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Covert James Geary

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DOUBLE JEOPARDY: RETRIAL AFTER REVERSAL OF A CONVICTION ON EVIDENTIARY GROUNDS

The defendant was convicted by a jury of the charges of rape and first degree murder and was sentenced to death. The Florida Supreme Court, on review,¹ held that the only evidence having any merit was the testimony of the rape victim and noted that serious doubt had been raised as to her credibility.² The conviction was reversed and a new trial ordered.³ On remand, the trial court dismissed the case, holding that a reversal by an appellate court on evidentiary grounds prevented retrial under the double jeopardy clause of the fifth amendment to the United States Constitution.⁴ On appeal of the dismissal, the state appellate courts held that where a reversal was made on "weight of the evidence" grounds as opposed to a finding of "insufficient evidence," the protection against double jeopardy did not bar retrial.⁵ On appeal to the United States Supreme Court, it was held that where the evidence has met the test of legal sufficiency as established in *Jackson v. Virginia*⁶ but the court reviewing the jury's verdict finds it against the weight of the evidence, a new trial is not barred by the double jeopardy clause. *Tibbs v. Florida*, 102 S. Ct. 2211 (1982).

As early as the fifteenth century, English courts were using the term "jeopardy" in connection with a defendant's protection against

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1. Review was authorized under Florida Rule of Appellate Procedure 6.16(b), under which the Florida Supreme Court would review the evidence supporting the conviction of a defendant who had been sentenced to death and determine whether the interest of justice required a new trial. See note 5, *infra*, for its repromulgation in 1977 as FLA. R. APP. P. 9.140(f) (Supp. 1982).

2. *Tibbs v. State*, 337 So. 2d 788, 791 (Fla. 1976).

3. The court said, "Our review of the record of this proceeding leaves us with considerable doubt that Delbert Tibbs is the man who committed the crimes for which he has been convicted." *Id.* at 790. The court went on to order a new trial, as the evidence was not satisfactory to establish the identity of the accused as a participant in the crime. *Id.* at 791.

4. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V, cl. 2.

5. *State v. Tibbs*, 370 So. 2d 386 (Fla. Dist. Ct. App. 2d Cir. 1979) (reversing the dismissal), *aff'd*, 397 So. 2d 1120 (Fla. 1981). As the state appellate rules were revised in 1977, review was authorized under FLA. R. APP. P. 9.140(f) (West Supp. 1982):

The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled. 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.

6. 443 U.S. 307 (1979). The test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

multiple trials.⁷ The basic premise was that a defendant should not be tried or punished twice for the same offense.⁸ In *Vaux's Case*,⁹ it was accepted as established that "the life of a man shall not be twice put in jeopardy for one and the same offence, and that is the reason and cause that *autrefois* acquitted or convicted of the same offence is a good plea."¹⁰ Thus, it was settled at an early date that once a defendant had been acquitted or convicted, he could not be retried or repunished for the same offense. Blackstone later summarized four pleas which gave reasons why the defendant ought not be required to answer to a prosecution: (1) *autrefois acquit*, or former acquittal, (2) *autrefois convict*, or former conviction, (3) *autrefois attaint*, or former attainder, and (4) pardon.¹¹ The plea of *autrefois acquit*, said Blackstone,

is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.¹²

The drafters of the fifth amendment engaged in some debate over the extent of the protection against double jeopardy that was to be accorded defendants.¹³ A version of the double jeopardy clause proposed by James Madison provided that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence."¹⁴ Representative Benson argued that the meaning of this provision was doubtful. He contended that although the traditional rule was that a person should not be put in jeopardy

7. Kirk, "Jeopardy" *During the Period of the Year Books*, 82 U. PA. L. REV. 602 (1934). See also J. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL PHILOSOPHY* (1969) for a discussion of the application of double jeopardy principles in England at the time of the American Revolution. Several recent Supreme Court decisions also contain excellent discussions of the common law roots of the protection against double jeopardy. See, e.g., *United States v. Wilson*, 420 U.S. 332 (1974); *Bartkus v. Illinois*, 359 U.S. 121, 150 (1959) (Black, J., dissenting); *Green v. United States*, 355 U.S. 184, 198 (1957) (Frankfurter, J., dissenting).

8. See J. SIGLER, *supra* note 7, at 15.

9. 76 Eng. Rep. 992 (K.B.).

10. *Id.* at 993.

11. 4 W. BLACKSTONE, *COMMENTARIES* *335-8. At common law, attainder was an extinction of civil rights and capacities resulting in the forfeiture of the defendant's entire estate. It was used as a substituted punishment where the defendant had committed treason or felony and received the death sentence. *BLACK'S LAW DICTIONARY* 116 (5th ed. 1979).

12. 4 W. BLACKSTONE, *supra* note 11, at *335-6.

13. See the discussion of this debate in *Tibbs*, 102 S. Ct. at 2217, n.14.

14. 1 *ANNALS OF CONGRESS* 434 (J. Gales ed. 1789).

more than once for the same offense, it was well known that one might be entitled to more than one trial. The humane intention of the clause, he argued, was to prevent more than one punishment.¹⁵ Representative Sherman agreed that Madison's suggestion was ambiguous and added that under the rule existing at that time, one who was found guilty could not obtain a second trial in his favor. When questions are raised as to the fairness of the first conviction, he contended, a second trial would be in the defendant's favor.¹⁶ While the House adopted Madison's language, the concerns voiced there led the Senate to reject Madison's proposal and substitute the language presently appearing in the double jeopardy clause.¹⁷ The phrase "to more than one trial, or punishment" was replaced by "be twice put in jeopardy of life or limb." Thus, the intention of the majority of the drafters of the Bill of Rights was to permit the state to retry the defendant when he succeeded in having his conviction set aside.

