

A Retreat in Double Jeopardy Policy: *Tibbs v. Florida*¹ — The First United States Congress incorporated into the Bill of Rights² a prohibition against double jeopardy, stating in the fifth amendment to the Constitution that no person shall “. . . be subject for the same offence to be twice put in jeopardy of life or limb.”³ Despite this straightforward language, determining whether the double jeopardy clause’s protection applies in a given criminal proceeding is not always easy.⁴ Although the double jeopardy clause protects a defendant against repeated prosecutions for the same offense,⁵ the right is not absolute.⁶ The government has a valid interest in punishing those guilty of criminal offenses, thereby vindicating the state’s vital interest in the enforcement of criminal laws.⁷ As a result of these competing interests, a court’s determination of whether the double jeopardy bar prohibits further prosecution in any given case is based, either explicitly or implicitly, on a judicial balancing of the de-

¹ 102 S. Ct. 2211 (1982).

² For a detailed description of how the double jeopardy clause came to be incorporated, see *United States v. Wilson*, 420 U.S. 332, 339-43 (1975). See also Comment, *Double Jeopardy and Government Appeals*, 52 TEX. L. REV. 303, 307-09 (1974); 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 729-32 (1971); S. Jour., 1st Cong., 1st Sess., 71, 77 (1820 ed.).

³ U.S. CONST. amend V. The double jeopardy clause of the fifth amendment was held applicable to the states through the fourteenth amendment in *Benton v. Maryland*, 395 U.S. 784, 794 (1969), which overruled *Palko v. Connecticut*, 302 U.S. 319 (1937).

The concept of double jeopardy is deeply rooted in western civilization. *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting). The principle that no man should be punished twice for the same offense was not entirely unknown to the Greeks and Romans, and early English common law was opposed to putting a man in jeopardy twice. J. SIGLER, *DOUBLE JEOPARDY* 1-37 (1969). See also Kirk, “*Jeopardy*” *During the Period of the Yearbooks*, 82 U. PA. L. REV. 602, 602 (1934); Note, *Twice In Jeopardy*, 75 YALE L.J. 262, 262 (1965) [hereinafter cited as Note, *Twice in Jeopardy*]. The concept is clearly expressed in Blackstone’s dicta that it was a “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 offense.” 4 W. BLACKSTONE, *COMMENTARIES* 335-36 (1789).

⁴ *Crist v. Bretz*, 437 U.S. 28, 32 (1978) (“[T]his deceptively plain language has given rise to problems both subtle and complex”); *United States v. Scott*, 437 U.S. 82, 87 (1978) (“These historical [double jeopardy] purposes are necessarily general in nature, and their application has come to abound in often subtle distinctions which cannot by any means all be traced to the original three common law pleas. . . .”); *Burks v. United States*, 437 U.S. 1, 9 (1978) (“The Court’s holdings in this area . . . can hardly be characterized as models of consistency and clarity.”).

The difficulty of applying the double jeopardy clause has also been recognized by commentators. See, e.g., Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 U.C.L.A. L. REV. 81 (1967) (describing the concept of double jeopardy as a “wilderness of legal complexity”); Botchelder, *Former Jeopardy*, 17 AM. L. REV. 735, 748-49 (1883) (stating “Nobody disputes the justice or the obligation of the rule of former jeopardy in the abstract, the difficulty is in deciding where it shall be applied”); Mead, *Double Jeopardy Protection—Illusion or Reality?*, 13 IND. L. REV. 863 (1980) (observing that “The simple language of the double jeopardy clause belies the difficulty courts have had in applying and scholars have had in discussing its protection”).

⁵ *United States v. Dinitz*, 424 U.S. 600, 606 (1976).

⁶ See *infra* notes 53-61 and accompanying text.

⁷ *United States v. Jorn*, 400 U.S. 470, 479 (1971). See also *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (“But justice, though due the accused, is due to the accuser also.”).

fendant's interests against those of the government.⁸ This balancing is done by inquiring whether the additional proceeding would be an "act of governmental oppression of the sort against which the double jeopardy clause was intended to protect."⁹ When a court determines that the requisite oppression exists, the government's interest in the enforcement of the criminal law is subordinated to the interests of the defendant and retrial is forbidden.

In 1974, Delbert Tibbs was charged in a three count indictment with the rape of a woman named Cynthia Nadeau, the premeditated murder of a man named Terry Milroy, and the crime of felony murder for killing Milroy while raping Nadeau.¹⁰ Nadeau, the State's chief trial witness, testified that she and Milroy were hitchhiking when they were picked up by a man driving a green truck.¹¹ The man drove a short distance, then turned off the highway into a field and stopped the truck.¹² He then requested that Milroy get out to help him siphon gas from some farm machinery.¹³ After a few minutes passed, Nadeau got out of the truck and went around to the back where she discovered the driver pointing a gun at Milroy.¹⁴ The driver informed Milroy that he wanted to have sex with Nadeau and commanded her to undress.¹⁵ After forcing Nadeau to engage in sodomy, the driver shot and wounded Milroy.¹⁶ Milroy pleaded for his life, but the man fired again, inflicting the fatal wound.¹⁷ The killer then proceeded to rape Nadeau, following which he ordered her to dress and return to the truck.¹⁸ After returning to the highway

⁸ The Supreme Court has recognized the need to balance these competing interests. See, e.g., *Arizona v. Washington*, 434 U.S. 497, 503-05 (1978); *United States v. Jorn*, 400 U.S. 470, 479 (1971).

