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Tibbs v. Florida: A Dubious Distinction between Weight and Sufficiency of Evidence in the Double Jeopardy Context

Robert L. Baker

NOTES

TIBBS V. FLORIDA: A DUBIOUS DISTINCTION BETWEEN WEIGHT AND SUFFICIENCY OF EVIDENCE IN THE DOUBLE JEOPARDY CONTEXT

The double jeopardy clause of the fifth amendment provides that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb. . . ."[1] The amount of protection this clause provided to a defendant whose conviction had been reversed remained unclear[2] until 1978, when the United States Supreme Court held that the double jeopardy clause barred retrial after a conviction was reversed due to *insufficient* evidence.[3] A reversal for insufficient evidence occurs when a court, viewing the evidence in the light most favorable to the prosecution, determines that no rational trier of fact could find that the elements of the charged offense were proven beyond a reasonable doubt.[4] In other words, when there are questions regarding the sufficiency of evidence, a court's review is limited to the narrow consideration of whether every element of the crime charged has been proven beyond a reasonable doubt; such a review does not concern the credibility of the evidence.[5]

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1. U.S. CONST. amend. V.

2. *See infra* notes 18-20 and accompanying text.

3. *See* Burks v. United States, 437 U.S. 1, 18 (1978).

4. *See* Jackson v. Virginia, 443 U.S. 307, 318-19 (1979). *Jackson* established the standard that a conviction must be based upon sufficient evidence, which the Court defined as the evidence required to persuade the trier of fact beyond a reasonable doubt of the existence of the essential elements of the crime. *Id.* at 316. The *Jackson* Court stated that if the beyond a reasonable doubt standard was not met, the conviction could not be upheld. *Id.* at 317-18. The *Jackson* test of the sufficiency of evidence has been employed in many subsequent cases. *See, e.g.*, United States v. Henderson, 680 F.2d 659, 661 (9th Cir. 1982) (the sufficiency test involves viewing the evidence in the light most favorable to the prosecution); Stacy v. Love, 679 F.2d 1209, 1212-13 (6th Cir. 1982) (in responding to a defendant's challenge to the sufficiency of the evidence, the court considers the evidence in the light most favorable to the government to determine if a rational fact finder could find guilt beyond a reasonable doubt); United States v. McQueeney, 674 F.2d 109, 111 (1st Cir. 1982) (in evaluating a contention that the evidence was insufficient to convict, an appellate court must consider the evidence in the light most favorable to the government to decide whether the trier of fact could find guilt beyond a reasonable doubt). *See generally* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 467 (1982) (explaining the test of sufficiency of evidence within the context of a motion for judgment of acquittal under FED. R. CRIM. P. 29).

5. *See* Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (a review of the sufficiency of evidence does not concern the credibility of the evidence); United States v. Thevis, 665 F.2d 616, 648 (5th Cir. 1982) (an appellate court's role in considering the sufficiency of evidence is "strictly limited"), *cert. denied*, 102 S. Ct. 3489 (1982); United States v. Beck, 615 F.2d 441, 448 (7th Cir. 1980) (it is not the function of a court in determining the sufficiency of evidence to balance inconsistent testimony, consider credibility, or draw inferences); *see also* 2 C. WRIGHT, *supra* note 4, § 467, at 663-65 (discussing the limited role of a court when

Recently, in *Tibbs v. Florida*,[6] the Supreme Court considered whether the double jeopardy clause barred retrial of a criminal defendant after a state appellate court reversed a conviction on the grounds that the trial court's verdict was against the *weight* of the evidence. A reversal based on the weight of the evidence occurs when a court, in effect acting as a thirteenth juror, weighs all the evidence, assesses its credibility, and determines that it does not support the verdict.[7] Therefore, when there are questions concerning the weight of evidence, a court's review involves the broad consideration of whether the evidence, viewed in its entirety, is credible.[8] When engaging in this type of review, a court does not consider whether the evidence presented, if believed, was sufficient to prove the essential elements of the crime.[9] Rather, the question of evidentiary weight concerns the credibility or believability of the evidence presented. In contrast, the question of sufficiency of evidence revolves around whether the prosecution presented enough evidence to prove the elements of the charged offense. The *Tibbs* Court distinguished a reversal based on the broad ground that the verdict was against the weight of the evidence, from a reversal based on the narrow ground that the evidence was insufficient.[10] While the *Tibbs* Court

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it considers the sufficiency of evidence). *But see* Speigner v. Jago, 603 F.2d 1208, 1212 (6th Cir. 1979) (in cases questioning the sufficiency of evidence, a reviewing court gives consideration to the relative weight of evidence), *cert. denied*, 444 U.S. 1076 (1980).

6. 102 S. Ct. 2211 (1982).

7. The notion that a court acts as a thirteenth juror, because it must weigh the evidence and consider its credibility when it reverses a conviction for being against the weight of the evidence, has been expressed in many cases. *See, e.g.*, United States v. Lopez, 576 F.2d 840, 845 n.1 (10th Cir. 1978); Brodie v. United States, 295 F.2d 157, 159-60 (D.C. Cir. 1961); Applebaum v. United States, 274 F.2d 43, 46 (7th Cir. 1921); United States v. Turner, 490 F. Supp. 583, 593 (E.D. Mich. 1979) (trial courts apply the same test in evaluating sufficiency and weight of evidence), *aff'd*, 633 F.2d 219 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *see also* 3 C. WRIGHT, *supra* note 4, § 553, at 245-48 (explaining the function and role of a court ruling on a motion for a new trial based on the weight of the evidence under FED. R. CRIM. P. 33).

8. *See* United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980) (in deciding whether a verdict is against the weight of the evidence on a motion for a new trial, a court may weigh all the evidence and consider its credibility, rather than view only the evidence which is most favorable to the prosecution); United States v. Simms, 508 F. Supp. 1188, 1202 (W.D. La. 1980) (when a court determines whether a verdict is against the weight of the evidence, its power to weigh the evidence and consider the credibility of witnesses is considerably broader than when it determines whether the evidence was merely sufficient); United States v. Turner, 490 F. Supp. 583, 593 (E.D. Mich. 1979) (there is a "much broader standard of review" on a motion alleging that a verdict is against the weight of the evidence than there is on a motion contending that the evidence is insufficient); *see also* 3 C. WRIGHT, *supra* note 4, § 553, at 245 (declaring that a court has broader power when it considers evidentiary weight than it does when it considers the sufficiency).

9. *See* United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980) (regardless of whether there is an "abstract sufficiency" of evidence, a court may still find a verdict to be against the weight of the evidence); United States v. Turner, 490 F. Supp. 583, 593 (E.D. Mich. 1979) (a court can determine the question of evidentiary credibility despite the fact that the evidence is sufficient to prove the essential elements of the crime).

10. 102 S. Ct. at 2217-21.

acknowledged that a finding of insufficient evidence raised a double jeopardy bar against retrial,[11] it held that no such bar arises upon a finding that a conviction is merely against the weight of the evidence.[12]

While a distinction may be drawn between reversals based on the weight of evidence and those based on the sufficiency of evidence, this Note will illustrate that it is not a proper distinction to be made in the double jeopardy context. Just as the double jeopardy clause bars retrial after a reversal of a conviction based on insufficient evidence, the protection afforded by that clause also should be extended to bar retrial after a reversal of a conviction based on the weight of the evidence.

THE DEVELOPMENT OF INSUFFICIENT EVIDENCE AS A BAR TO RETRIAL

The seminal case concerning the retrial of an accused who successfully appealed a conviction is *United States v. Ball.*[13] In that case, the United States Supreme Court held that the double jeopardy clause did not bar retrying defendants who had successfully obtained reversals of their convictions on the grounds that their indictments were defective.[14] Implicit in the Court's holding was the notion that a defendant, by appealing his conviction, waives the right to be free from double jeopardy.[15] While *Ball* involved retrial after a reversal on procedural grounds,[16] it nevertheless has been perceived as the starting point for analyzing a series of double jeopardy cases which deal with reversals of convictions on evidentiary grounds as well.[17]

Supreme Court decisions following *Ball* initially indicated acceptance of the concept, implicit in *Ball,* that a defendant waives the right to be free from double jeopardy by appealing his conviction. These cases, generally referred to as the *Bryan-Forman* line of decisions, established the rule that a defendant who seeks a new trial on appeal waives the right to be free

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11. *Id.* at 2217.