In the earliest significant case interpreting the double jeopardy clause, a mistrial had been declared when the jury had been unable to arrive at a verdict.¹⁸ The Supreme Court held that the government had discretion in retrying a defendant in such a case and, in cases of "manifest necessity," the defendant could be retried. The Court also said that retrial is not precluded by the double jeopardy clause when there has been no conviction or acquittal.¹⁹

Some of the earliest federal cases applying the double jeopardy clause to appeals held that a new trial was available after a successful appeal by either the defendant or the prosecution.²⁰ In 1896, the Court limited this rule in *United States v. Ball*,²¹ which, in an historical context, is one of the most significant cases developing the application of the double jeopardy clause to reversals of convictions. In *Ball*, the first trial of three codefendants resulted in one acquittal and two guilty verdicts. The two defendants who were found guilty had their convictions reversed on appeal on the grounds that the indictments were defective. Subsequently, all three codefendants were reindicted,

15. *Id.* at 753.

16. *Id.*

17. See J. SIGLER, *supra* note 7, at 31.

18. *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824).

19. *Id.* at 580. This analysis has continued to the present. In *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), the Court stated that double jeopardy generally consists of three protections: (1) prior acquittals, (2) prior convictions, and (3) multiple punishments for the same offense.

20. *United States v. Harding*, 26 F. Cas. 131 (C.C.E.D. Pa. 1846) (No. 15,301); *United States v. Shoemaker*, 27 F. Cas. 1067 (C.C.D. Ill. 1840) (No. 16,279); *United States v. Keen*, 26 F. Cas. 686 (C.C.D. Ind. 1839) (No. 15,510). *Cf.* *United States v. Gibert*, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15,204).

21. 163 U.S. 662 (1896).

retried, and found guilty. The Supreme Court held on appeal that the acquittal of the first defendant was a bar to any reindictment of him for that offense.²² The Court's holding would logically apply to acquittals ordered by any appellate court as well, because it is the acquittal which gives rise to the bar. The defendants who had their indictments set aside, without a judgment of acquittal, could still be retried.²³ The distinction was made in *Ball* between an acquittal and an appellate dismissal of an indictment. After acquittal, a defendant cannot be retried for that offense.

In a series of decisions in the middle part of this century, the Court began to limit the *Ball* holding. The Court retreated from the distinction between procedural reversals and evidentiary ones and began focusing instead on whether the reversal was made at the appellate or trial court level. A defendant's appeal of his conviction was construed as a waiver of his protection against double jeopardy.²⁴ In *Forman v. United States*,²⁵ the Court failed to distinguish between reversals for procedural errors and reversals for insufficient evidence altogether. The Court instead cited *Ball* for the assertion that appellate reversals did not involve double jeopardy.²⁶ In 1957, in *Green v. United States*,²⁷ the Court described the philosophy behind the double jeopardy clause. The policies there enumerated have been cited and relied upon by federal and state courts through the present:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to 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.²⁸

The *Green* policies against a state making repeated attempts to convict a defendant are basically twofold: it subjects the defendant to

22. *Id.* at 669.

23. *Id.* at 672.

24. *Bryan v. United States*, 338 U.S. 552 (1950) (where defendant successfully appeals his conviction, he waives any double jeopardy protection he might have); *Sapir v. United States*, 348 U.S. 373 (1955) (limiting but affirming, in dicta, the *Bryan* rule that when a defendant asks for a new trial, he may not claim double jeopardy); *Yates v. United States*, 354 U.S. 298 (1957) (applying the *Bryan* waiver rule to cases in which the defendant asks for a new trial in the alternative to a motion for acquittal).

25. 361 U.S. 416 (1960).

26. *Id.* at 425.

27. 355 U.S. 184 (1957).

28. *Id.* at 187-88 (Black, J.).

a continued embarrassment, expense, and ordeal; and it increases the possibility that even though innocent he may be found guilty.

The Supreme Court, in the 1960's, began developing the principle that some appellate reversals may give rise to a valid claim of double jeopardy. The Court, in *United States v. Tateo*,²⁹ allowed a retrial where the defendant's conviction had been reversed because of a procedural error. The Court's holding that the state could always retry a defendant after a procedural error gave rise to the inference that retrials might not be allowed following evidentiary reversals. But by 1969, the Court had yet to go that far, instead only reaffirming *Ball*, as well as the *Bryan-Forman* "waiver" decisions.³⁰

In *Burks v. United States*,³¹ the Court finally limited *Ball* to its facts. The Court noted that *Ball* allowed retrial after trial error and stated that the same policies do not apply when the appellate court finds the evidence legally insufficient to convict the defendant.³² The Court held unanimously that when the government's case is found "so lacking that it should not have even been submitted to the jury,"³³ a retrial is precluded. It is therefore an acquittal, whether at the trial court or appellate level, that gives rise to the protection against double jeopardy. In a related case, *United States v. Scott*,³⁴ the Court adopted a definition of an acquittal. Relying on the earlier case of *United States v. Martin Linen Supply Co.*,³⁵ the Court held that "a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" ³⁶

In another related case, *Greene v. Massey*,³⁷ the Court, in dicta, referred to the granting of a new trial "in the interests of justice" and expressed no opinion on this matter.³⁸ *Tibbs*, holding that a new trial "in the interests of justice" does not give rise to a valid claim

29. 377 U.S. 463 (1964).

30. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 720 (1969) (stating broadly that there were no limitations upon the power to retry a defendant who had succeeded in getting his first conviction set aside).

31. 437 U.S. 1 (1978).

32. *Id.* at 14-15.

33. *Id.* at 16.