Commentators have also discussed the need to weigh the defendant's interests against those of the state. See, e.g., Comment, *The 1978 Double Jeopardy Cases—Mistrials, Dismissals, and Acquittals*, 83 DICK. L. REV. 291, 293-94 (1978) ("[I]n essence, all double jeopardy problems entail a weighing of the defendant's double jeopardy interests, as they are implicated, against the public's interest.") and Recent Development, *Emerging Standards in Supreme Court Double Jeopardy Analysis*, 32 VAND. L. REV. 609, 614 (1979) ("The Court balances these competing policies in every double jeopardy case, regardless of the particular problem presented.").

⁹ *United States v. Scott*, 437 U.S. 82, 91 (1978). The clearest expression of the policy behind the double jeopardy protection is found in *Green v. United States*, in which the Court stated:

"[T]he 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."

355 U.S. 184, 187-88 (1957).

¹⁰ *Tibbs v. Florida*, 102 S. Ct. 2211, 2213 (1982).

¹¹ *Tibbs v. State*, 337 So. 2d 788, 789 (Fla. 1976). Nadeau later gave a detailed description of the vehicle, testifying that it had a rounded hood, black vinyl seats, no door handle, and an oil light that blinked on and off. *Id.*

¹² *Id.*

¹³ *Tibbs v. Florida*, 102 S. Ct. 2211, 2213 (1982).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Tibbs v. State*, 337 So. 2d 788, 789 (Fla. 1976).

¹⁸ *Id.*

and driving a short distance, he stopped the truck and ordered Nadeau to walk in front of it.¹⁹ She left the truck, but ran in the opposite direction and was able to escape successfully.²⁰

A jury found Tibbs guilty of first degree murder and rape and recommended the death sentence.²¹ The trial judge subsequently imposed the death sentence.²² Tibbs appealed his conviction to the Supreme Court of Florida.²³ Tibbs contended that the totality of evidence offered by the State at trial was insufficient to place him at the scene of the murder and rape, or to establish beyond all reasonable doubt that he was the perpetrator.²⁴ A plurality of three justices reversed Tibbs' conviction.²⁵ Identifying several weaknesses in the State's case,²⁶ the justices stated that they had considerable doubt that Tibbs was guilty.²⁷ Under Florida law no corroborative evidence was required in a rape case if the victim was able to testify directly to the crime and identify the defendant as her assailant.²⁸ The court said, however, that the limitation on this rule was that the testimony of the victim had to be "carefully scrutinized so as to avoid an unmerited conviction."²⁹ The court reversed the conviction and

¹⁹ *Id.*

²⁰ *Id.* Nadeau subsequently ran to a nearby house and called the police. She gave the police a detailed description of the driver and his vehicle. A few days later, Tibbs was stopped by a patrolman in a different part of the state because he appeared to match Nadeau's description of her assailant. After examining photographs taken of Tibbs, Nadeau identified him as the driver of the vehicle. She later picked Tibbs out of a policeman's line-up and during trial positively identified him as her assailant. *Tibbs v. Florida*, 102 S. Ct. 2211, 2213-14 (1982).

²¹ *Tibbs v. State*, 337 So. 2d 788, 789 (Fla. 1976).

²² *Id.*

²³ *Id.* At the time of Tibbs' first appeal, under Florida Appellate Rule 6.16(b) (1962), the court was obligated to review any conviction for which the death penalty had been imposed to determine if the "interests of justice" required a new trial. The substance of this rule has been recodified in Rule 9.140(f) of the Florida Rules Appellate Procedure (1977). *Id.*

²⁴ *Id.* Tibbs stated that there was no evidence to support or corroborate Nadeau's testimony and that her statements at trial were so conflicting and inherently unreliable that his conviction should be reversed. *Id.* at 789-90.

²⁵ *Id.* at 790.

²⁶ *Id.* The court identified several infirmities in the State's case:

- 1) Except for the testimony of the victim, no evidence was introduced to place Tibbs at or near the scene of the crime.
- 2) Despite the victim's detailed description of the truck, the vehicle was never found.
- 3) No gun or car keys were ever found in Tibbs' possession.
- 4) Tibbs cooperated fully with the police when he was stopped.
- 5) The State introduced no evidence casting doubt on Tibbs' veracity.
- 6) Several features of the victim's testimony cast doubt on her believability. First, while she claimed that the crimes occurred while it was still light out, all other evidence indicated that the crimes occurred after nightfall. Second, Nadeau admitted using marijuana throughout the day. Third, the fact that Nadeau first identified Tibbs in a suggestive photograph session indicated a less reliable identification than would have been possible had she picked him out of a book with multiple photographs of more than one person. *Id.* at 790-91.

