a sentencing hearing under Arkansas' law of pardons.[68] Marshall observed that "Arkansas decisional law holds that pardoned convictions have no probative value in sentence enhancement proceedings."[69] Thus, argued Justice Marshall, in relying on the pardoned conviction while opting not to introduce evidence of

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61 *Id.*

62 *Id.* at 290-91.

63 *Id.* at 291 (citing *Burks*, 437 U.S. at 16-17). Indeed, Justice Rehnquist asserted that *Burks* clearly enunciated this requirement, stating, "It is quite clear from our opinion in *Burks* that a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause—indeed, that was the *ratio decidendi* of *Burks*." *Id.* Yet, the Court's opinion in *Burks* fails to support this claim, at least in degree. Regarding the quantum of evidence to be examined by the appellate court, the only reference within *Burks* seems only slightly suggestive. The Court stated in *Burks*: "Obviously a federal appellate court . . . must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." 437 U.S. at 17. This remark hardly specifies the quantum of evidence that must be examined to determine whether the evidence qualifies as substantial.

64 *Lockhart*, 109 S. Ct. at 291 n.8.

65 *Id.* at 290-91.

66 *Id.* at 293 (Marshall, J., dissenting).

67 *Id.* (Marshall, J., dissenting) (emphasis in original). See *supra* note 33 and accompanying text for a discussion of the four convictions.

68 *Lockhart*, 109 S. Ct. at 293 (Marshall, J., dissenting).

69 *Id.* (Marshall, J., dissenting).

other convictions, the state failed in its proof.[70] Justice Marshall caustically stated: "That Arkansas was not roused to investigate Nelson's pardon claim until long after his trial does not transform the State's failure of proof—fatal for double jeopardy purposes under *Burks*—into a mere failure of admissibility."[71] Justice Marshall concluded that the state failed to prove its case after it had the "one fair opportunity" to offer what proof it could that Nelson had four prior convictions, and the double jeopardy clause prohibits the state any other opportunities.[72]

Justice Marshall also disagreed with the majority's holding that a reviewing court must look to all admitted evidence in evaluating insufficiency for double jeopardy purposes.[73] Justice Marshall strongly disputed the majority's assertion that *Burks* decided this issue.[74] Though Justice Marshall's dissent did not offer a rule for determining what evidence a reviewing court should look to for its sufficiency finding under a double jeopardy analysis, he located the interests that must be balanced under such an analysis.[75] Justice Marshall contended that "the defendant's interest in repose and society's interest in the orderly administration of justice" act as competing interests that require balancing before deciding when to apply a double jeopardy bar.[76] Thus, Justice Marshall concluded

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70 *Id.* at 294 (Marshall, J., dissenting).

71 *Id.* at 293 (Marshall, J., dissenting). This argument, however, offers scant guidance to the appellate courts regarding their review of the evidence admitted at the trial level. Of course, Justice Marshall refused to acknowledge that issue as the real issue of the case: "The majority rushes headlong past those facets of Nelson's case and of Arkansas law that reveal the prosecution's failure to present sufficient evidence of guilt in this case, in order to answer the open and narrow question of Double Jeopardy law on which the Court granted certiorari." *Id.* at 292 (Marshall, J., dissenting).

72 *Id.* at 294 (Marshall, J., dissenting).

73 *Id.* (Marshall, J., dissenting).

74 *Id.* (Marshall, J., dissenting).

75 *Id.* at 295 (Marshall, J., dissenting).

76 *Id.* (Marshall, J., dissenting). Justice Marshall also asserted that, "[s]ociety's interest . . . would appear to turn on a number of variables." *Id.* (Marshall, J., dissenting). Justice Marshall identified the central variable as the "likelihood that retrying the defendant will lead to conviction." *Id.* (Marshall, J., dissenting). To determine this probability, the dissent suggested that "one might inquire into whether prosecutors tend in close cases to hold back probative evidence of a defendant's guilt; if they do not, there would be scant societal interest in permitting retrial given that the State's remaining evidence is, by definition, insufficient." *Id.* (Marshall, J., dissenting).