34. 437 U.S. 82 (1978).

35. 430 U.S. 564 (1977).

36. 437 U.S. at 97 (quoting *Martin Linen*, 430 U.S. at 571).

37. 437 U.S. 19 (1978).

38. In a more recent case, *Hudson v. Louisiana*, 450 U.S. 40 (1981), the Court referred, in dicta, to the awarding of a new trial in a situation where the state trial judge acts as a "thirteenth juror" and disagrees with the jury's evaluation of conflicting evidence, stating that "nothing in *Burks* precludes retrial in such a case." *Id.* at 44-45 n.5. See *infra* notes 106-10 and accompanying text.

of double jeopardy, thus limits *Burks* to cases where the evidence is not legally sufficient to support a verdict of guilty.³⁹

Justice O'Connor, writing for the majority in *Tibbs*, cites *United States v. Ball*⁴⁰ as the source of the general rule which allows retrial after an appellate reversal of a conviction and *Burks v. United States*⁴¹ and *Greene v. Massey*⁴² as the sources of the exception prohibiting a retrial only where the evidence is not legally sufficient to sustain the verdict.⁴³ *Burks* and *Greene*, as interpreted in *Tibbs*, rest upon two closely related policies: the special weight attached to judgments of acquittal by the double jeopardy clause,⁴⁴ and the principle that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."⁴⁵ These policies do not apply with the same force when the appellate court disagrees with the jury's resolution of conflicting evidence. This situation is more like that of a hung jury than a judgment of acquittal.⁴⁶

The distinction between sufficiency and weight of the evidence has been used by other courts.⁴⁷ In order for a court to review a conviction by testing weight of the evidence presented at trial, an en-

39. 102 S. Ct. at 2217.

40. 163 U.S. 662 (1896).

41. 437 U.S. 1 (1978).

42. 437 U.S. 19 (1978).

43. 102 S. Ct. at 2217. *Tibbs* was a 5-4 decision. Justice O'Connor wrote for the majority, which included Chief Justice Burger and Justices Powell, Stevens, and Rehnquist. Justice White wrote for the minority, which included Justices Blackmun, Brennan, and Marshall.

44. *Id.* at 2218.

45. *Id.* (quoting *Burks*, 437 U.S. at 11).

46. 102 S. Ct. at 2218. See *infra* notes 61-70 and accompanying text.

47. One federal appellate court recently described the distinction as follows:

When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different from those raised by a motion for judgment of acquittal. The question is not whether the defendant should be acquitted outright, but only whether he should have a new trial. The district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980). Earlier, in *United States v. Robinson*, 71 F. Supp. 9 (D.D.C. 1947), a district court stated that this power was recognized at an early date at common law. See also *United States v. Turner*, 490 F. Supp. 583 (E.D. Mich. 1979) (applying the "weight of the evidence" approach at the trial court level); *United States v. Simms*, 508 F. Supp. 1188 (W.D. La. 1980).

abling statute is required.⁴⁸ The *Tibbs* Court also notes that it makes no difference whether a "weight of the evidence" reversal is made at the trial or appellate court level; the principles and policies applying are the same.⁴⁹ The "weight of the evidence" review is essentially a discretionary tool used by the courts, when so authorized, to order new trials where an injustice may have occurred.

The "sufficiency of the evidence" test represents the threshold constitutional standard for review of the evidence presented at trial. Any verdict which fails to meet this evidentiary standard will be reversed, and a judgment of acquittal will be ordered.⁵⁰ The test for the sufficiency of the evidence, as defined in *Jackson v. Virginia*, is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."⁵¹ The "weight of the evidence" test is a discretionary review applied as an overlay of the "sufficiency of the evidence" test. Here, the reviewing court no longer looks at the evidence in the light most favorable to the prosecution; instead, it studies the evidence as an independent finder of fact. A reversal on "weight of the evidence" grounds does not mean that acquittal was the only proper verdict.⁵² A reversal on "weight of the evidence" grounds refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of

48. 102 S. Ct. at 2220 n.22. The Florida Supreme Court, in allowing the retrial, stated that it would not permit its state courts to review the weight of the evidence in the future. 397 So. 2d at 1125. However, the issue remains relevant because of its application in other jurisdictions. 102 S. Ct. at 2216 (majority), 2222 (dissent).

In Louisiana, for example, the trial judge has discretion under article 851 of the Code of Criminal Procedure to allow a new trial. Article 851 provides, in pertinent part:

The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

The court, on motion of the defendant, shall grant a new trial whenever:

(1) The verdict is contrary to the law and the evidence;

...

(5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

Federal Rule of Criminal Procedure 33 allows the court "on motion of [the] defendant [to] grant a new trial to him if required in the interest of justice" where, for example, the conviction is against the weight of the evidence. This power to review the evidentiary weight is triggered only by motion under rule 33. 2 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 553 (1982).

49. 102 S. Ct. at 2220. Thus, *Tibbs* has effect in Louisiana, where a new trial may be ordered by the trial court.

50. *Burks v. United States*, 437 U.S. 1 (1978).

51. 443 U.S. 307, 319 (1979).

52. 102 S. Ct. at 2218.

an issue or cause than the other."⁵³ Thus a reversal on "weight of the evidence" grounds occurs where the reviewing court has found the evidence legally sufficient to sustain the verdict but it is not entirely satisfied that the jury's verdict is correct, and it therefore grants a new trial. This approach is consistent with the definition of acquittal arrived at in *Scott*.⁵⁴ Because the evidence has been found legally sufficient, there has not been an acquittal; therefore, the defendant may be retried.