12. *Id.* at 2213.

13. 163 U.S. 662 (1896). *Ball* concerned a trial of three men indicted for murder. Two of the defendants were convicted, while the third was acquitted. *Id.* at 664. The two convicted men successfully appealed their convictions on the grounds that the indictment was defective because it failed to state the time and place of the victim's death. *Id.* A new indictment charging the three men was filed and they were retried despite their double jeopardy objections. *Id.* at 665. All three defendants were convicted and sentenced to death. *Id.* at 666. The Supreme Court reviewed the convictions and held that the double jeopardy clause barred retrial of the defendant who had been acquitted on the faulty indictment. *Id.* at 667-70. The Court did not find a double jeopardy bar to retrial of the two defendants who successfully had their initial convictions set aside on procedural grounds. *Id.* at 672.

14. *Id.* at 672.

15. *See* Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal,* 8 IND. L. REV. 497, 504 n.20 (1975) (*Ball* established that when a defendant takes affirmative action to set aside a conviction, any double jeopardy defense at retrial is waived).

16. *Id.* at 505 (a defective indictment is a "procedural defect").

17. *See* Burks v. United States, 437 U.S. 1, 13 (1978) ("*Ball* appears to represent the first instance in which this Court considered in any detail the double jeopardy implications of an appellate reversal.").

from double jeopardy.[18] This rule was developed in situations involving both convictions reversed on procedural grounds,[19] and convictions reversed for insufficiency of evidence.[20]

A later group of decisions dealing with the waiver concept suggested by *Ball* involved only convictions reversed for insufficiency of evidence. These decisions rejected the concept that a defendant can waive his double jeopardy defense simply by pursuing such a reversal. The major case, *Burks v. United States,*[21] examined the *Bryan-Forman* line of decisions[22] and declared that

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18. The *Bryan-Forman* line of decisions consists of four cases. The first case, Bryan v. United States, 338 U.S. 552, 560 (1950), held that a defendant, who on appeal sought either acquittal or a new trial, was not placed in double jeopardy when his conviction was reversed and the case was remanded on the grounds that the evidence was insufficient to convict him. The next case in this line of decisions was Sapir v. United States, 348 U.S. 373 (1955) (per curiam). In his concurrence in *Sapir,* Justice Douglas maintained that after a reversal due to insufficiency of evidence, dismissal of the indictment was required if the defendant had not requested a new trial in the alternative; therefore, he implied that *Bryan* was limited. *Id.* at 373-74 (Douglas, J., concurring). Two years later, in Yates v. United States, 354 U.S. 298 (1957), the Court again dealt with the double jeopardy implications of retrial after appellate reversal. While the *Yates* Court did not allow retrial when there was "palpably insufficient" evidence, it stated that it was within its power to order a new trial in such a case, especially if a new trial as well as an acquittal had been requested. *Id.* at 327-28. The final case in the *Bryan-Forman* line of decisions was Forman v. United States, 361 U.S. 416 (1960). In *Forman,* the Court held that when a person successfully appealed a conviction and requested a new trial, double jeopardy was not a bar to retrial even though the request for a new trial did not pertain to the grounds for reversal. *Id.* at 425. Together, the four *Bryan-Forman* decisions stand for the proposition that once a defendant moves for a new trial on any ground as one form of relief, he has waived a double jeopardy defense at a subsequent trial. *See generally* Note, *Double Jeopardy: The Prevention of Multiple Prosecutions,* 54 CHI.[-]KENT L. REV. 549, 560-63 (1977) (discussion of the waiver theory as employed in the *Bryan-Forman* line of decisions) [hereinafter cited as Note, *Prevention of Multiple Prosecutions*].

19. *See* Forman v. United States, 361 U.S. 416, 418-19 (1960) (reversal of conviction because charge was improperly submitted to jury).

20. *See* Yates v. United States, 354 U.S. 298, 328 (1957); Sapir v. United States, 348 U.S. 373, 373-74 (1955) (Douglas, J., concurring); Bryan v. United States, 338 U.S. 552, 553 (1950).

21. 437 U.S. 1 (1978). *Burks* involved a petitioner who had been convicted in district court of robbing a bank with a dangerous weapon. *Id.* at 2. The petitioner moved for a new trial on the grounds that the evidence purporting to implicate him in the crime was insufficient. *Id.* at 3. The Court of Appeals for the Sixth Circuit found that the government had not rebutted effectively the petitioner's proof of insanity, which was essentially a finding of insufficient evidence. United States v. Burks, 547 F.2d 968, 970 (6th Cir. 1976). The Sixth Circuit relied on 28 U.S.C. § 2106 (1976) (appellate court may remand or require additional proceedings "as may be just under the circumstances"), and *Bryan* as its authority for remanding the case for a determination of whether an acquittal should be entered or a new trial ordered. 547 F.2d at 970. Subsequently, the Supreme Court addressed the issue of whether the double jeopardy clause was a bar to a second trial when there had been an appellate reversal of a conviction on the sole ground that the evidence was insufficient. *Burks,* 437 U.S. at 1.

22. The *Burks* Court found that *Bryan* allowed retrial regardless of the ground for appellate reversal. 437 U.S. at 6. Additionally, the *Burks* Court perceived *Sapir* as precluding retrial after a reversal on the ground that the evidence was insufficient, unless a new trial had been requested. *Id.* at 7. Further, the *Burks* majority viewed *Yates* as acknowledging appellate court authority to remand for retrial after a reversal for insufficient evidence. *Id.* at 8. According to the *Burks* Court, *Forman* was ambiguous because it allowed appellate courts

those decisions "can hardly be characterized as models of consistency and clarity."[23] *Burks* overruled these decisions to the extent that they allowed retrial after a conviction was reversed for insufficiency of evidence.[24] The *Burks* Court held that the double jeopardy clause barred retrial of a defendant whose conviction was reversed "due to failure of proof at trial,"[25] regardless of whether the defendant had requested a new trial.[26] The purpose of the double jeopardy clause, according to *Burks,* was to prevent multiple prosecutions for the same offense.[27] Central to this purpose was denial to the prosecution of "another opportunity to supply evidence which it failed to muster in the first proceeding."[28] Nevertheless, distinguishing reversals based on insufficiency of evidence from those based on procedural error, the *Burks* Court concluded that in the latter situation the double jeopardy clause did not bar retrial.[29] The Court justified this distinction by noting that a reversal for procedural error "implies nothing with respect to the guilt or innocence of the defendant [while] . . . [t]he same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial. . . ."[30] This distinction reflects the *Burks* Court's concern over whether a particular reversal reflected the defendant's guilt or innocence.[31]

In *Greene v. Massey,*[32] decided the same day as *Burks,* the Court extended the *Burks* holding to encompass state proceedings.[33] Thus, the double

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to go beyond the defendant's request for relief by ordering a retrial, while it also suggested that retrial would be precluded when a defendant did not request a new trial and his conviction was reversed for insufficient evidence. *Id.* at 8-9. The *Burks* majority noted that the *Forman* holding did not clearly distinguish between reversals based on trial error and reversals based on insufficiency of evidence. *Id.*

23. *Id.* at 9.

24. *Id.* at 18.

25. *Id.* at 16.

26. *Id.* at 17.

27. *Id.* at 11.

28. *Id.*

29. *Id.* at 14-16.

30. *Id.* at 15-16.

31. Similar notions were expressed by the Court in another case decided on the same day as *Burks.* In United States v. Scott, 437 U.S. 82 (1978), a dismissal was granted before a verdict was returned due to prejudice caused by preindictment delay. The Court held that there was no double jeopardy bar to a government appeal of a dismissal in such circumstances. *Id.* at 98-99. The basis of the decision in *Scott* was that the defendant opted to terminate the proceeding on grounds unrelated to guilt or innocence. *Id.* at 99. The *Scott* Court implied that there would be different double jeopardy implications if the dismissal were based on questions of guilt or innocence. *Id.* at 96.