While recognizing that this central variable seems useful, Justice's Marshall's suggested inquiry answers itself. It seems legitimate to question why a prosecutor would ever hold back probative evidence of the defendant's guilt if he thought it was a close case. In *Lockhart*, the prosecutor labored under the mistaken, though sincere belief that Nelson's case was not close. As the majority observed in its opinion, "[T]here is no indication that the prosecutor knew of the pardon and was attempting to deceive the court." *Id.* at 288 n.2.

that the majority arrived prematurely at a test for evaluating evidentiary insufficiency for double jeopardy purposes, while disingenuously treating it as a decision already reached.[77]

V. ANALYSIS

A. THE ISSUES INVOLVED IN LOCKHART

The Supreme Court has subjected the double jeopardy clause of the Constitution to remarkably varying interpretations over the past fifty years.[78] The Court even conceded in *Burks*[79] that its "holdings in this area . . . can hardly be characterized as models of consistency and clarity."[80] Indeed, the Court's *Burks* decision overruled two established lines of decisions which allowed the state to retry defendants who requested new trials as one avenue of relief.[81] However, *Burks* hardly settled the issues involved.[82] Thus, the Court's decision in *Lockhart* represented an opportunity to quell the turbulence that marked the Court's recent decisions in this area.

Yet the *Lockhart* Court attempted to limit the significance of its holding.[83] This case hardly stands as a radical departure from the principle established by *Burks*,[84] or a clarification of double jeopardy law. As the majority stated in the *Lockhart* opinion, the *Burks* decision specifically refers to the incorrect receipt of evidence as the sort of trial error which carries no double jeopardy implications.[85] *Lockhart*, however, raises the important question of how the *Burks* analysis applies to erroneously admitted evidence which, when subtracted from the state's case, leaves the state with insufficient evidence to convict.[86] As the majority contended, the Court's resolution of this

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77 *Id.* at 294 (Marshall, J., dissenting).

78 Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 82 (1979).

79 437 U.S. 1 (1979).

80 *Id.* at 9.

81 *Id.* at 10. *See supra* notes 15-18 and accompanying text.

82 The fact that Justices Marshall, Brennan, and Blackmun joined in a strongly worded dissent to the majority holding in Lockhart v. Nelson, 109 S. Ct. 285, 292-96 (1988) (Marshall, J., dissenting), suggests that a certain degree of controversy still attaches to this issue. See *supra* notes 66-77 and accompanying text for a discussion of the dissent in *Lockhart*.

83 The Court never placed *Lockhart* in its logical place within double jeopardy law—as the functional and analytical counterweight to the *Burks* principle. Instead, the Court stated, "Our holding today thus merely recreates the situation that would have been obtained if the trial court had excluded the evidence of the conviction because of the showing of a pardon." *Lockhart*, 109 S. Ct. at 291.

84 *Burks*, 437 U.S. at 18. See *supra* notes 15-18 and accompanying text for a discussion of the principle established by *Burks*.

85 *Lockhart*, 109 S. Ct. at 290 (citing *Burks*, 437 U.S. at 14-16).

86 *Id.*

issue seems consonant with the logic of *Burks*.[87] In this sense, the *Lockhart* decision represents a positive move by the Court in the direction of consistency. However, as the dissent points out, the majority's brief opinion missed an opportunity to clarify the thrust and contours of the Court's post-*Burks* double jeopardy analysis.[88] This Note develops an analysis of the interests served by double jeopardy jurisprudence and explores how the *Lockhart* principle affects these interests. Further, an examination of what lies behind these interests is provided to develop a better understanding of the *Lockhart* principle's effect on double jeopardy jurisprudence.

B. IMPLICATIONS OF THE MAJORITY'S DECISION

As the Court expressed in *Tateo*, all double jeopardy decisions entail a balancing of two corresponding interests: 1) the defendant's interest in obtaining a fair trial, and 2) society's interest in punishing one whose guilt is clear.[89] Embedded within the notion of a fair trial is the concept of finality. Upon acquittal, the double jeopardy clause absolutely protects the defendant's interest in finality by barring retrial for the same offense.[90] Any result other than an acquittal requires a double jeopardy analysis that balances the interests of the defendant and society. Thus, in cases like *Lockhart*, the courts struggle to determine which contending interest overrides the other.