²⁷ *Id.* at 791.

²⁸ See *Thomas v. State*, 167 So. 2d 309 (Fla. 1964).

²⁹ *Tibbs v. State*, 337 So. 2d 788, 789 (Fla. 1976) (quoting *Thomas v. State*, 167 So. 2d at 310).

remanded the case for a new trial.³⁰ The court reasoned that it did not want to risk "the very real possibility" that Tibbs had nothing to do with the crimes.³¹

On remand, Tibbs moved for a dismissal arguing that retrial would violate the double jeopardy clause.³² In deciding whether to grant the motion, the trial court was forced to consider the principles articulated in *Burks v. United States*,³³ a case decided subsequent to the Florida Supreme Court's reversal of Tibbs' conviction.³⁴ In *Burks*, the United States Supreme Court held that where an appellate court reverses a conviction based on the insufficiency of the evidence presented at trial, the double jeopardy clause barred further prosecution.³⁵ Based on *Burks*, the trial court granted Tibbs' motion to dismiss, concluding that to retry Tibbs would in fact violate the double jeopardy clause.³⁶

The State appealed Tibbs' dismissal to an intermediate appellate court.³⁷ The appellate court reversed the trial court and held that Tibbs could be retried.³⁸ The court distinguished *Burks* by characterizing the state supreme court's reversal of Tibbs' conviction as one based on the weight of the evidence, rather than the legal insufficiency of the evidence as in *Burks*.³⁹ The appellate court concluded therefore that *Burks* did not mandate a dismissal of Tibbs' case.⁴⁰ The Florida Supreme Court affirmed the appellate court's decision.⁴¹ The court characterized its original reversal of Tibbs' conviction as one resting on the weight of the evidence.⁴² Adopting the reasoning of the appellate court, the Florida Supreme Court distinguished a reversal based on the weight of the evidence⁴³ from one based on insufficiency and concluded that retrial of Tibbs was not barred by the double jeopardy clause.⁴⁴ Tibbs then filed a petition for certiorari with the United States Supreme Court.⁴⁵ The Court granted the petition.⁴⁶ In a five-to-four decision,⁴⁷ the Court held that retrial of a

³⁰ *Id.* at 791.

³¹ *Id.*

³² *State v. Tibbs*, 370 So. 2d 386, 386 (Fla. Dist. Ct. App. 1979).

³³ 437 U.S. 1 (1978).

³⁴ *State v. Tibbs*, 370 So. 2d 386, 386 (Fla. Dist. Ct. App. 1979).

³⁵ *Burks v. United States*, 437 U.S. 1, 11 (1978). The rule of *Burks* was applied to the states in *Greene v. Massey*, 437 U.S. 19, 24 (1978).

³⁶ *State v. Tibbs*, 370 So. 2d 386, 386 (Fla. Dist. Ct. App. 1979).

³⁷ *Id.*

³⁸ *Id.* at 388.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Tibbs v. State*, 397 So. 2d 1120, 1127 (Fla. 1981) (per curiam).

⁴² *Id.* at 1126.

⁴³ *Id.* at 1123. The court stated that a reversal based on the "weight of the evidence" is a determination that the greater amount of credible evidence supports one side of an issue or cause than the other. *Id.*

⁴⁴ *Id.* The court said a finding that the evidence is "legally insufficient" means that the prosecutor had failed to prove the defendant's guilt beyond a reasonable doubt. *Id.*

⁴⁵ *Tibbs v. Florida*, 454 U.S. 963 (1981).

⁴⁶ *Id.*

⁴⁷ *Tibbs v. Florida*, 102 S. Ct. 2211, 2221 (1982). Justice O'Connor delivered the opinion of the Court, in which Chief Justice Burger and Justices Powell, Rehnquist, and Stevens

criminal defendant is not barred by the double jeopardy clause when an appellate court reverses a conviction based on the weight of the evidence.⁴⁸

The significance of *Tibbs v. Florida* is that the decision has limited a criminal defendant's protection from being placed twice in jeopardy. First, by permitting retrial following a reversal of a conviction based on the weight of evidence, the Supreme Court has limited the effect of its holding in *Burks*. As a result of the Court's holding in *Tibbs*, some appellate reversals⁴⁹ dealing with the factual deficiency of the evidence will not bar retrial while other such reversals will. Second, and more importantly as far as future double jeopardy decisions are concerned, the Supreme Court in *Tibbs* lost sight of the policies underlying the double jeopardy protection. The Court recognized a double jeopardy distinction between convictions reversed for insufficient evidence and those overturned based on the weight of the evidence even though the rationale preventing retrial in *Burks* applies with equal weight in *Tibbs*' situation. In both instances, the government has failed to present the evidence required to support a final judgment against the defendant, and retrial presents the grave danger of unjust conviction that the double jeopardy clause was intended to prevent. Although reviewing courts in Florida are no longer allowed to reverse convictions based on the weight of the evidence, courts in other jurisdictions sometimes rely on the weight of the evidence to do so.⁵⁰ It is important for courts in such other states to recognize the weaknesses of the *Tibbs* opinion when interpreting the double jeopardy provisions of their own constitutions.⁵¹ State law protection against double jeopardy should extend to prohibit further prosecution of defendants following a reversal based on weight of evidence even if the federal constitution does not.⁵²

This casenote will begin by discussing the background and development of double jeopardy law to establish the context in which *Tibbs v. Florida* was decided. Next, the United States Supreme Court's opinion in *Tibbs* will be described. The Supreme Court's reasoning will then be analyzed by discussing

joined. Justice White wrote in dissent, in which Justices Brennan, Marshall and Blackmun, joined. *Id.*

⁴⁸ *Id.* at 2218-19.