32. 437 U.S. 19 (1978). *Greene* involved a petitioner who had been sentenced to death in a Florida trial court. *Id.* at 20. In *Sosa v. State,* 215 So. 2d 736 (Fla. 1968) (per curiam), the Florida Supreme Court reversed Greene's conviction and remanded his case for a new trial. The state supreme court held that evidence was lacking in establishing the defendant's guilt beyond a reasonable doubt and that the interests of justice required a new trial. *Id.* at 737. A special concurrence seemed to rest the reversal on procedural errors. *Id.* at 737-46 (Ervin, J., concurring). Because of this ambiguity, the Supreme Court remanded the case for a determination of the ground for reversal. 437 U.S. at 26-27.

33. 437 U.S. at 24.

jeopardy clause was held to bar retrial when a state appellate court reversed a defendant's conviction on the basis of insufficient evidence.[34]

To summarize, the pre-*Burks* cases allowed a defendant to be retried after a reversal of his conviction on the theory that by seeking appeal, the defendant had waived the right not to be placed in double jeopardy. In overruling these decisions, to the extent that they assumed such waiver, the *Burks* Court focused on both the purposes underlying the double jeopardy clause and the basis for the particular reversal. Consequently, in *Burks,* the Supreme Court announced that the double jeopardy clause bars retrial of a defendant whose conviction is reversed on the basis of insufficient evidence. Furthermore, this bar was held to be applicable in both state and federal proceedings.

REVERSALS BASED ON WEIGHT OF EVIDENCE AS A BAR TO RETRIAL

The Facts and Procedural History of Tibbs v. Florida

In 1974, Delbert Tibbs was convicted of rape and first degree murder by a jury in a Florida trial court.[35] Pursuant to the jury's recommendation, Tibbs was sentenced to death.[36] In *Tibbs v. State*[37] *(Tibbs I)*, Tibbs appealed his conviction directly to the Florida Supreme Court.[38] Florida law provided that in a prosecution for rape, no corroborating evidence was necessary to support the victim's testimony and eyewitness identification.[39] Nonetheless, Florida courts were required to scrutinize closely such testimony and identification.[40] The Florida Supreme Court enumerated six weaknesses in the state's evidence that created serious doubt concerning Tibbs's guilt.[41]

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34. *Id.*

35. Tibbs v. Florida, 102 S. Ct. 2211, 2215 (1982).

36. *Id.*

37. 337 So. 2d 788 (Fla. 1976).

38. *Id.* at 790. The Florida Supreme Court has a statutory duty to review convictions in which the death sentence is imposed. *See* FLA. STAT. § 921.141(4) (1975); FLA. APP. R. 6.16(b) (1962) (recodified as FLA. APP. R. 9.140(f) (1982)). Rule 9.140(f) provides, in part: "In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review."

39. *See* Tibbs v. State, 337 So. 2d 788, 790 (Fla. 1976) (citing Thomas v. State, 167 So. 2d 309 (Fla. 1964)).

40. *Id.*

41. *Id.* at 790-91. The six weaknesses in the state's evidence were as follows: (1) other than the victim's testimony, the state produced no evidence to place Tibbs in the area where the crime was committed at the time it occurred; (2) while the victim gave a detailed description of the vehicle driven by her assailant, no such vehicle was ever found; (3) the police found neither a gun, nor car keys to the assailant's vehicle, in Tibbs's possession; (4) Tibbs was very cooperative with the police when he was stopped and questioned by them, and when he was arrested; (5) the state produced no evidence casting doubt on Tibbs's veracity; and (6) several factors cast doubt on the victim's testimony, such as her use of marijuana throughout the day of the crime, her assertion that the crime occurred in daylight while independent evidence indicated that the crime occurred after nightfall, and the method employed in her photographic identification of Tibbs. *Id.*

Because of the doubt raised by these evidentiary weaknesses, the Florida court reversed Tibbs's conviction and remanded his case for a new trial.[42]

On remand, the trial court interpreted *Tibbs I* as being based on a finding of insufficient evidence.[43] Thus, relying on *Burks,* the trial court dismissed the indictment on the grounds that retrial would violate the double jeopardy clause.[44] On appeal, the state appellate court characterized the Florida Supreme Court's reversal in *Tibbs I* as one based on evidentiary weight.[45] Interpreting Florida precedent as allowing retrial after a reversal based on the weight of the evidence,[46] the appellate court held that *Burks* and *Greene* were not controlling and, accordingly, reversed the trial court's decision with orders for a new trial.[47]

On review, in *Tibbs v. State*[48] *(Tibbs II)*, the Florida Supreme Court similarly held that *Burks* and *Greene* did not bar retrial.[49] Consistent with *Burks* and *Greene,* the state supreme court concluded that a reversal due to insufficiency of evidence barred retrial, while a reversal for procedural error did not.[50] Moreover, agreeing with the appellate court, the supreme court stated that its reversal in *Tibbs I* had been based on the weight of the evidence,[51] or in other words, that "the evidence [was] technically sufficient but its weight [was] so tenuous or insubstantial that a new trial [was] ordered in the interests of justice."[52] Nevertheless, the Florida Supreme Court

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42. *Id.* at 791.

43. Tibbs v. Florida, 102 S. Ct. 2211, 2215 (1982).

44. *Id.*

45. State v. Tibbs, 370 So. 2d 386, 388 (Fla. Dist. Ct. App. 1979).

46. *Id.* at 387. The court cited the following cases: State v. Coles, 91 So. 2d 200 (Fla. 1956) (when there is sufficient evidence to support a conviction, a new trial should not be granted unless injustice would result); Lowe v. State, 154 Fla. 730, 19 So. 2d 106 (1944) (when the ends of justice will best be served by granting a new trial due to the inconclusiveness of the testimony, it is the court's duty to remand for a new trial); Woodward v. State, 113 Fla. 301, 151 So. 509 (1933) (the ends of justice will be served by granting a new trial when the evidence raises serious doubt as to the defendant's guilt); Skiff v. State, 107 Fla. 90, 144 So. 323 (1932) (per curiam) (the court should reverse a conviction and order a new trial when the evidence is contradictory or insubstantial); Fuller v. State, 92 Fla. 873, 110 So. 528 (1926) (per curiam) (a conviction should be reversed and a new trial granted when the evidence as to the identity of the accused is not satisfactory); Nims v. State, 70 Fla. 530, 70 So. 565 (1915) (a new trial should be awarded when the evidence bearing on the identity of the accused is not satisfactory); Williams v. State, 58 Fla. 138, 50 So. 749 (1909) (after a jury convicted three codefendants, but the evidence only supported a conviction of one of them, justice required a new trial for all three); Sosa v. Maxwell, 234 So. 2d 690 (Fla. Dist. Ct. App.) (a new trial may be granted when the weight of the evidence is of very questionable probative value), *cert. denied,* 240 So. 2d 640 (Fla. 1970), *cert. denied,* 402 U.S. 951 (1971)).

47. 370 So. 2d at 388.

48. 397 So. 2d 1120 (Fla. 1981) (per curiam).

49. *Id.* at 1127.

50. *Id.* at 1122. The court reasoned that a "reversal for insufficient evidence is essentially an acquittal," while a reversal for procedural error "does not indicate that the government's case failed. . . ." *Id.*

51. *Id.* at 1126.

52. *Id.* at 1122-23.

declared that such reversals were of questionable validity and, although declining to recharacterize its prior holding,[53] admitted the impropriety of reweighing the evidence in *Tibbs I*.[54] Finally, the *Tibbs II* court held that reversals based on evidentiary weight were not to be employed by Florida courts in the future.[55]

The Holding and Rationale of Tibbs v. Florida

The Supreme Court granted certiorari[56] to consider "whether the Double Jeopardy Clause bars retrial after a state appellate court sets aside a conviction on the ground that the verdict was against 'the weight of the evidence.' "[57] The *Tibbs* Court held that retrial is not barred in such circumstances.[58] In so holding, the Court emphasized the general rule that the double jeopardy clause does not preclude retrial of a defendant who succeeds in obtaining a reversal of his conviction; the Court viewed *Burks* as establishing only a "narrow exception"[59] to this rule. The *Tibbs* Court also viewed *Burks* as resting on two policies. The first policy concerned the special significance which must be accorded judgments of acquittal in light of the double jeopardy implications of retrial.[60] The Court stated that a finding of insufficient evidence should be given the same effect as an acquittal "because it means that no rational factfinder could have voted to convict the defendant."[61] The second policy involved the principle that the purpose of the double jeopardy clause was to deny the prosecution "another opportunity to supply evidence which it failed to muster in the first proceeding."[62]

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53. *Id.* at 1126-27.