The *Tibbs* Court states that where the defendant, instead of moving for an acquittal, seeks an acquittal through a new trial, the appellate court acts as a "thirteenth juror" and weighs the conflicting testimony.⁵⁵ While the majority contends that this approach does not violate *Burks* and *Greene*, the dissent argues strongly that the distinction should be between procedural and evidentiary reversals and that any reversal on evidentiary grounds should bar retrial.⁵⁶ The dissent argues that where the evidence does not support the verdict, the state should not be allowed to re prosecute. This argument, however, fails to consider the true nature of the "weight of the evidence" approach and does not accept that the evidence already has been found legally sufficient.⁵⁷ Instead, the dissent argues that any reversal due to a failure of proof is tantamount to a finding of insufficient evidence and therefore a retrial should be precluded.⁵⁸ Additionally, the "weight of the evidence" may be a misnomer; this approach rests not only on evidentiary grounds but on policy grounds as well.⁵⁹ Ultimately, awarding a new trial in this situation is in the defendant's favor. It may cause the reader some concern when the Court states that "[t]he reversal simply affords the defendant a second opportunity to seek a favorable judgment."⁶⁰ Surely this does not mean that the defendant has the burden of proving his innocence. The state already has presented sufficient evidence for a reasonable trier of fact to convict. A reversal on the weight of the evidence gives the defendant a chance to have the evidence heard by another jury, with the hope of securing a more favorable verdict. When seen in this light, the ordering of a new trial truly is in the defendant's favor. He has received a new trial where, as a strict legal matter, his first trial leading to conviction was fair.

53. *Id.* at 2216 (quoting *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981)).

54. 437 U.S. 82 (1978). See *supra* notes 34-36 and accompanying text.

55. 102 S. Ct. at 2218.

56. 102 S. Ct. at 2223 (White, J., dissenting).

57. *But see* note 80, *infra*.

58. 102 S. Ct. at 2222 (White, J., dissenting).

59. See *infra* notes 86-89 and accompanying text.

60. 102 S. Ct. at 2219. The dissent misconstrues this ruling as shifting the burden of proof on retrial. 102 S. Ct. at 2222 (White, J., dissenting).

As it has been suggested that the situation in *Tibbs* is analagous to that of a hung jury, a comparison with hung juries may be helpful. Generally, trial courts are given the power to allow retrial after the first trial ends with a deadlocked jury.⁶¹ However, several commentators recently have suggested that a retrial after a hung jury terminates the first trial violates all the principles behind the protection against double jeopardy and therefore a retrial should be prohibited.⁶² They assert that when a trial ends with a hung jury, the prosecution has had a full and fair opportunity to present the state's case.⁶³ Each time a mistrial is declared and the case is tried again, the defendant's presentation will weaken, as his financial resources inevitably dwindle, and the state, with its virtually unlimited resources and incentive to present a stronger case, will strengthen its prosecution.⁶⁴ Additionally, allowing a retrial "prolongs the period in which [the defendant] is stigmatized by an unresolved accusation of wrongdoing."⁶⁵ Allowing retrial after having a deadlocked jury, it is argued, thus violates the policies set forth in *Green v. United States*, increasing the chance that an innocent man will be found guilty.

The arguments raised by these commentators carry some weight. However, the state does not have unlimited resources, and will not always present a stronger case on retrial. Additionally, its evidence against the defendant necessarily weakens with the passage of time; witnesses might be unlocatable, and those who do testify might not recall the specific facts with clarity sufficient to convince a jury. Still, these commentators raise the valid concern that perhaps the state should not be allowed to conduct numerous trials against a defendant. After a number of trials end in hung juries, perhaps the state should be allowed to proceed no further.⁶⁶

The cases allowing retrial after a hung jury build upon the rule of *United States v. Perez*,⁶⁷ decided in 1824. The Court, in *Perez*, held

61. *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). In Louisiana, a mistrial may be ordered where the jury is unable to agree upon a verdict. LA. CODE CRIM. P. art. 775(2). The Reporter's Comments cite *Perez* and acknowledge that this dismissal poses no bar to a subsequent prosecution. LA. CODE CRIM. P. art. 775(2), comment (c)(4).

62. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV. 701 (1981); Note, *Trial Judge's Discretionary Power to Dismiss in Hung Jury Situations*, 47 TENN. L. REV. 198 (1979); Note, *Trial Judge's Discretion to Declare a Mistrial on Basis of Deadlocked Jury*, 3 W. ST. L. REV. 344 (1976); Note, *Double Jeopardy and Hung Juries*, 5 RUT.-CAM. L.J. 218 (1974).

63. Findlater, *supra* note 62, at 717.

64. *Id.* at 713 & 716; Note, *Double Jeopardy and Hung Juries*, *supra* note 62, at 231.

65. Findlater, *supra* note 62, at 715 (quoting *Arizona v. Washington*, 434 U.S. 497 (1978) (Stevens, J.)).

66. See cases cited at note 88, *infra*.

67. 22 U.S. (9 Wheat.) 579 (1824). See *supra* notes 18-19 and accompanying text.

that jeopardy had not yet attached because no finding as to guilt or innocence had been made by a jury. Because of the recent Supreme Court decisions holding that jeopardy attaches long before the jury's decision is announced,⁶⁸ it has been argued that *Perez* is no longer controlling and that the above policy concerns will be best served by preventing retrial.⁶⁹ However, the Supreme Court consistently has allowed retrial in cases involving hung juries.⁷⁰

Applying these arguments to *Tibbs*, a reversal based on the weight of the evidence may be even more in violation of the policies behind the double jeopardy protection than allowing a retrial after a hung jury. Here, we have a "hung judge" or, even worse, a "hung appellate court." Perhaps our judicial system, with its concern for efficiency, should not allow a judge to throw up his arms in the face of a jury verdict and say, "I don't know." If he is not satisfied with the evidence, he should acquit. Surely our judges should be more able to make conclusive determinations than our juries.