⁴⁹ Although much of the discussion in this casenote refers to "appellate" reversals based on the weight of the evidence, the same considerations that are presented would logically also apply to a trial court's finding that a conviction was against the weight of the evidence. *See Id.* at 2220 n.22.

⁵⁰ *See infra* note 207 and accompanying text.

⁵¹ All but five states (Connecticut, Maryland, Massachusetts, North Carolina, and Vermont) have double jeopardy provisions in their constitutions. The five states that do not have such a provision in their constitutions consider protection from double jeopardy a part of their common law. Note, *Twice In Jeopardy*, *supra* note 3, at 263 n.3.

⁵² *See generally* Note, *Stepping Into The Breach: Basing Defendants' Rights On State Rather Than Federal Law*, 17 AM. CRIM. L. REV. 339, 340 (1978) ("[A] significant number of state courts have exceeded the federal minimum by independently interpreting their own state constitutional provisions, which may or may not correspond to their federal counterparts."); Findlater, *Retrial After A Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV. 701, 736 n.164 (1981) [hereinafter cited as Findlater].

three major weaknesses in the *Tibbs* decision. First, the validity of distinguishing between the weight of the evidence and the sufficiency of the evidence in determining whether to invoke the double jeopardy clause will be explored. This presentation shows the difficulty appellate courts will encounter in attempting to distinguish between reversals based on either of these grounds. It will be submitted that many appellate reversals can be characterized as based either upon the weight or the insufficiency of the evidence. It follows that some courts may take the opportunity provided by the decision in *Tibbs* to characterize reversals as being upon the weight, rather than the sufficiency of the evidence, thus allowing for the retrial, rather than the release, of the defendant. Second, recent Supreme Court double jeopardy decisions stressing the difference between factual and legal determinations made by courts will be examined. This examination will determine the implication the reasoning of these earlier opinions has for distinguishing between the weight and the sufficiency of the evidence. This section shows that these decisions prohibited retrial where the earlier proceeding suggests the factual innocence of the defendant. The Supreme Court allowed retrial in *Tibbs*, however, despite the fact that reversals based on the weight of the evidence are grounded on a court's belief that the evidence presented at trial did not support a conviction. It will be submitted that the Supreme Court's failure in *Tibbs* to follow the reasoning of its earlier decisions is in error. Third, the policies that underlie the double jeopardy clause will be analyzed to determine their implications for distinguishing between the weight and sufficiency of evidence in the context of double jeopardy protections. The discussion will focus on the policy considerations enumerated in *Burks* and other Supreme Court double jeopardy decisions that bar retrial following an acquittal or an appellate reversal based on the insufficiency of the evidence. The analysis will demonstrate that because the policy considerations behind the double jeopardy protection apply with equal force to reversals based on either the weight or insufficiency of the evidence, the double jeopardy clause should bar further prosecution in both situations. It will be submitted that because allowing retrial following a reversal based on the weight of the evidence affords the prosecution another opportunity to supply evidence it failed to produce in the first trial and places an unfair burden on defendants, the double jeopardy clause should prohibit further prosecution when a reviewing court reverses a conviction in this manner.

I. BACKGROUND AND DEVELOPMENT OF DOUBLE JEOPARDY LAW

The double jeopardy clause protects a defendant in a criminal proceeding from multiple punishment or repeated prosecutions for the same offense.⁵³ This prohibition against being twice put in jeopardy, however, has never been held absolute. In 1863 the Supreme Court, in *United States v. Ball*,⁵⁴ set forth the

⁵³ *United States v. Dinitz*, 424 U.S. 600, 606 (1976).

⁵⁴ 163 U.S. 662 (1896).

general rule that although the double jeopardy clause prohibited further prosecution of a defendant following an acquittal, a defendant who successfully appeals a conviction may be retried for the same offense.⁵⁵ *Ball* concerned two defendants who were convicted of murder.⁵⁶ The defendants obtained a reversal because of a defect in the indictment, namely, that it failed to aver the time or the place of the death of the victim.⁵⁷ After the defendants were retried and convicted on a proper indictment, they appealed to the Supreme Court.⁵⁸ The defendants argued that their second trial should have been barred because they had been tried once for the same offense.⁵⁹ The *Ball* Court rejected this view of the double jeopardy clause and allowed retrial.⁶⁰ The Court held that the government is not prohibited from retrying a defendant following an erroneous conviction.⁶¹ After *Ball*, therefore, the double jeopardy clause placed no limitation on the power of a state to retry a defendant who obtained a reversal of his conviction.