54. *Id.* at 1126.

55. *Id.* at 1125. The Florida Supreme Court considered the same cases that the appellate court had viewed as reversals based on the weight of the evidence and "prefer[red] to view these ambiguous decisions as reversals which were based on sufficiency." *Id.* at 1124. For a discussion of these cases, see *supra* note 46 and accompanying text. Because the Florida Supreme Court was not convinced that reversals based on evidentiary weight had been valid in Florida, it concluded that "[h]enceforth, no appellate court should reverse a conviction or judgment on the ground that the weight of the evidence is tenuous or insubstantial." 397 So. 2d at 1125.

56. Tibbs v. Florida, 102 S. Ct. 502 (1981).

57. Tibbs v. Florida, 102 S. Ct. 2211, 2213 (1982). The Court issued a memorandum decision granting certiorari, *see supra* note 56; therefore, the Court's reason for granting review was expressed only in the decision on the merits.

58. 102 S. Ct. at 2213.

59. *Id.* at 2217. The Court stated the general rule that a "criminal defendant who successfully appeals a judgment against him 'may be tried anew . . . for the same offence of which he had been convicted.'" *Id.* (quoting United States v. Ball, 163 U.S. 662, 672 (1896)). Nevertheless, the *Tibbs* Court recognized that *Burks* precludes retrial after a reviewing court has made a finding of insufficiency of evidence. *Id.*

60. *Id.* at 2218.

61. *Id.*

62. *Id.* (quoting Burks v. United States, 437 U.S. 1, 11 (1978)). The Court reasoned that this policy "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." *Id.* The *Burks* Court had declared that denying the prosecution a second chance to muster evidence was central to the goal of the double jeopardy

The *Tibbs* Court held that these policies did not apply when a verdict was reversed for being against the weight of the evidence.[63] Accordingly, the Court held that the double jeopardy clause did not bar retrial in such situations.[64]

The *Tibbs* majority attempted to justify this holding by analyzing reversals based on the weight of evidence,[65] and by distinguishing such reversals from those based on the insufficiency of evidence.[66] Of particular importance to the Court was the notion that a reversal based on the evidentiary weight was not the equivalent of an acquittal.[67] Instead, the Court declared that in such cases the reversing court acts as a "thirteenth juror" by reweighing the evidence.[68] The Court analogized this occurrence to a deadlocked jury situation[69] in which it is settled that there is no double jeopardy bar to retrial.[70] The *Tibbs* majority also believed that a reversal based on the weight of the evidence could not occur unless the prosecution already had presented evidence legally sufficient for a conviction.[71] Under this view, a reversal based on evidentiary weight is not the same as one based on insufficient evidence. Moreover, the Court stated that a reversal based on the weight of the evidence did not necessitate a further reversal if the same evidence resulted in another guilty verdict at a subsequent trial.[72] The majority added that retrial merely would allow the defendant a "second chance

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clause of preventing multiple prosecutions for the same offense. Burks v. United States, 437 U.S. 1, 11 (1978).

63. 102 S. Ct. at 2218. For a detailed discussion of the applicability of the *Burks* policies in the case of a reversal based on the weight of the evidence, see *infra* text accompanying notes 87-111.

64. 102 S. Ct. at 2221.

65. *Id.* at 2218-19.

66. *Id.* at 2218.

67. *Id.* In contrast, the Court considered a reversal based on insufficiency of evidence the equivalent of an acquittal. *See supra* text accompanying note 61.

68. 102 S. Ct. at 2218. For an explanation of a court's role as a thirteenth juror when reversing on the weight of the evidence, see *supra* notes 7-9 and accompanying text. For an explanation of a court's role when reversing on the sufficiency of evidence, *see supra* notes 4-5 and accompanying text.

69. 102 S. Ct. at 2218. The Court offered no authority for this analogy.

70. The Supreme Court has advanced several reasons for permitting retrial after a mistrial due to a deadlocked jury. First, the Court has noted that a jury's failure to agree on a verdict is not tantamount to reasonable doubt as to the defendant's guilt and, thus, is not equivalent to an acquittal, which would bar retrial. *See* Arizona v. Washington, 434 U.S. 497, 509 (1978). Second, the Court has expressed fears that if retrial after such an occurrence were always barred, a trial court might coerce a jury into breaking its deadlock, resulting in an unjust judgment. *See id.* at 509-10. The Court offered a long list of Supreme Court precedents to support the proposition that retrial is permitted in a deadlocked jury situation. 102 S. Ct. at 2218 n.17 (citing, inter alia, United States v. Sanford, 429 U.S. 14, 16 (1976) (per curiam); Johnson v. Louisiana, 406 U.S. 356, 401-02 (1972) (Marshall, J., dissenting); Downum v. United States, 372 U.S. 734, 735-36 (1963)).

71. 102 S. Ct. at 2219. The Court offered no authority for this proposition. For an explanation of what constitutes legally insufficient evidence, see *supra* note 4.

72. 102 S. Ct. at 2219 n.18. For a detailed discussion of whether a reversal on the weight of the evidence would necessitate a reversal on the same evidence at a subsequent trial, see *infra* text accompanying notes 91-94.

at acquittal."[73] Consequently, under such circumstances, the Court did not consider a new trial to be the type of governmental oppression that the double jeopardy clause was designed to prevent.[74]

The *Tibbs* majority also considered some of the practical ramifications of its decision. The Court rejected Tibbs's arguments that a distinction between evidentiary weight and sufficiency would be unworkable,[75] and that such a distinction would undermine *Burks*.[76] Instead, the majority reasoned that since both appellate and trial court judges regularly make that distinction,[77] there was no basis for believing that they would be unable to do so in the aftermath of *Tibbs*.[78] Further, the Court maintained that because *Jackson v. Virginia*[79] established that due process requires convictions to be based on sufficient evidence, courts would be prevented from "mask[ing] reversals based on legally insufficient evidence as reversals grounded on the weight of the evidence."[80]

Similarly, the *Tibbs* Court discussed the practical problems that might have resulted from a contrary ruling.[81] The Court reasoned that state legislators might respond to such a ruling by forbidding appellate courts to reweigh evidence if it would result in a bar to retrial.[82] Moreover, the Court feared that a contrary ruling might lead to restrictions on a trial court judge's power to order a retrial.[83] Either result, the Court noted, might be detrimental to defendants by preventing judges from providing full protection against unjust convictions.[84]

Finally, the Court rejected Tibbs's suggestion that the reversal in *Tibbs I* was based not on the weight of the evidence, but rather on a finding of insufficiency.[85] The Court considered any ambiguity on this issue to have

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73. 102 S. Ct. at 2219.

74. *Id.* The Court reasoned that "[w]hen the State has secured one conviction based on legally sufficient evidence, it has everything to lose and little to gain by retrial." *Id.* at 2219 n.19.

75. *Id.* at 2219-20.

76. *Id.*

77. *Id.* at 2220. The Court cited several state and federal appellate court decisions as authority. *Id.* at 2220 n.20 (citing, inter alia, United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980); United States v. Weinstein, 452 F.2d 704, 714-16 (2d Cir. 1971), *cert. denied,* 406 U.S. 917 (1972); United States v. Shipp, 409 F.2d 33, 36-37 (4th Cir. 1969), *cert. denied,* 396 U.S. 864 (1969); Dorman v. State, 622 P.2d 448, 453-54 (Alaska 1981)).

78. *Id.* at 2220.

79. 443 U.S. 307, 316 (1979). For a discussion of *Jackson,* see *supra* note 4.

80. 102 S. Ct. at 2220.

81. *Id.* at 2220 n.22.

82. *Id.* Although fearing that state legislators might prohibit courts from reweighing evidence if it would result in a bar to retrial, the Court seemed to ignore the fact that the Florida Supreme Court, in *Tibbs II,* prohibited Florida courts from reweighing evidence if retrial would be allowed upon reversal. *See* Tibbs v. State, 397 So. 2d 1120, 1125 (Fla. 1981). Therefore, if the Court were concerned with state courts having continued power to reweigh evidence, it should have reached a contrary ruling, at least insofar as Florida was concerned.

83. 102 S. Ct. at 2220 n.22.