Framed in this way, it seems clear that the Court's holding in *Lockhart* amounts to a decision of which interest trumps the other in situations like that present in *Lockhart*. *Lockhart* implies that, in the case where incorrectly admitted evidence stands alone between sufficient or insufficient evidence to convict, society's law enforcement interest overrides the defendant's interest in finality.[91]

The *Lockhart* decision must be understood in the context of the amount of protection afforded the defendant's interest by pre-*Lockhart* double jeopardy jurisprudence. Certain compelling considera-

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87 *Id.* *See supra* note 85 and accompanying text.

88 *Lockhart*, 109 S. Ct. at 296 (Marshall, J., dissenting). Justice Marshall criticized the majority opinion for its failure to detail such an analysis, stating that "[t]he Court today should have enunciated . . . rules calibrated to accomodate, as best as possible, the defendant's interest in repose with society's interest in punishing the guilty." *Id.* (Marshall, J., dissenting).

89 *Id.* Both the majority and dissenting opinions quote approvingly this passage from the *Tateo* opinion. *Lockhart*, 109 S. Ct. at 289 and 295.

90 Burks v. United States, 437 U.S. 1, 16 (1979).

91 It should be recognized that *Burks* represents a decision that the defendant's interest in finality overrides society's interest in law enforcement where a reversal is based on insufficient evidence. *See Burks*, 437 U.S. at 13, 15-17.

tions[92] explain the level of protection defendants enjoyed under pre-*Lockhart* double jeopardy doctrine. Yet equally compelling arguments exist for protecting legitimate state interests in double jeopardy jurisprudence.[93] A thorough discussion of these countervailing interests entails an inspection of what lies behind them.

1. The Defendant's Interests

In order to analyze the impact of the *Lockhart* decision, one must first look to how the double jeopardy clause protects the defendant's interests. Primarily, the double jeopardy clause protects the defendant's interest in finality.[94] At the trial level this is accomplished by prohibiting any state appeal from a judgment of acquittal.[95] Thus, the double jeopardy clause affords the defendant's interest in finality absolute protection in the case of acquittal.[96] Various rationales exist for this rule of absolute protection enjoyed exclusively by the defendant.[97] Professors Westen and Drubel argue convincingly that the most persuasive rationale for this rule lies in the jury's "legitimate authority to acquit against the evidence."[98] If one accepts the power to acquit against the evidence as within the legitimate authority of the jury, then it follows that no acquittal may

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92 See *infra* notes 94-105 and accompanying text for a discussion of these considerations.

93 See *infra* notes 106-117 and accompanying text for a discussion of the state's interests.

94 See *infra* notes 94-97 and accompanying text for a discussion of the defendant's interest in finality. The Court has found that the double jeopardy clause protects defendants from certain forms of state oppression:

> 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 [(1)] subjecting him to embarrassment, expense and ordeal and [(2)] compelling him to live in a continuing state of anxiety and insecurity, as well as [(3)] enhancing the possibility that even though innocent he may be found guilty.

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

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

96 *Id.*

97 Westen & Drubel, *supra* note 78, at 124-32. Professors Westen and Drubel identify several plausible explanations for this absolute protection. First, this rule may be designed to protect the defendant's legitimate expectations that a verdict of acquittal will be final. *Id.* at 124. Second, this rule may simply recognize that the defendant possesses a greater interest in the finality of an acquittal than that of a conviction because it acts in his favor. *Id.* at 127. Third, this rule may serve to prevent the state from perfecting its case against the defendant. *Id.* at 129. Fourth, this rule may prohibit the state from invading the exclusive fact-finding authority of the jury. *Id.* at 129. Finally, this rule may protect the jury's authority to acquit against the evidence. *Id.*

98 *Id.* at 130-32. *See* Westen & Drubel, *supra* note 78, at 124-32 (defeat of the other rationales discussed *supra* at note 97). Of course, the system will not permit juries to convict against the evidence. The appellate courts meet such decisions with reversal for insufficient evidence.

be challenged as erroneous.[99]

Yet this analysis only raises the question of why the judicial system allows juries to acquit against the evidence. Perhaps the answer to this question lies in the dissymmetry of resources between the defendant and the state.[100] The chief resource advantage that the state possesses relative to the defendant would be the support of a functioning bureaucracy. The criminal justice system, designed by the state itself, is set into motion by the arrest of the defendant. Clearly, the potential for harm to the individual defendant presents itself, particularly where a part of this organized system works to convict the defendant. This explains the presence at the trial level of certain procedural safeguards such as the presumption of innocence and the exclusionary rule.