Over a century later, in *Burks v. United States*, the Supreme Court created an exception to *Ball*.⁶² The Court held that the double jeopardy clause precludes retrial of a defendant if the reviewing court finds the evidence presented at trial insufficient to sustain the jury's guilty verdict.⁶³ The defendant in *Burks* was tried and convicted of bank robbery.⁶⁴ The Court of Appeals for the Sixth Circuit reversed *Burks'* conviction, holding that the evidence was insufficient to sustain the verdict.⁶⁵ The Court of Appeals then remanded the case to the trial court for a determination of whether a judgment of acquittal or a new trial should be granted.⁶⁶ The defendant appealed the remand to the United States Supreme Court on a writ of certiorari.⁶⁷ The Supreme Court held that the double jeopardy clause of the fifth amendment precludes retrial when a defendant's conviction is reversed for insufficient evidence.⁶⁸ The Court said that the appellate reversal was the equivalent of a post-trial verdict of acquittal.⁶⁹ If

⁵⁵ *Id.* at 671.

⁵⁶ *Id.* at 664. A third defendant was acquitted at the first proceeding, and the *Ball* Court held that he could not be retried. *Id.* at 669.

⁵⁷ *Id.*

⁵⁸ *Id.* at 666.

⁵⁹ *See id.* at 665.

⁶⁰ *See id.* at 671. ("[I]t is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted." *Id.* at 671-72).

⁶¹ *Id.* at 671-72.

⁶² *Burks v. United States*, 437 U.S. 1, 15 (1978).

⁶³ *Id.* at 18. Although *Burks* involved a federal prosecution, the Supreme Court in *Greene v. Massey*, 437 U.S. 17 (1978), held that the double jeopardy principle articulated in *Burks* applied fully to the states. *Id.* at 24. *See generally* *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy clause applies to the states).

⁶⁴ *Burks v. United States*, 437 U.S. at 2-3.

⁶⁵ *United States v. Burks*, 547 F.2d 968, 970 (6th Cir. 1977).

⁶⁶ *Id.*

⁶⁷ *Burks v. United States*, 437 U.S. 1, 2 (1978).

⁶⁸ *Id.* at 17-18.

⁶⁹ *Id.* at 11.

the verdict of acquittal had been rendered by the trial court, the Court continued, the double jeopardy clause would have barred retrial.⁷⁰ The Court reasoned that it should make no difference that the reviewing court, rather than the trial court, determined that the evidence was insufficient.⁷¹ The *Burks* Court explained that barring retrial where the state had produced evidence insufficient to convict the defendant at the first trial was central to the double jeopardy protection.⁷² Repeated prosecutions would permit the state to present additional evidence in an effort to convict the defendant.⁷³

Conceding that its earlier double jeopardy decisions were confusing,⁷⁴ the Court in *Burks* noted that part of this confusion resulted from its prior failure to distinguish properly between reversals due to trial error and those due to lack of evidence.⁷⁵ The Court suggested that these two types of reversals deserved different double jeopardy analysis.⁷⁶ Reexamining its decision in *Ball*, the Court stated that *Ball* was correct in allowing a new trial to rectify trial error in the initial proceeding.⁷⁷ The *Burks* Court reasoned that a reversal for trial error does not constitute a decision that the Government had failed to prove its case.⁷⁸ Instead, a reversal for trial error is merely a court's determination that the defendant was convicted through a judicial process that was somehow defective.⁷⁹ The Court explained that following a reversal for trial error, the accused has a strong interest in obtaining an error-free trial.⁸⁰ Moreover, where a conviction is reversed for trial error, society maintains a valid concern in seeing that the guilty are punished.⁸¹ In contrast, the Court said that when a conviction is reversed because the state has failed to present sufficient evidence, the state has been given one full opportunity to assemble its evidence and society's interest in the enforcement of criminal laws has therefore been vindicated.⁸²

⁷⁰ *Id.* at 10-11. Previous Supreme Court decisions had held that once a judgment of acquittal is entered, retrial is forbidden. *E.g.*, *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *Kepner v. United States*, 195 U.S. 100, 126-28 (1904).

⁷¹ *Burks v. United States*, 437 U.S. at 11.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 9. The Court's decision in *Burks* overruled, at least in part, *Forman v. United States*, 361 U.S. 416 (1960); *Yates v. United States*, 354 U.S. 298 (1957); *Sapir v. United States*, 348 U.S. 373 (1955); *Bryan v. United States*, 338 U.S. 552 (1950).

⁷⁵ *Burks v. United States*, 437 U.S. at 14-15.

⁷⁶ *Id.* at 15.

⁷⁷ *Id.* at 14. *See United States v. Tateo*, 377 U.S. 463 (1964), where the Court stated: "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to the conviction." *Id.* at 466.

⁷⁸ *Burks v. United States*, 437 U.S. at 15.