Actually, the argument that in a *Tibbs* situation the policies are more in favor of allowing a retrial is stronger than in cases where there has been a hung jury. A jury has reached a decision: it has convicted the defendant, giving no indication that it harbors a reasonable doubt. The policies enumerated in *Green*⁷¹ do not apply as forcefully against retrying a defendant who has been convicted by a jury as they do against retrying a defendant whom a jury failed to convict. Of course, there is a greater possibility that an innocent man will be found guilty. At the same time, however, he has already been found guilty in a fair proceeding and has no legal right to a retrial or other reversal of his conviction. Thus, allowing the defendant a new trial is seen more as an act of mercy than the kind of government misconduct spoken out against in *Green*.

The ordering of a new trial after a fair conviction by a jury raises the concern that the role of the jury system will be undermined by the reviewing court. Perhaps this is a desirable result; indeed, the

68. *Crist v. Bretz*, 437 U.S. 28 (1978) (jeopardy attaches in a jury trial with the empaneling and swearing of the jury); *Serfass v. United States*, 420 U.S. 377 (1975) (jeopardy attaches in a bench trial with the swearing of the first witness).

69. Note, *Double Jeopardy and Hung Juries*, *supra* note 62, at 221-24.

70. The Court, in dicta, has stated this assertion repeatedly. *Arizona v. Washington*, 434 U.S. 497 (1978); *United States v. Sanford*, 429 U.S. 14 (1976); *Illinois v. Somerville*, 410 U.S. 458 (1973); *Downum v. United States*, 372 U.S. 734 (1963); *Wade v. Hunter*, 336 U.S. 684 (1949). The Court has not recently ruled on any case specifically affirming the *Perez* rule allowing retrial after having a deadlocked jury and has recently passed on an opportunity to do so. *United States v. Becton*, 632 F.2d 1294 (5th Cir. 1980), *cert. denied*, 454 U.S. 837 (1981).

71. 355 U.S. 184 (1957). See *supra* notes 27-28 and accompanying text.

jury's role in our criminal trial process has been criticized.⁷² One commentator argues that the jury fails to make accurate findings of fact and fails to apply the law as instructed by the judge; instead, he argues, the jury returns a general verdict according to the result it desires.⁷³ At the same time, however, the jury's function is not primarily fact finding; there are more efficient and effective ways of determining facts in criminal trials. The jury's function is essentially political; it protects the public from governmental tyranny or at least from the fear of governmental tyranny.⁷⁴ It can be argued that by removing the case from the jury, a court is engaging in the kind of governmental action that the jury system was meant to prevent. However, the right to a jury trial exists for the defendant.⁷⁵ Just as he may waive this right before trial, he logically should be able to have the jury's verdict reviewed, both for evidentiary sufficiency and weight. Where a defendant moves for an acquittal and not for a new trial, the reviewing court is allowed to make only a limited review for evidentiary sufficiency.⁷⁶ A review of evidentiary weight cannot involuntarily deny a defendant a constitutional right because the judicial authority for that review lies in the defendant's request. Additionally, the court will never review the weight of the evidence unless the defendant has been found guilty. Where the defendant asks for a review of the evidence, his right to a trial by jury is not undermined so long as the court does not reverse the jury's findings to his detriment. Indeed, a post-verdict judgment of acquittal goes further towards undermining our jury system than an order for retrial based upon the weight of the evidence. In the latter, the court is not so much removing the case from a jury's hands as giving it to another one. With a judgment of acquittal, the court makes a final determination of reversal of a jury's verdict.⁷⁷

72. See, e.g., J. FRANK, COURTS ON TRIAL 108-16 (1973); W. SEAGLE, LAW: THE SCIENCE OF INEFFICIENCY 107-08 (1952); G. WILLIAMS, THE PROOF OF GUILT 271-79 (1963).

73. J. FRANK, *supra* note 72, at 111.

74. Slovenko, *Control Over the Jury Verdict in Louisiana Criminal Law*, 20 LA. L. REV. 657, 700-02 (1960).

75. The sixth amendment of the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury."

76. *Burks v. United States*, 437 U.S. 1, 16 (1978).

In *Tibbs*, the defendant did not move for a new trial, yet the state supreme court reviewed the evidence and ordered a new trial. This was done under the state appellate rule providing that the supreme court would review the evidence supporting the conviction of a defendant who had been sentenced to death, as discussed in note 1, *supra*. Thus, the state procedure provided for an "automatic motion for a new trial." It is suggested that this does not remove the case from the jury against the defendant's wishes, as any defendant who has been sentenced to death surely would allow an appellate court to review the evidence both for sufficiency and weight.

77. Even Professor Slovenko, who argued that a directed verdict of acquittal under-

Many courts have stated that the authority to order a new trial based on the weight of the evidence should be used sparingly.⁷⁸ Critics argue that there is no method of ensuring that this authority will be used sparingly and that this procedure will lead to an abuse of discretion and undermine both *Jackson v. Virginia* and *Burks*.⁷⁹

It is conceivable that a court may reverse a conviction as "against the weight of the evidence" for the purpose of allowing retrial where the evidence is actually insufficient.⁸⁰ A court's evaluation of the evidence behind a guilty verdict is a matter of substance; the form is not relevant,⁸¹ nor is the label used by the court in reviewing the

mines the jury's role, agreed that a defendant should be able to have a jury's verdict set aside and a new trial ordered. *Slovenko*, *supra* note 74, at 692, 695.