84. *Id.*

85. *Id.* at 2220-21. Tibbs relied heavily on the notion that the reversal in *Tibbs I* was based

been resolved in *Tibbs II* when the Florida Supreme Court characterized its earlier reversal as based on the weight of the evidence.[86]

ANALYSIS AND CRITICISM OF THE *TIBBS* HOLDING

The main thrust of the Court's holding in *Tibbs* was its conclusion that the two policies underlying the *Burks* decision were not applicable when a conviction was reversed for being against the weight of the evidence.[87] Consequently, each policy consideration should be carefully examined. One policy articulated in *Burks* involved the special significance attached to acquittals under the double jeopardy clause. Although the *Tibbs* Court did not acknowledge it, this policy applies equally to reversals based on the weight of evidence as to those based on evidentiary insufficiency. The *Burks* Court placed great importance upon whether a reversal was based on a consideration of the defendant's guilt or innocence.[88] Similarly, the Florida Supreme Court displayed a deep concern with Tibbs's guilt or innocence when it enumerated the weaknesses in the prosecution's evidence.[89] Because a reversal based on the weight of the evidence involves a broad consideration of the credibility of the entire evidence,[90] it logically follows that any such reversal is based largely on a consideration of a defendant's guilt or innocence.

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on insufficiency of evidence. Brief for Appellant at 6-7, Tibbs v. Florida, 102 S. Ct. 2211 (1982). Perhaps his argument would have been successful if it had been based on the purpose of the double jeopardy clause and the applicability to his reversal of the policies underlying *Burks*.

86. 102 S. Ct. at 2221. This controversy was due largely to the ambiguous nature of the Florida Supreme Court's opinion in *Tibbs I*. While the opinion was couched in terms of the weight of the evidence, it stated that "[h]uman liberty should not be forfeited by a conviction under evidence which is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt." Tibbs v. State, 337 So. 2d 788, 791 (Fla. 1976) (quoting McNeil v. State, 104 Fla. 360, 361, 139 So. 791, 792 (1932)). The United States Supreme Court considered this language to be inconsistent with the result of *Tibbs I*. 102 S. Ct. at 2221 n.23. In *Tibbs II*, the Florida court attempted to clarify its holding in *Tibbs I*. *See supra* text accompanying notes 51-55. It is interesting to note, however, that *Tibbs I* was rendered by Justices Sundberg, Hatchett, Boyd and England, and that these same justices, with the exception of Justice Hatchett (retired), dissented in *Tibbs II*. *See* Brief for Appellant at 6, Tibbs v. Florida, 102 S. Ct. 2211 (1982). These dissenters asserted that Tibbs should not be retried, and that the reversal in *Tibbs I* was based on insufficiency. Tibbs v. State, 397 So. 2d 1120, 1127 (Fla. 1981) (Sundberg, J., concurring in part and dissenting in part); *id.* at 1130 (England, J., concurring in part and dissenting in part); *id.* at 1130-31 (Boyd, J., dissenting). For a discussion of the dissenting opinion in *Tibbs*, see *infra* note 111.

87. 102 S. Ct. at 2218. The *Tibbs* Court relied on dicta from Hudson v. Louisiana, 450 U.S. 40 (1981), as authority for the proposition that the rule established in *Burks* was inapplicable to reversals based on the weight of evidence. The *Hudson* Court, however, expressly stated that it was not deciding whether the double jeopardy clause would bar retrial after a conviction was reversed on the basis that the verdict was against the weight of the evidence. 450 U.S. at 44 n.5. For a discussion of the two policies underlying the *Burks* decision, see *supra* notes 60-63 and accompanying text.

88. *See supra* text accompanying note 31. The emphasis placed on a defendant's guilt or innocence also was present in United States v. Scott, 437 U.S. 82 (1978).

89. *See supra* notes 41-42 and accompanying text.

90. *See supra* notes 7-9 and accompanying text.

Therefore, the *Tibbs* Court should have accorded the same degree of significance to reversals based on evidentiary weight as *Burks* attached to acquittals.

In refusing to do so, however, the *Tibbs* majority rejected the idea that a conviction based on the same evidence, at a subsequent trial, necessarily would have to be reversed on the ground that it was against the weight of the evidence.[91] The Court did not believe that the evidentiary weight standard was applied equally to successive convictions. Noting that reversals based on evidentiary weight are made in the interests of justice, the *Tibbs* Court reasoned that while reversal of a first conviction might serve that interest, reversal after a second conviction might not.[92] A contrary view, however, had been expressed in lower federal court decisions; under this view, when the government has no additional evidence to present at the second trial, or when the appellate court concludes that the evidentiary deficiency cannot be corrected, the trial court should be instructed to dismiss the indictment.[93] Moreover, as the Florida Supreme Court declared in a decision relied upon by the *Tibbs* majority, a conviction should only be reversed for being against the weight of the evidence when it is "plainly, manifestly, palpably, clearly or decidedly against the evidence."[94] Under these two approaches, a subsequent conviction on the same evidence would require reversal. Thus, it can be argued that a reversal on the basis of evidentiary weight should be accorded the same degree of significance that *Burks* attached to acquittals.

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91. 102 S. Ct. at 2219 n.18.

92. *Id.* In reaching this conclusion, the Court relied on a 1926 Florida Supreme Court decision, Blocker v. State, 92 Fla. 878, 110 So. 547 (1926) (en banc), and on a footnote in a more recent Second Circuit decision, United States v. Weinstein, 452 F.2d 704 (2d Cir. 1971), *cert. denied,* 406 U.S. 917 (1972). The *Blocker* court stated:

> There is in this State no limit to the number of new trials that may be granted in any case, but it takes a strong case to require an appellate court to grant a new trial in a case upon the ground of insufficiency of conflicting evidence to support a verdict when the finding has been made by two juries. . . .

92 Fla. at 893, 110 So. at 552. The Second Circuit noted that when a defendant was convicted by a third jury, it would be difficult for any judge to conclude that another trial was required in the interests of justice. *Weinstein,* 452 F.2d at 714 n.14.

93. *See* United States v. Wiley, 517 F.2d 1212, 1220 n.39 (D.C. Cir. 1975) (to allow the prosecution more than one fair chance to present its evidence would unjustly increase its prospects of obtaining a conviction because it would be able to employ the evidence presented by the defense to establish a prima facie case, and furthermore, the prosecution could correct any tactical errors it made in the first proceeding); *see also* United States v. Snider, 502 F.2d 645, 656 (4th Cir. 1974) (when evidence is insufficient and cannot be cured at a subsequent trial, the indictment should be dismissed rather than a new trial ordered); United States v. Edmons, 432 F.2d 577, 586 (2d Cir. 1970) (when the prosecution's case was based entirely on the fruit of illegal arrests and there was no indication that admissible evidence could be introduced at a new trial, a dismissal of the indictment was required); Phillips v. United States, 311 F.2d 204, 207 (10th Cir. 1962) (recognizing its power under *Bryan* to order a retrial, the court "deem[ed] a new trial inappropriate . . . [because] there [was] nothing in the record to indicate that relevant testimony [was] available or would be adduced upon a new trial").

94. Blocker v. State, 92 Fla. 878, 893, 110 So. 547, 552 (1926) (en banc). For a discussion of the *Tibbs* majority's reliance on *Blocker,* see *supra* notes 91-92 and accompanying text.

The Court's refusal to treat the reversal of Tibbs's conviction as an acquittal appears to be inconsistent with its prior statement in *United States v. Martin Linen Supply Co.*[95] In that case, the Court stated that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action."[96] The *Martin Linen* Court further stated that the important question was "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[97] While reversing on the basis of evidentiary weight, the Florida Supreme Court in *Tibbs I* enumerated several weaknesses in the state's evidence.[98] This should be regarded as a resolution of at least some of the factual elements of the offense with which Tibbs was charged. The application of the *Martin Linen* test to the state supreme court's opinion in *Tibbs I* strengthens the contention that Tibbs's reversal should have been accorded the same degree of significance that *Burks* attached to acquittals.[99]

The other policy underlying *Burks,* which the *Tibbs* Court found inapplicable to reversals based on evidentiary weight, was the notion that the double jeopardy clause precludes the prosecution from being granted a second opportunity to present evidence which it failed to present at the first trial.[100] The *Tibbs* majority characterized a retrial after a reversal based on the weight of the evidence as merely a second opportunity for the defendant to seek acquittal.[101] Furthermore, the majority quoted from *United States v. DiFrancesco*[102] as authority for the proposition that providing the defendant with a second chance to seek acquittal would not create " 'an unac-

95. 430 U.S. 564 (1977) (double jeopardy barred a government appeal of a district court order granting a defendant's motion for acquittal under FED. R. CRIM. P. 29(c), which permits a judge to enter a judgment of acquittal despite the return of a guilty verdict by the jury).