Further, a recognition of this dissymmetry accounts for the design of the double jeopardy clause and its subsequent treatment by the courts.[101] The judicial system affords acquittals absolute finality, as Professors Westen and Drubel argue,[102] in order to protect the jury's authority to acquit against the evidence. Yet, this fails to explain why juries should ever, either explicitly or implicitly, enjoy such an authority.[103] An application of the dissymmetry model suggests that the jury acts as the ultimate buffer between the defendant and the considerable resources of the state. Thus, a decision to acquit against the evidence might represent a judgment by the jury that the state has used its resources unjustly against the defendant.

At the appellate level, this dissymmetry remains significant. The *Burks* principle[104] blunts the effect of this dissymmetry at the appellate level. *Burks* requires that defendants receive immunity

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99 Westen & Drubel, *supra* note 78, at 130. Professors Westen and Drubel argue that "[t]here are no identifiably erroneous acquittals because every such purported candidate, evaluated by a legal standard resting on the evidence, may be explained alternatively as an extralegal judgment by the jury to act against the evidence." *Id.*

100 The definition of resources as used here includes time, money, and administrative capacity. This clarifies what the *Green* Court meant by its reference to "the State with all its resources and power." Green v. United States, 355 U.S. 184, 187-88 (1957). While the state may invest few resources into trying a particular defendant, double jeopardy analysis seems to assume the state could invest a great amount of resources trying a particular defendant if it so chose.

101 See *supra* note 94 for a discussion of the Court's view of the purpose of the double jeopardy clause.

102 See *supra* notes 95-97 for a discussion of the absolute protection afforded the defendant's finality interest.

103 Westen & Drubel, *supra* note 78, at 130 n.230. Professors Westen and Drubel equate the jury's decision to acquit against the evidence with the chief executive's authority to pardon or grant clemency, which is not subject to judicial review.

104 See *supra* notes 15-18 and accompanying text for a discussion of the *Burks* principle.

from re-prosecution if the state failed to muster sufficient evidence at the trial.[105] In light of the state's formidable resource advantage, such a failure indicates an increased likelihood that the defendant is actually innocent. Thus, a policy prohibiting retrial of defendants under these circumstances reflects an appreciation of the resource dissymmetry between the state and defendant.

Prior to *Lockhart*, individual defendants possessed significant protection of their interests at the appellate level through application of the *Burks* principle. This principle rests on a recognition of the dissymmetry of resources between the state and the defendant. Likewise, the procedural advantages that individual defendants possess at the trial level stem from a recognition of this disymmetry. Therefore, the *Burks* principle merely preserves the defendant's trial level advantage at the appellate level.

2. *Society's Interest in Punishing the Guilty*

The *Lockhart* principle guards society's interest in punishing the guilty.[106] By granting the state another opportunity to try the defendant where the trial court erroneously admitted evidence,[107] *Lockhart* recognizes that the state likely used its resources in a judicious manner. Unlike a reversal for insufficient evidence, a reversal for trial error does not usually reflect a judgment that the state squandered its resources. Under a resources analysis, this principle also reflects the view that if the state judiciously employed its resources it should not be prevented from reapplying them.

The *Lockhart* decision also saves certain costs to society. As Professors Westen and Drubel observed, the cost of holding otherwise poses the risk of putting many defendant's facing retrial under the *Ball* principle[108] beyond the reach of prosecution for crimes they are guilty of committing.[109] Nelson's situation in particular brings the danger of an opposite rule into sharp relief. Both petitioner and respondent in *Lockhart* agree that Nelson's record shows at least three other felony convictions the prosecutor could have used at the

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105 *Id.*

106 Lockhart v. Nelson, 109 S. Ct. 285, 289-90 (1988) (citing United States v. Tateo, 377 U.S. 463, 466 (1964)).

107 *Lockhart*, 109 S. Ct. at 291.