78. *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980); *United States v. Turner*, 490 F. Supp. 583, 593 (E.D. Mich. 1979); *United States v. Robinson*, 71 F. Supp. 9, 10 (D.D.C. 1947).

79. 102 S. Ct. at 2223 (White, J., dissenting). *See also* 18 TRIAL, Sept. 1982, at 49-50.

80. Indeed, this very well may have been the case in *Tibbs*. The only evidence produced by the state was the testimony of the 17-year-old rape victim and her identification of Delbert Lee Tibbs as the perpetrator of the crimes. She admitted having tried "just about all" types of drugs and that she had smoked marijuana shortly before the crimes in question. She testified that the crimes occurred in the daylight, while other evidence indicated that they occurred after nightfall. The truck and gun, used in the crimes were never recovered. There was no record of Tibbs ever having owned a gun. Tibbs was hitchhiking through the state before and after the incident, and there was no evidence apart from the victim's testimony placing him in that part of the state at the time of the commission of the crimes. Immediately after the crimes, the rape victim moved back in with the man she had deserted in St. Petersburg when she eloped with the murder victim, giving rise to the inference that she may have lied to protect him. The defendant, on the other hand, was a college-educated writer who was hitchhiking through the state to learn more about how people live. He cooperated fully with police, and witnesses testifying to his good reputation as a law-abiding citizen went un rebutted. The state's other evidence, such as Tibbs' cellmate who claimed Tibbs confessed to him, was either substantially discredited or added nothing to the case against him. *See* 101 S. Ct. at 2214, 2216; 337 So. 2d at 792 (Boyd, J., concurring specially in the Florida Supreme Court's first hearing of the case).

The evidence against Tibbs may have been legally insufficient; it is arguable that, viewing the evidence in the light most favorable to the prosecution, a reasonable juror could not convict the defendant. Indeed, after the United States Supreme Court's decision, the Florida state prosecutors entered a *nolle prosequi*, perhaps fearing that the testimony of the rape victim, who was then undergoing drug rehabilitation treatment, would not be believed. Telephone conversation with Mr. Louis R. Beller of Miami Beach, Florida, the defendant's attorney (Jan. 11, 1983).

This suggestion does not lead the author to conclude that the Court erred in sanctioning the "weight of the evidence" review. The Court held that the due process requirement had been satisfied. 102 S. Ct. at 2220 n.21. For purposes of analyzing the propriety of the weight of the evidence review, that aspect of the holding will be accepted as correct. However, the case in which the Supreme Court affirmed the validity of the weight of the evidence review also serves as an example of its potential abuses.

81. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

evidence.⁸² As the *Tibbs* Court points out, due process limitations prevent abuse;⁸³ if the evidence is actually insufficient, the court's decision should not stand on appeal. Although it does not undermine *Burks*, the holding in *Tibbs* certainly limits *Burks* to those instances where the evidence is found insufficient as a matter of law. Other courts have shown a desire to limit *Burks*,⁸⁴ and courts in the future should follow up on the suggestion in *Tibbs* that *Burks* is a very narrow exception to the rule allowing retrial after appellate reversal.⁸⁵ As mentioned earlier, an order for retrial based on the weight of the evidence may rest on subjective policy grounds as well as the court's own weighing of the evidence.⁸⁶ The *Tibbs* Court states, "[T]he weight of the evidence rule, . . . often derives from a mandate to act in the interests of justice. . . . Although reversal of a first conviction based on sharply conflicting testimony may serve the interests of justice, reversal of a second conviction based on the same evidence may not."⁸⁷ Thus, while the Florida Supreme Court awarded *Tibbs* a new trial based on its concern for fair play and in the interests of justice, it may be more likely to uphold a second conviction on the same evidence.⁸⁸ The dissenters see the holding in *Tibbs* as a strictly evidentiary ruling, one which is rigid and inflexible. The dissenters' argument that this holding has been an evidentiary reversal as a matter of state statutory law which should be tantamount to an acquittal fails to take into account the true nature of the "weight of the evidence" ruling.⁸⁹

Tibbs also raises questions concerning judicial efficiency. As a matter of judicial efficiency, perhaps it would be better to prevent

82. *Lee v. United States*, 432 U.S. 23, 31 (1977).

83. 102 S. Ct. at 2220.

84. *See, e.g., Lydon v. Commonwealth*, 381 Mass. 356, 409 N.E.2d 745 (1980), *cert. denied*, 449 U.S. 1065 (in a two-tiered system, if a defendant elects a bench trial, he must first undergo a second trial de novo before he can appeal; as the appeal is limited to the findings of the second trial, any possible evidentiary insufficiency in the first trial goes unreviewed); *Maryland v. Boone*, 40 Md. App. 41, 393 A.2d 1361 (1978) (where, because of trial error, evidence was improperly admitted and there was not sufficient admissible evidence to sustain the verdict, the state supreme court based its reversal on "trial error," not insufficient evidence, and allowed a retrial).

85. *See United States v. Curtis*, 683 F.2d 769, 773 (3d Cir. 1982), where the court states that the "stringency" of the *Burks* policy was highlighted in the *Tibbs* decision.

86. *See supra* note 59 and accompanying text.

87. 102 S. Ct. at 2219 n.18.

88. Conceivably, a number of successive reversals against the weight of the evidence could give rise to a valid double jeopardy claim. This problem has been considered in the hung jury context. In *United States v. Castellanos*, 478 F.2d 749 (2d Cir. 1973), the Second Circuit allowed a third trial after the first two ended with hung juries. But in *Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971), the court barred a fifth trial after four successive hung juries, sustaining the defendant's claim of double jeopardy. *See also* commentaries cited in note 62, *supra*.