96. 430 U.S. at 571.

97. *Id.*

98. *See supra* note 41.

99. The dissenting Justices in *Tibbs* argued that the majority's emphasis on judgments of acquittal was misplaced. 102 S. Ct. at 2222 (White, J., dissenting). Justice White was joined in his dissent by Justices Brennan, Marshall, and Blackmun. The majority cited United States v. DiFrancesco, 449 U.S. 117 (1980), and United States v. Scott, 437 U.S. 82 (1978), as authority for placing such significance on judgments of acquittal. 102 S. Ct. at 2218 n.15. Yet, the *Tibbs* Court did not indicate how these cases support such an analysis. Moreover, these cases fail to propose that an acquittal is required for double jeopardy protection; rather, they establish that the goal of the double jeopardy clause—protecting defendants from the oppression of multiple prosecutions—can be served by affording finality to acquittals. *See* United States v. DiFrancesco, 449 U.S. 117, 129-30 (1980) (quoting Green v. United States, 355 U.S. 184, 188 (1957)); United States v. Scott, 437 U.S. 82, 91-92 (1978). The dissent, therefore, argued that refusal to treat Tibbs's reversal as an acquittal should not have been fatal to his double jeopardy objection to retrial because double jeopardy goals should be achieved when a state has failed to meet its own evidentiary requirements. 102 S. Ct. at 2222 (White, J., dissenting). While this argument is appealing, it is perhaps more persuasive to argue that the Court should have treated Tibbs's reversal as an acquittal, making fully applicable the *Burks* policy of according special weight to acquittals.

100. 102 S. Ct. at 2218 (quoting Burks v. United States, 437 U.S. 1, 11 (1978)).

101. *Id.* at 2219.

102. 449 U.S. 117 (1980).

ceptably high risk that the Government, with its superior resources, [will] wear down [the] defendant' and obtain conviction solely through its persistence."[103]

Yet, by quoting the "unacceptably high risk" language in *DiFrancesco* out of context, the *Tibbs* Court completely misconstrued that case. In *DiFrancesco,* the Court declared that when there has been an acquittal, "*however mistaken the acquittal may have been* [the double jeopardy clause bars retrial because] there would be an unacceptably high risk"[104] of wearing down the defendant. Similarly, the *Tibbs* Court erroneously quoted from *United States v. Scott*[105] to support the proposition that "[g]iving the defendant this second opportunity [to seek acquittal] . . . hardly amounts to 'governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.'"[106] The *Scott* Court, however, did not intend to establish the rule that when a reversal is based on the weight of the evidence, a second chance to seek acquittal is proper; rather, the Court's declaration in *Scott* only suggested that when a reversal results from a "statutory right of appeal"[107] or a procedural error, then retrial is not the sort of government oppression that the double jeopardy clause was designed to prevent.[108] In fact, when a reversal is based on evidentiary considerations, although the defendant is given a second chance to seek an acquittal, the *Scott* Court maintained that the defendant would be subject to the relentless pursuit of an all-powerful state.[109] Thus, the *Tibbs* majority's reliance on both the "high risk" language of *DiFrancesco,* and the "governmental oppression" language of *Scott,* was misplaced. Consequently, the majority's conclusion that it simply was "afford[ing] the defendant a second opportunity to seek a favorable judgment"[110] was unsubstantiated.[111]

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103. 102 S. Ct. at 2219 (quoting United States v. DiFrancesco, 449 U.S. 117, 130 (1980)).

104. United States v. DiFrancesco, 449 U.S. 117, 130 (1980) (emphasis added). It also is interesting to note that *DiFrancesco* involved the right of the government to appeal a defendant's sentence and, thus, was unrelated to a *Tibbs*-type evidentiary problem.

105. 437 U.S. 82 (1978).

106. 102 S. Ct. at 2219 (quoting United States v. Scott, 437 U.S. 82, 91 (1978)).

107. United States v. Scott, 437 U.S. 82, 91 (1978).

108. *Id.* The *Scott* Court reasoned that when the government is willing to put on its case, but the defendant opts to terminate the proceeding for reasons unrelated to his guilt or innocence, the goal of protecting the defendant from oppressive state prosecutions is irrelevant. *Id.* at 96.

109. *Id.*

110. 102 S. Ct. at 2219.

111. The *Tibbs* dissent argued that a reversal of a subsequent conviction on the same evidence would be required. Therefore, it was the prosecution, not the defendant, that was obtaining the second chance. *Id.* at 2221 (White, J., dissenting). Further, the dissent maintained that the prosecution at Tibbs's trial had received a full and fair opportunity, free of procedural error, to present its best case. *Id.* at 2221-22. Thus, the dissent in *Tibbs* argued, the only purpose for allowing a retrial of Tibbs would be to provide the prosecution with an opportunity to present new evidence. *Id.* at 2222. If the prosecution had no new evidence, reprosecution would serve only to harass the defendant. *Id.* Therefore, the dissent concluded that because one policy of the double jeopardy clause was to deny the prosecution a second opportunity

An analysis of *Tibbs v. Florida* also requires a discussion of the purpose of the double jeopardy clause. The origins of the double jeopardy concept may be traced to ancient Greek and Roman law.[112] As one scholar has noted, a "moral sentiment" evolved that "no man should suffer twice for a single act."[113] Yet, when the double jeopardy clause was adopted by the first Congress it was enacted "without much debate or indication of its intended meaning."[114]

Nevertheless, relying on the language of Roger Sherman, a member of the first Congress,[115] the *Tibbs* Court determined that retrying a defendant whose conviction had been reversed was consistent with the intent of the framers of the fifth amendment. Sherman stated that if a defendant was "convicted on the first [trial], and anything should appear to set the judgment aside, he [could receive] a second [trial]."[116] Sherman's major concern, however, was that the right of a defendant to appeal a conviction should not be precluded by the double jeopardy clause;[117] hence, Sherman was not interested primarily in whether the government would have the ability to retry a defendant whose conviction had been reversed. Thus, the *Tibbs* Court fundamentally misconstrued Sherman's concern over the right of appeal when, based on that concern, the majority concluded that the framers of the fifth amendment envisioned no double jeopardy bar to retrial after a conviction had been reversed.

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to introduce evidence which it failed to produce in the first proceeding, retrial should be barred after a reversal based on the weight of the evidence. *Id.* at 2222-23.

112. *See* Bartkus v. Illinois, 359 U.S. 121, 151-55 (1959) (Black, J., dissenting) (tracing the development of the double jeopardy concept from ancient Greece to the present); United States v. Jenkins, 490 F.2d 868, 870 (2d Cir. 1973) (quoting the Greek orator Demosthenes who, in 355 B.C., stated that "the laws forbid the same man to be tried twice on the same issue"), *aff'd*, 420 U.S. 358 (1975); *see also* J. SIGLER, DOUBLE JEOPARDY 1-37 (1969) (discussing the history of double jeopardy concepts from the ancient Greeks to their adoption by the first Congress). *See generally* M. FRIEDLAND, DOUBLE JEOPARDY 5-15 (1969) (tracing the history of the double jeopardy concept in English law).

113. J. SIGLER, *supra* note 112, at 35. Sigler found this sentiment present among the Roman jurists and canon lawyers. *Id.*

114. *Id.* at 31.

115. 102 S. Ct. at 2217 n.14.

116. 1 ANNALS OF CONG. 753 (J. Gales ed. 1789). Several other members of the first Congress commented on the meaning of the proposed double jeopardy clause. For example, Samuel Livermore believed that the clause was "essential" because "persons may be brought to trial for crimes they are guilty of, but for want of evidence may be acquitted; in such cases, it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offense. . . ." *Id.* Allowing retrial after a finding of lack of evidence seems inconsistent with this language. Another member of the first Congress, Egbert Benson of New York, expressed the idea that the double jeopardy clause should not stand in the way of a defendant's right to appeal and, therefore, a defendant may be entitled to more than one trial. *Id.; see also* J. SIGLER, *supra* note 112, at 30 (discussion of the debates on the double jeopardy clause in the first Congress).