⁷⁹ *Id.* The Court cited incorrect treatment of evidence, incorrect instructions and prosecutorial misconduct as examples of fundamental defects. *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 16. The Court said that a reversal based on insufficiency of the evidence means the prosecution's case was so lacking that it should not even have been submitted to the jury. *Id.*

The Court cautioned, however, that appellate court reversals should be confined to cases where the prosecutor's failure to prove his case is clear.⁸³

In *United States v. Scott*,⁸⁴ the Supreme Court characterized the question of the applicability of the double jeopardy clause as a matter of distinguishing between trials which end pursuant to a legal claim and those in which the court makes a factual determination concerning the defendant's guilt or innocence.⁸⁵ In the context of dismissals, this, in effect, amounts to the same distinction as that between reversal for trial error rather than for the insufficiency of the evidence. The defendant in *Scott* was tried in a federal district court for distribution of narcotics.⁸⁶ Both before and during trial, the defendant moved to dismiss two counts of the indictment against him on the ground that his defense had been prejudiced by pre-indictment delay.⁸⁷ After hearing all of the evidence, the court granted the defendant's motion.⁸⁸ When the Government appealed, the United States Court of Appeals for the Sixth Circuit dismissed the appeal holding that the double jeopardy clause barred further prosecution of the defendant.⁸⁹ On writ of certiorari, the United States Supreme Court reversed the Court of Appeals' decision to dismiss the Government's appeal and remanded the case to that court.⁹⁰ The Supreme Court held that the Government's appeal invaded no interest protected by the double jeopardy clause, because the defendant had sought on his own to have his trial ended without any decision as to his factual guilt or innocence.⁹¹

In reaching its decision in *Scott*, the Supreme Court outlined what it considered two basic principles governing double jeopardy. First, a defendant who

⁸³ *Id.* at 17. The Court explained that a judge is to present the case to the jury if the evidence and the inferences therefrom when viewed in the light most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. *Id.* The Court reasoned that given the requirements for entry of a judgment of acquittal, the purposes of the double jeopardy prohibition would be ignored if the government was given a "second bite at the apple." *Id.*

⁸⁴ 437 U.S. 82 (1978).

⁸⁵ *Id.* at 87.

⁸⁶ *Id.* at 84.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* The Court of Appeals explained that the Supreme Court's decision in *United States v. Jenkins*, 420 U.S. 358 (1975), prohibited further proceedings. In *Jenkins*, the Supreme Court held that the government has no right to appeal whenever further proceedings would be required that would be devoted to the resolution of factual issues going to the elements of the offense charged. *Id.* at 370.

⁹⁰ *United States v. Scott*, 437 U.S. 82, 101 (1978). In *Scott*, the Supreme Court stated that *Jenkins* placed too great an emphasis on the defendant's right to have his guilt or innocence decided by the first jury. *Id.* at 87.

⁹¹ *Id.* The general rule is that when a defendant moves for a mistrial or otherwise seeks to terminate the proceedings he has made a deliberate choice to take the case from the initial trier of fact and therefor the double jeopardy clause imposes no bar to reprosecution. *United States v. Jorn*, 400 U.S. 470, 485 (1971). An exception to this rule has been recognized, however, where the conduct giving rise to the successful motion for a mistrial was prosecutorial or judicial conduct intended to provoke the defendant into moving for a mistrial. *Oregon v. Kennedy*, 102 S. Ct. 2083, 2089 (1982). For an earlier case discussing this exception, see *United States v. Dinitz*,

successfully appeals a conviction on any grounds other than the insufficiency of the evidence is not protected from reprosecution by the double jeopardy bar.⁹² The Court explained that requiring a defendant who is able to upset his conviction on grounds other than the insufficiency of the evidence to stand trial again is not the sort of governmental oppression the double jeopardy clause was intended to prevent.⁹³ Second, a judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, is final and the defendant may not be retried.⁹⁴ The *Scott* Court stated that permitting a second trial after an acquittal would present an unacceptably high risk that the Government's superior resources might wear down the defendant so that "even if innocent he may be found guilty."⁹⁵

Although the Court recognized that the Government, with all its "resources and power," should not be allowed to make repeated attempts to convict,⁹⁶ it nonetheless held that when a defendant chooses to terminate his trial on grounds unrelated to guilt or innocence this concern about governmental oppression did not apply.⁹⁷ The Court said that retrial after such an election by a defendant was allowed.⁹⁸ According to the *Scott* Court, the double jeopardy bar did not preclude retrial where a defendant successfully avoided conviction on the basis of what it termed a legal claim rather than on an assertion that the Government had failed to make out its case.⁹⁹ The Court reasoned that when the defendant asserts the presence of a legal or procedural defect in his trial, the defendant would avoid conviction if retrial were not permitted even though the Government's case might be able to satisfy the trier of fact of his guilt.¹⁰⁰ In effect, a legal claim only goes to the procedural effectiveness of the particular trial, and is not dependent upon the guilt or innocence of the accused. As long as the trial is dismissed for reasons unrelated to the defendant's guilt or innocence, the accused may be retried.¹⁰¹

After determining that a dismissal pursuant to a "legal" claim does not bar retrial, the Court contrasted the situation with one where the State seeks to reprosecute a defendant who had either been found not guilty or had at least allowed the issue of guilt to be submitted to the trier of fact.¹⁰² According to the Court, the double jeopardy clause bars retrial following an acquittal because permitting a second prosecution would create an unacceptably high risk that

424 U.S. 600 (1976). For a good discussion of this area of double jeopardy law, see Comment, *Double Jeopardy: An Illusory Remedy For Governmental Overreaching At Trial*, 29 BUFFALO L. REV. 795 (1980).