89. 102 S. Ct. at 2222 (White, J., dissenting).

retrial whenever the *Jackson v. Virginia*⁹⁰ test has been satisfied. Both the defendant and the state have an interest in the finality of the litigation. Additionally, the evidence will be much harder to evaluate on retrial. In *Tibbs*, the incident in question occurred on or about February 3, 1974.⁹¹ While it will be hard for the witnesses to an event which occurred nine years ago to testify as to specific facts, cross-examination also will be more difficult.

The Supreme Court in *Tibbs*, however, is leaning away from notions of judicial efficiency and towards a concern for fair play. After *Jackson v. Virginia*, one reasonably could have inferred that the Supreme Court was moving in the direction of a standard severely limiting the situations where a defendant could be retried. Such a harsh standard would have tended to discourage reviewing judges from reversing convictions in situations where they harbored only minor doubts as to the fairness of the first trial. *Tibbs*' policy encouraging retrial indicates that the Court is not moving towards such a harsh standard. By encouraging reviewing courts to act "in the interests of justice," the Supreme Court is promoting a fair process. Upon reviewing *Tibbs*' conviction, the Florida Supreme Court expressed a doubt, perhaps a subjective one, as to the fairness of the first conviction.⁹² At that point, the "interest of justice" in allowing a retrial after a reversal on weight of the evidence grounds outweighed the concern for judicial efficiency. This guarantee of a fair trial process is surely worth the comparatively small price of having to retry the defendant.⁹³

The most troublesome aspect of the *Tibbs* holding is the suggestion that the prosecution might be allowed to present additional evidence on retrial.⁹⁴ The purpose of preventing a retrial after an acquittal is to require the prosecutor to gather all available evidence and present his best case in one trial; he should not be allowed to produce more and more evidence over successive trials until he has enough evidence to convict. This is the kind of governmental misconduct spoken out against in *Green*.⁹⁵ After a reversal on procedural grounds, a retrial is allowed because the prosecutor has no motive

90. 443 U.S. 307 (1979). See tests discussed in *supra* notes 50-51 and accompanying text.

91. 102 S. Ct. at 2213.

92. 337 So. 2d at 791; 397 So. 2d at 1126.

93. The retrial should be less expensive for the state to prosecute than most original trials. The state already has investigated the case and has gathered sufficient evidence to sustain a conviction. Costs in preparation for the retrial should be little, if any.

94. The opinion states that it is not necessary but it is possible for the prosecution to offer new evidence on retrial. 102 S. Ct. at 2219 nn.18-19.

95. See *supra* note 28 and accompanying text.

to gather additional evidence, as he does after a reversal on evidentiary grounds. As one commentator stated about procedural reversals:

[T]he prosecutor need not feel he certainly must do a better job on retrial. The rate of reconviction following reversal on appeal is sufficiently high to warrant an assumption that, unless key defense evidence has been excluded, reconviction is the likely result. The prosecutor therefore has no special incentive to seek out a more favorable jury, uncover additional evidence, polish the testimony of his witnesses, or otherwise strengthen his case, thereby enhancing the risk that an innocent defendant will be convicted. In sum, when reversal stems from grounds other than insufficiency of the evidence, neither *Green* interest justifies denying the state its opportunity to retry.⁹⁶

However, the defendant presumably has asked for and received a new trial. As the *Tibbs* majority properly points out, there is no constitutional prohibition against allowing the prosecutor to introduce additional evidence on retrial where the conviction has been reversed as against the weight of the evidence. But allowing the prosecutor to introduce additional evidence on retrial may undermine the policies enumerated in *Green*, and it is contrary to the purpose of allowing the retrial—to let another jury pass judgment on the evidence presented against the defendant. Retrial is not allowed to see whether the prosecutor can do a better job of getting the defendant convicted; retrial is allowed to determine whether the facts as presented can convince a jury, in a manner which will satisfy reviewing judges, that the defendant is guilty beyond a reasonable doubt. Introduction of additional evidence violates the *Green* policy by allowing the state “with all its resources and power . . . to make repeated attempts to convict” and by “enhancing the possibility that even though innocent [the defendant] may be found guilty.”⁹⁷

On a theoretical level, the prosecution need not adduce additional evidence on retrial, as it already has introduced a legally sufficient amount of evidence. On a practical level, however, the prosecution has been alerted to the fact that its case is not solid. The reversal will motivate the prosecution to uncover and produce more evidence and make a more effective presentation at retrial. If the purpose in granting retrial is to “allow the defendant a second chance,” the prosecution should not be given another chance to introduce evidence, because this is in contradiction to the established policies supporting the protection against double jeopardy. As the dissent points out, *Burks* implements the principle that “[t]he Double Jeopardy Clause

96. Findlater, *supra* note 62, at 730.

97. *Green*, 355 U.S. at 187-88.

forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."⁹⁸ The prosecution "has been given one fair opportunity to offer whatever proof it could assemble."⁹⁹ When a reversal is made on "weight of the evidence" grounds, as opposed to a reversal for trial error, the prosecutor will try to "remedy the defect in his proofs, an opportunity that the double jeopardy clause forbids."¹⁰⁰ On retrial, the defendant is allowed to produce additional evidence disproving his guilt. The *Tibbs* majority recognizes that as the defendant has been given another trial for the purpose of seeking a more favorable judgment, he should be allowed to produce additional evidence or otherwise strengthen his arguments.¹⁰¹ Fair play, therefore, requires that the prosecution be allowed to use additional evidence in rebuttal of whatever new contentions the defendant makes; fair play does not dictate that the state should use its resources to make sure it does a better job when it was required to present its best case at the first trial. Thus it is strongly suggested that, as a prophylactic rule protecting the defendant's constitutional rights, the prosecution be prevented from presenting additional evidence in its case in chief against a defendant whose conviction has been reversed as being "against the weight of the evidence" or "in the interests of justice."