117. United States v. Wilson, 420 U.S. 332, 340-41 (1975) (discussing the intent of the framers of the fifth amendment); *see also* J. SIGLER, *supra* note 112, at 30 (discussing Sherman's approval of a legislative effort to protect a defendant's right of appeal).

In light of the sparse indications of the framers' intent, an examination of judicial constructions is essential to determine the purpose of the double jeopardy clause. Perhaps the clearest expression of the goal of this clause was articulated by the Supreme Court in *Green v. United States*.[118] In an often quoted passage,[119] the *Green* Court declared:

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[120]

This admirable purpose of protecting individuals from the hazards of multiple prosecutions has served as the basis of many Supreme Court decisions in addition to *Green*.[121] Nevertheless, by holding that the double jeopardy clause imposed no barriers to retrying a defendant who successfully appealed a conviction, the *Tibbs* majority seemed to ignore the underlying purpose of the provision.[122] The Court, however, found support in two sources for creating this exception to the purpose of the double jeopardy clause.

First, relying on *United States v. Tateo*,[123] the *Tibbs* Court stated that society could not afford to grant immunity to all defendants who succeed

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118. 355 U.S. 184 (1957).

119. Recent Supreme Court decisions quoting this passage from *Green* include the following: United States v. DiFrancesco, 449 U.S. 117, 127-28 (1980); Illinois v. Vitale, 447 U.S. 410, 427 (1980) (Stevens, J., dissenting); United States v. Scott, 437 U.S. 82, 87 (1978); Crist v. Bretz, 437 U.S. 28, 35 (1978); Arizona v. Washington, 434 U.S. 497, 504 n.13 (1978); Abney v. United States, 431 U.S. 651, 661-62 (1977).

120. 355 U.S. at 187-88.

121. Burks v. United States, 437 U.S. 1 (1978), is perhaps the best example of a Supreme Court decision based on the double jeopardy clause purpose enunciated in *Green*. For a full discussion of *Burks*, see *supra* notes 21-31 and accompanying text. Another case illustrating this goal of the double jeopardy clause is United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (double jeopardy clause bars appeal of acquittal under FED. R. CRIM. P. 29(c), which permits a judge to enter a judgment of acquittal despite the return of a guilty verdict by the jury). The *Martin Linen* Court stated that "[a]t the heart of [the double jeopardy clause] is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression." *Id.* at 569. Finally, a third case expressing similar concerns is United States v. Wilson, 420 U.S. 332 (1975) (double jeopardy clause is not a bar to government appeal from a district court post-verdict dismissal of an indictment). The *Wilson* Court found the common law origins of the double jeopardy clause to be "directed at the threat of multiple prosecutions. . . ." *Id.* at 342.

122. 102 S. Ct. at 2217.

123. 377 U.S. 463 (1964). *Tateo* established what may be termed the "fairness rationale" for allowing retrial after a reversal for procedural error. The *Tateo* Court stated that "[c]orresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial." *Id.* at 466; *see* Note, *Prevention of Multiple Prosecutions*, *supra* note 18, at 560 (discussion of the *Tateo* "fairness rationale" as a justification for allowing retrial after a conviction has been reversed).

in obtaining reversals of their convictions.[124] *Tibbs* misapplied *Tateo,* however, because that case dealt with a reversal based on procedural error;[125] by contrast, the reversal in *Tibbs* was based upon the weight of evidence. One scholar has suggested that society's interest in retrial does not apply with equal force to reversals for lack of evidence,[126] because after a defendant's conviction has been reversed for evidentiary reasons "[s]ociety should have no more fear of releasing such a defendant than of releasing a defendant who has been acquitted by a jury. . . ."[127] Accordingly, because the *Tibbs* reversal was based upon a broad consideration of the credibility of the evidence, the societal interest in retrial was minimized. Consequently, the *Tibbs* Court's first justification for creating an exception to the double jeopardy clause, which was adopted to prevent multiple prosecutions, was based on societal interests that had little force under the circumstances presented by the *Tibbs* case.

The *Tibbs* majority relied on *United States v. Scott*[128] to establish a second justification for creating its exception and, thereby, allowing defendants who successfully appeal their convictions to be retried. *Tibbs* interpreted *Scott* as standing for the proposition that "retrial after reversal of a conviction is not the type of governmental oppression targeted by the Double Jeopardy Clause."[129] This interpretation, however, fails to recognize the distinction drawn in *Scott* between reversals based on questions of guilt or innocence, and those based on constitutional, statutory, or other procedural grounds.[130] *Scott* would be more accurately interpreted as supporting the contention that no governmental oppression exists when a defendant whose conviction was reversed on the grounds of procedural error is retried.[131] The *Tibbs* Court,

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124. 102 S. Ct. at 2217 (citing United States v. Tateo, 377 U.S. 463, 466 (1964)). This notion is based on the fear that criminals will be released only to prey upon society. *See* Comment, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence,* 31 U. CHI. L. REV. 365, 370-71 (1964) (discussion of the societal interests involved in retrial) [hereinafter cited as Comment, *A New Trial After Appellate Reversal*].

125. 377 U.S. at 464 (trial testimony and trial judge's comments tainted the voluntariness of a guilty plea).

126. *See* Thompson, *supra* note 15, at 517-18.

127. Comment, *A New Trial After Appellate Reversal, supra* note 124, at 371. The author reasoned that after an appellate reversal for lack of evidence, there is no presumption that the prosecution's burden of proof has been met. Instead, "the appellate court is specifically holding that the burden has not been met." *Id.* Thus, a defendant whose conviction is reversed on that basis is in a position quite similar to that of a defendant who has been acquitted.

128. 437 U.S. 82 (1978).

129. 102 S. Ct. at 2217 (citing United States v. Scott, 437 U.S. 82, 91 1978)).

130. United States v. Scott, 437 U.S. 82, 98 n.11 (1978). For a discussion of the *Scott* Court's concern with whether a reversal was based upon a defendant's guilt or innocence, see *supra* note 30.

131. The "governmental oppression" notions employed by the *Tibbs* Court were not used by the *Scott* Court in reference to reversals based on the soundness of the evidence. Instead, the *Scott* Court found that retrial of a criminal defendant, who successfully had obtained a reversal of his conviction on *procedural* grounds, was "not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." 437 U.S.

therefore, wholly misconstrued *Scott* as justifying its exception to the purpose of the double jeopardy clause.

To summarize, the purpose of the double jeopardy clause is to protect individuals from multiple prosecutions for the same offense. Consequently, the retrial of a defendant whose conviction has been reversed can be justified only when that reversal was based on procedural error, and, therefore, not based on considerations of guilt or innocence. Retrial after a reversal based on the weight of the evidence, which inescapably involves a consideration of guilt or innocence, clearly violates the purpose of the double jeopardy clause. Moreover, the policies underlying the *Burks* decision, which accord special significance to acquittals and deny the prosecution a second chance to present evidence which it failed to present at the first trial, clearly are applicable to a reversal based on evidentiary weight.

THE IMPACT OF *TIBBS V. FLORIDA*

The *Tibbs* decision erodes the fifth amendment right not to be "twice put in jeopardy."[132] It requires a defendant, whose conviction already has been reversed by an appellate court on issues dealing with guilt or innocence,[133] to face for a second time the "heavy pressures and burdens—psychological, physical, and financial,"[134] that accompany criminal charges. By allowing a defendant to be retried after his conviction was reversed because it was against the weight of the evidence,[135] the *Tibbs* decision also will have a powerful impact on appellate review of convictions.

The most obvious problem raised by this decision is the possibility that an appellate judge who seriously doubts the sufficiency of the evidence might employ *Tibbs* to avoid ruling on the sufficiency question.[136] In other words, to avoid reversing a conviction on the basis of evidentiary insufficiency, a judge might rule that the conviction was against the weight of the evidence and, subsequently, remand the case for a new trial.[137] The *Tibbs* majority rejected this possibility, relying on the due process requirement imposed on

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at 91. Nevertheless, the *Tibbs* Court relied on *Scott* as support for the general idea that retrial of a defendant whose conviction was reversed based on the weight of the evidence did not amount to governmental oppression. 102 S. Ct. at 2217.