108 See *supra* notes 10-14 and accompanying text for a discussion of the *Ball* principle.

109 *See* Westen & Drubel, *supra* note 78, at 147 n.292. The authors suggest that the situation where a defendant suffers conviction on the basis of improperly admitted evidence, yet can prove that without such evidence the evidence remains insufficient to support a conviction, arises frequently. *Id.* Consequently, the costs to society of a principle contrary to that established by *Lockhart*, 109 S. Ct. at 285, prove proportionately higher.

sentence enhancement hearing.[110] Thus, Nelson qualifies as a clearly guilty defendant, at least for purposes of a sentence enhancement proceeding.

The state retains two interests in prosecuting defendants: 1) that of receiving one fair opportunity to convict one whose guilt it strongly suspects,[111] and 2) pursuing conviction without facing unreasonable expenses. A principle contrary to that in *Lockhart* raises the prospect that the state might have to "overtry" cases.[112] Rulings on the admissibility of evidence, like the one by the trial court in *Lockhart*, induce reliance by the state.[113] The state suggests in its brief that it "would be forced to 'throw in the kitchen sink' to avoid reversal and dismissal because the state would never be entirely certain of how much of its case would be reviewed for sufficiency on appeal."[114] Such a rule affects the administration of justice because it puts the state at great cost, at least in trying the case.[115]

The state is also entitled to one fair opportunity to muster its case. Situations like that in *Lockhart*, where because of no contemporaneous objection by counsel the court incorrectly receives certain evidence, promise to recur. In the absence of a correct ruling by the trial court on the admissibility of a portion of state's evidence, the state possesses an excuse for failing to muster sufficient evidence to convict.[116] This excuse likely explains the Court's finding in *Lockhart* that the incorrectly admitted evidence should be classified as "trial error" and not as a basis for reversal due to insufficient evidence.[117]

V. CONCLUSION

By affording the state's law enforcement interest greater protection, the *Lockhart* decision serves as a functional and analytical

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110 Petitioner's Brief at 16, *Lockhart* (No. 87-1277); Respondent's Brief at 5 n.1, *Lockhart* (No. 87-1277). See *supra* note 33 for a discussion of these other convictions.

111 The notion of one fair opportunity does not require that the procedural advantages of the State and the defendant stand in equipoise. In reality, the defendant retains a considerable advantage at the trial level. See *supra* note 100 and accompanying text for a discussion of these advantages.

112 *See* Petitioner's Brief at 13, *Lockhart* (No. 87-1277).

113 Petitioner's Brief at 12, *Lockhart* (No. 87-1277).

114 *Id.*

115 *Id.*

116 *See* Westen & Drubel, *supra* note 78, at 147 n.292 (the authors discern a possible tendency of the courts to find society's law enforcement interest overriding where the prosecution offers an excuse for its failure to muster evidence in the first trial).

117 *Lockhart*, 109 S. Ct. at 290-91.

counterweight to the *Burks* principle.[118] The *Burks* and *Lockhart* principles guard, at the appellate level, the two identified interests relevant to double jeopardy jurisprudence.[119] While the *Burks* principle protects the defendant's interest in finality, the *Lockhart* principle supports the societal interest in punishing the guilty. Further, the *Lockhart* and *Burks* principles together replicate, at the appellate level, the balance of interests accomplished at the trial level.

The *Lockhart* court correctly recognized that the double jeopardy clause adequately preserved the significant interests of the defendant at both the trial and appellate levels. Yet society's law enforcement interest deserves some protection, though not in a measure equal to the defendant's. The *Lockhart* principle both protects this societal interest in law enforcement and replicates, at the appellate level, the balancing of the interests present at the trial level.

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118 See *supra* notes 15-18 and accompanying text for a discussion of the *Burks* principle.

119 See *supra* note 89 and accompanying text for a discussion of these two interests.