The decision in *Tibbs* is useful in that it provides the kind of "bright line rule" that courts often seem to avoid. In Louisiana the clear line of demarcation, after *Tibbs*, between "weight" and "sufficiency" of the evidence and the limitation of *Burks* should provide guidance for our courts in an area where there has been a lack of clarity in the past.

Louisiana Code of Criminal Procedure article 851 imposes upon the trial judge the duty¹⁰² to review the jury's verdict upon a defendant's motion for a new trial and authorizes him to grant a new trial where the verdict is contrary to the law and the evidence¹⁰³ and where, in his opinion, the ends of justice would be served thereby.¹⁰⁴ The initial interpretation in Louisiana of *Burks v. United States*¹⁰⁵ was that

98. 102 S. Ct. at 2222-23 (White, J., dissenting) (quoting the majority opinion at 102 S. Ct. at 2218; also quoting *Burks*, 437 U.S. at 11).

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

100. Findlater, *supra* note 62, at 729.

101. 102 S. Ct. at 2219 n.19.

102. *State v. Jones*, 288 So. 2d 48 (La. 1973); *State v. Daspit*, 167 La. 53, 118 So. 690 (1928).

103. LA. CODE CRIM. P art. 851(1).

104. LA. CODE CRIM. P art. 851(5).

105. 437 U.S. 1 (1978).

where there was "no evidence" in support of the verdict, an acquittal was mandated, and where there was "insufficient evidence," retrial was allowed under article 851(1).¹⁰⁶ In the initial case, *State v. Hudson*, the trial judge had granted a new trial while giving only vaguely worded oral reasons for his order. The supreme court held that there was some, albeit insufficient, evidence in support of the verdict and allowed retrial.¹⁰⁷ Justice Tate, concurring, argued that the trial judge actually had granted a new trial to serve the ends of justice under article 851(5).¹⁰⁸ The United States Supreme Court unanimously reversed.¹⁰⁹ A retrial was barred under *Burks*, it held, not only where there was "no evidence" but where there was "insufficient evidence" as well.¹¹⁰ Thus, after *Hudson*, some doubt existed as to whether a Louisiana trial judge could order a new trial under article 851(1), as well as to how he might reverse a jury's verdict as being supported by insufficient evidence. The only way a defendant could have the evidence supporting his conviction reviewed was by asking for a new trial under article 851. In 1982, the Louisiana Legislature moved to clarify this area. It enacted article 821, providing a post-verdict motion for acquittal.¹¹¹ Where the defendant so moves, the trial court may examine the verdict for insufficient evidence under *Jackson v. Virginia*.¹¹²

The Supreme Court's holding in *Tibbs* defines and gives constitutional credence to the different policies and standards applying to the two post-verdict motions now available to a defendant. Where a motion for acquittal is made and granted, *Burks*-type policies apply and a retrial is barred.¹¹³ Where the defendant moves for a new trial under article 851(1) or (5), the *Tibbs*-type weighing applies and the double jeopardy clause does not preclude retrial. A convicted defendant who

106. *State v. Hudson*, 373 So. 2d 1294 (La. 1979).

107. *Id.* at 1297.

108. *Id.* at 1298.

109. *Hudson v. Louisiana*, 450 U.S. 40 (1981). See Joseph, *Developments in the Law, 1980-1981—Postconviction Procedure*, 42 LA. L. REV. 693, 696 (1982).

110. 450 U.S. at 43. Indicating what it would eventually hold in *Tibbs*, the Court addressed Justice Tate's concurring opinion in dicta and said that nothing in *Burks* precludes retrial where the state trial judge has acted as a "thirteenth juror" and ordered a new trial. *Id.* at 44-5, n.5.

111. 1982 La. Acts, No. 144, adding LA. CODE CRIM. P art. 821.

112. 443 U.S. 307 (1979). The reporter's comments to article 821 indicate that *Jackson v. Virginia* is the standard used here. The comments also indicate that if the evidence is legally insufficient, a "modified verdict," perhaps guilty of a lesser included offense for which there is sufficient evidence, could be entered. This approach was not ruled upon in *Tibbs*.

113. Where a defendant files a motion for a post-verdict judgment of acquittal in a bench case, it will be treated as a motion for a new trial. *State v. Vaccaro*, 411 So. 2d 415 (La. 1982).

wants a bench order of acquittal no longer has to request a new trial, as he did in the past. A defendant, of course, may move for acquittal and for a new trial in the alternative. In such a case, a trial judge ordering reversal should be explicit as to which standard he has applied; this has important implications for appellate review as well as for double jeopardy.¹¹⁴

In *Tibbs v. Florida*, the Supreme Court has defined the narrow limitations of a judgment of acquittal, preventing retrial after the reversal of a jury's guilty verdict only where the evidence is insufficient as a matter of law. The Court has given the lower courts a clearly drawn rule to follow, drawing the line between evidentiary *weight* and evidentiary *sufficiency*. *Tibbs* also represents an adherence in our judicial system to a preference of a guarantee of a fair trial procedure over a concern for speed, efficiency, and finality of judgment. While it is in the defendant's favor to allow a retrial after the reversal of a conviction as being against the weight of the evidence, it is strongly suggested that the prosecution be prevented from presenting any new evidence in its case in chief.

Covert James Geary

114. A Louisiana appellate court cannot review a trial court's ruling upon a motion for a new trial. *State v. Jack*, 332 So. 2d 464 (La. 1976). As a determination of evidentiary sufficiency is made as a matter of law, appellate courts have authority to review such determinations made by the trial court or to make such determinations on their own.