⁹² *United States v. Scott*, 437 U.S. at 90-91.

⁹³ *Id.* at 91.

⁹⁴ *Id.*

⁹⁵ *Id.* (quoting *United States v. Greene*, 355 U.S. 184, 188 (1957)).

⁹⁶ *Id.* at 96.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 101.

¹⁰² *Id.* at 91.

the Government's superior resources would wear down a defendant so that even though innocent, he may be found guilty.¹⁰³ The Court defined an acquittal as a "ruling of the judge, whatever its label, actually represent[ing] a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged."¹⁰⁴ The Court reasoned, however, that when a defendant's first trial is terminated for reasons completely unrelated to factual guilt or innocence, the trier of fact has not found the defendant innocent in any sense of the word and therefore retrial is appropriate.¹⁰⁵ Thus, prior to *Tibbs*, where a defendant either established his innocence at trial or established on appeal that sufficient evidence to convict had not been introduced at trial, the double jeopardy bar of the fifth amendment would apply. Where a conviction was overturned on a procedural or "legal" claim, the defendant would be retried.

II. *TIBBS v. FLORIDA*

In a five-to-four decision, the Supreme Court affirmed the Florida Supreme Court's ruling that the double jeopardy clause does not bar retrial where a defendant is able to reverse his conviction based on the weight of the evidence.¹⁰⁶ The majority opinion, written by Justice O'Connor,¹⁰⁷ began by reaffirming the general rule of *United States v. Ball* that a criminal defendant who successfully appeals a judgment against him may be retried.¹⁰⁸ The Court then recognized the two major considerations behind the *Ball* rule.¹⁰⁹ First, society has a strong interest in punishing those who violate criminal laws.¹¹⁰ Second, although *Burks* created an exception by prohibiting retrial following a reversal based on the insufficiency of the evidence, retrial of a defendant who obtains a reversal of his conviction is not normally the sort of governmental oppression the double jeopardy clause was designed to prevent.¹¹¹ Justice O'Connor then moved directly to a discussion of the exception *Burks* created to the general rule of *Ball*.¹¹²

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 97 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)).

¹⁰⁵ *Id.* at 98 n.11.

¹⁰⁶ *Tibbs v. Florida*, 102 S. Ct. 2211, 2213 (1982).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2217 (citing *United States v. Ball*, 163 U.S. 662, 672 (1896)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* See *United States v. Tateo*, 377 U.S. 463, 466 (1964).

¹¹¹ *Tibbs v. Florida*, 102 S. Ct. 2211, 2217 (1982). See *United States v. Scott*, 437 U.S. 82, 91 (1978). The *Tibbs* Court explained that *Burks* was a narrow exception to the *Ball* rule. *Tibbs v. Florida*, 102 S. Ct. at 2217.

For examples of situations where the Supreme Court has found that the sort of governmental oppression the double jeopardy clause was designed to prevent exists, see *Oregon v. Kennedy*, 102 S. Ct. 2083, 2089 (1982) (Retrial forbidden when prosecution or court intends to provoke defendant into moving for a mistrial); *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (Second prosecution not allowed following mistrial declared over defendant's objection unless "manifest necessity" demonstrated); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (Double jeopardy clause bars retrial following an acquittal).

¹¹² *Tibbs v. Florida*, 102 S. Ct. at 2217. See *Burks v. United States*, 437 U.S. 1, 16

In *Burks*, as noted, the Supreme Court held that where an appellate court reverses a conviction based on the insufficiency of the evidence, the double jeopardy clause bars further prosecution.¹¹³ The *Tibbs* Court, in explaining *Burks*, stated that evidence is legally insufficient when the government's case is so weak that the evidence should never have been submitted to the trier of fact.¹¹⁴ In effect, the standard of legal insufficiency is met when no rational factfinder could convict the defendant based upon the evidence presented.¹¹⁵

Turning to the rationale behind *Burks*, the *Tibbs* Court stated that the *Burks*' exception rested on two closely related policies.¹¹⁶ First, judgments of acquittal are given special weight in a double jeopardy analysis.¹¹⁷ Noting that a reversal by an appellate court based on the insufficiency of the evidence is the functional equivalent of an acquittal, the *Tibbs* Court reasoned that a reversal based on the insufficiency of the evidence also should absolutely shield the defendant from retrial.¹¹⁸ Second, in *Burks*, the Court stated that under the double jeopardy protection the prosecution should not be given a second opportunity to produce evidence it failed to present in the first trial.¹¹⁹ In effect, if the government were allowed repeated attempts to convict, an unfair burden would be placed on the defendant because the repeated attempts would create the grave risk that a defendant may be convicted purely as a result of governmental perseverance.¹²⁰ The *Tibbs* Court concluded, therefore, that when a reversal is based upon the prosecution's failure to produce sufficient evidence to prove its case, the double jeopardy clause prevents the government from making another attempt at conviction.¹²¹ This, of course, is to restate the holding of *Burks*.