132. U.S. CONST. amend. V.

133. *See supra* text accompanying notes 88-89.

134. Breed v. Jones, 421 U.S. 519, 530 (1975) (prosecution of a youth in adult court, on the same offense that was the subject of an adjudicatory proceeding in juvenile court, held to violate the double jeopardy clause).

135. 102 S. Ct. at 2221.

136. *Id.* at 2223 (White, J., dissenting).

137. *Id.* The Florida Supreme Court, in *Tibbs II,* also recognized that appellate tribunals might have been tempted "to direct a retrial merely by styling reversals as based on 'weight' when in fact there is a lack of competent substantial evidence to support the verdict of judgment and the double jeopardy clause should operate to bar retrial." Tibbs v. State, 397 So. 2d 1120, 1125-26 (Fla. 1981). Therefore, the state supreme court prohibited other Florida courts from using an evidentiary weight standard to reverse convictions. *Id.* at 1125.

courts by *Jackson v. Virginia*[138] to reach a finding of insufficient evidence when it exists.[139] The *Tibbs* dissent, on the other hand, viewed the majority holding as creating an avenue to undermine the decisions in both *Burks* and *Jackson*.[140] The possibility of undermining the principles established by those decisions compelled the Florida Supreme Court, in *Tibbs II,* to abolish appellate court reversals of convictions when such reversals were based on evidentiary weight.[141] There are, however, other jurisdictions which still allow a conviction to be reversed in the interest of justice if it is determined to be against the weight of the evidence.[142] Therefore, the *Tibbs* decision may have the effect of subjecting defendants to retrials in situations where the principles established in *Burks* and *Jackson* otherwise would combine to bar retrial.

Tibbs also undermines clarification of the double jeopardy clause and its policies recognized in *Burks*. The *Burks* decision can be viewed as part of the "closer look"[143] at the double jeopardy clause that was taken by the Supreme Court in the mid-1970s. *Burks* clarified the *Bryan-Forman* cases[144] by establishing that retrial was permitted after a reversal due to procedural error, but not after a reversal due to a failure of proof.[145] The *Tibbs* Court sanctioned a "third category"[146] of reversal, one based on evidentiary weight, which may lead either to inconsistent appellate results, or to burdening higher courts with the task of determining whether appellate reversals were based

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138. 443 U.S. 307, 316-18 (1979).

139. 102 S. Ct. at 2220.

140. *Id.* at 2223 (White, J., dissenting). If a judge reversed a conviction on the weight of the evidence, instead of making a finding of evidentiary insufficiency, the *Burks* double jeopardy bar to retrial would be undermined. In addition, the dissent stated that a judge's desire to allow retrial might influence his decision whether to reverse on the weight or sufficiency of the evidence, thereby undermining *Jackson*. *Id.*

141. *See supra* note 137.

142. *See, e.g.,* FED. R. CRIM. P. 33; ALASKA R. CRIM. P. 33; MICH. COMP. LAWS ANN. § 770.1 (West 1982); R.I. SUPER. CT. R. CRIM. P. 33.

143. *See, e.g.,* United States v. Martin Linen Supply Co., 430 U.S. 564, 568-69 (1977) (after a "closer look" it is evident that the double jeopardy clause was "directed at the threat of multiple prosecutions"); United States v. Wilson, 420 U.S. 332, 339 (1975) (Court found it necessary to examine more clearly the policies of the double jeopardy clause to determine the appropriateness of governmental appeals); *see also* Note, *Prevention of Multiple Prosecutions, supra* note 18, at 549 ("In taking a 'closer look,' the Court has viewed the main objective of the double jeopardy clause to be the prevention of multiple prosecutions"). The *Burks* decision fits into this "closer look" category of cases because it was premised on the notion that the double jeopardy clause was designed to prevent multiple prosecutions. *See supra* text accompanying notes 27-28.

144. *See supra* notes 22-24 and accompanying text.

145. *See* Burks v. United States, 437 U.S. 1, 14-16 (1978). For a discussion of the distinction drawn in *Burks* between reversals based on procedural error and those based on evidentiary considerations, see *supra* text accompanying notes 25-30.

146. Tibbs v. State, 397 So. 2d 1120, 1122-23 (Fla. 1981) (the Florida court referred to this category as "appellate reversals where the evidence is technically sufficient but its weight is so tenuous or insubstantial that a new trial is ordered in the interests of justice").

on the weight or sufficiency of evidence.[147] Because these concepts are closely related, confusion between them seems certain.

Finally, the *Tibbs* decision might lead to inefficiency in the criminal justice system.[148] The Court's holding allows the prosecution a second chance to muster evidence after a reversal based on evidentiary weight.[149] Allowing this second chance could "serve to condone and perhaps perpetuate careless prosecutorial trial preparation and practice."[150]

CONCLUSION

An analysis of *Tibbs v. Florida* leads to the conclusion that allowing a defendant to be retried, after his conviction has been reversed on the basis of evidentiary weight, is both contrary to the purpose of the double jeopardy clause, and inconsistent with that provision's policies as articulated in recent Supreme Court decisions. The purpose of the double jeopardy clause is to prevent multiple prosecutions for the same offense. While decisions rendered prior to *Burks* failed to construe the double jeopardy clause as preventing retrial of a defendant whose conviction had been reversed, the *Burks* Court recognized that these cases defeated the purpose of the double jeopardy clause. Thus, *Burks* barred the retrial of a defendant whose conviction had been reversed, unless the reversal was based on procedural error. The justifications for this exception do not apply with equal force to a reversal based on the weight of the evidence. The *Tibbs* Court's inclusion of such a reversal within this exception undermines the goal of the double jeopardy clause. Further, the holding in *Tibbs* is inconsistent with the principles announced in *Burks* because a reversal based on evidentiary weight should be treated as an acquittal, thus barring retrial, and because retrial after such a reversal gives the prosecution a second opportunity to amass evidence. *Tibbs* established a distinction between reversals based on the weight of evidence and those based on the insufficiency of evidence. In drawing this distinction, however, the Court did not recognize the true purpose of the double jeopardy clause.

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147. *Id.* at 1125. The Florida Supreme Court viewed the possibility of "disparate appellate results," and the possibility of having to review appellate reversals based on "evidentiary shortcomings," as two additional reasons for abolishing this category of reversals. *Id.*

148. *Cf.* United States v. Wiley, 517 F.2d 1212 (D.C. Cir. 1975). Although *Wiley* is a pre-*Burks* decision concerning retrial after a finding of insufficiency of evidence, the notion that "confining the Government to a single prosecution furthers sound judicial administration by creating incentives for thorough preparation and careful presentation of the Government's case," *id.* at 1220 n.39, is equally applicable to retrial after a reversal based on the weight of the evidence.

149. 102 S. Ct. at 2219 n.19. The *Tibbs* Court admitted that a "second chance for the defendant, of course, inevitably affords the prosecutor a second try. . . . It is possible that new evidence or advance understanding of the defendant's trial strategy will make the State's case even stronger during a second trial than it was at the first." *Id.*

150. Sumpter v. DeGroote, 552 F.2d 1206, 1213 (7th Cir. 1977) (petitioner's right not to be placed in double jeopardy was violated when her conviction was affirmed in part and remanded for the sole purpose of allowing the prosecution to prove an essential element of the charged offense). While *Sumpter* was an insufficiency case, the idea of careless trial preparation is equally applicable to a *Tibbs*-type evidentiary weight problem.

Considering the policies underlying the *Burks* decision, and the *Scott* Court's emphasis on whether reversals are based on questions of guilt or innocence, a distinction between weight and sufficiency of evidence appears to be improper in the double jeopardy context.

The *Tibbs* Court had the opportunity to extend the protection of the double jeopardy clause to a defendant whose conviction was reversed on the basis of evidentiary weight. The Court's refusal to do so raises the possibility that reviewing courts will employ *Tibbs* to avoid ruling on the sufficiency of evidence, which would result in a greater number of retrials concerning evidentiary questions. The double jeopardy clause should bar retrial of a defendant whose conviction has been reversed on the grounds that it was against the weight of the evidence; to subject such a defendant to the rigors of a second trial is surely the type of government oppression that the clause was designed to prevent.

Robert L. Baker