After examining the policies behind the *Burks* decision, the *Tibbs* Court explained that these policies are not as forceful when a conviction is reversed based on the weight of the evidence.¹²² The Court noted that an appellate judge's disagreement with a jury's resolution of conflicting evidence does not mean that acquittal by the jury was the only proper verdict.¹²³ Suggesting that in such a case the appellate court is really acting as a "thirteenth juror," the Court reasoned that this "difference of opinion" was similar to the situation of a deadlocked jury.¹²⁴ Earlier decisions, the Court recognized, consistently held that the double jeopardy clause presents no bar to retrial when a jury is unable

(1978).

¹¹³ *Tibbs v. Florida*, 102 S. Ct. at 2217. See *Burks v. United States*, 437 U.S. at 18.

¹¹⁴ *Tibbs v. Florida*, 102 S. Ct. at 2217-18.

¹¹⁵ *Id.* at 2218.

¹¹⁶ *Id.*

¹¹⁷ *Id.* See, e.g., *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam).

¹¹⁸ *Tibbs v. Florida*, 102 S. Ct. at 2218.

¹¹⁹ *Id.* See *Burks v. United States* 437 U.S. 1, 11 (1978).

¹²⁰ *Tibbs v. Florida*, 102 S. Ct. at 2218. See *Green v. United States*, 355 U.S. at 187-88 (1955); *United States v. DiFrancesco*, 449 U.S. 119, 130 (1980).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

to reach a verdict.¹²⁵ After making this analogy, the Court stated that an appellate reversal on weight should not be given the special deference given acquittals.¹²⁶

The *Tibbs* Court explained that a reversal based on weight can only occur after the prosecution has presented sufficient evidence for the case to be submitted to a jury and has convinced the jury to convict.¹²⁷ Because a reversal based on weight can occur only after the jury has decided against acquittal and returned a guilty verdict, the Court reasoned that a reversal based on weight simply gives a defendant a second opportunity to secure an acquittal.¹²⁸ While the Court admitted that allowing retrial following a reversal based on weight affords the prosecution a second try as well, the Court explained that because the State already had secured a conviction based on technically sufficient evidence, the State had little to gain and everything to lose on retrial.¹²⁹ The Court stated that the double jeopardy prohibition should not require society to pay the high price of immunity for every defendant who is able to get his conviction reversed by an appellate court any more than society should be forced to have every defendant who fails to get an error-free trial set free.¹³⁰ The Court concluded that the second opportunity that the state will receive as a result of the Court's ruling in *Tibbs* does not involve the type of oppression outlawed by the double jeopardy clause.¹³¹

Justice White wrote a dissenting opinion in *Tibbs* and was joined by three other Justices.¹³² The dissent began by recognizing that the meaning of the double jeopardy clause in any criminal proceeding is not always clear.¹³³ The opinion then noted that to sustain *Tibbs*' conviction, the prosecution was required not only to produce evidence sufficient to persuade a rational factfinder of guilt beyond a reasonable doubt under the federal constitutional standard announced in *Jackson v. Virginia*,¹³⁴ but also, under Florida law, to establish that the conviction was not against the weight of the evidence.¹³⁵ According to the dissent, because the Florida Supreme Court found *Tibbs*' conviction to be against the weight of the evidence and reversed, the prosecution failed as a

¹²⁵ *Id.* See *Johnson v. Louisiana*, 406 U.S. 356, 401-02 (1972) (Marshall, J., dissenting); *Logan v. United States*, 144 U.S. 263, 298 (1892).

¹²⁶ *Tibbs v. Florida*, 102 S. Ct. at 2219.

¹²⁷ *Id.*

¹²⁸ *Id.* The double jeopardy clause prohibits retrial of a defendant who is able to obtain an acquittal.

In a footnote, the majority suggested that a reversal based on weight does not always require the prosecution to produce new evidence at a second trial. The court reasoned that if two juries convict a defendant an appellate court will be much more reluctant to grant a new trial. *Id.* at n.18.

¹²⁹ *Id.* at n.19.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 2221.

¹³³ *Id.* (White, J., dissenting).

¹³⁴ 443 U.S. 307, 319 (1979).

¹³⁵ *Tibbs v. Florida*, 102 S. Ct. 2211, 2221 (1982) (White, J., dissenting).

matter of Florida law to produce adequate evidence.¹³⁶ The dissent assumed, therefore, that if the State produced the same evidence again on retrial, the state appellate courts would again have to reverse any conviction.¹³⁷ Because the State had a full and fair opportunity to present its case and the reviewing court held that the evidence was inadequate under Florida law, the dissent reasoned that the only possible point in conducting a new trial would be to allow the State to produce additional evidence.¹³⁸ The dissent was not willing to agree with the majority that reprosecution under such circumstances did not violate the double jeopardy clause.¹³⁹

Justice White then noted that the majority correctly recognized that if the evidence were inadequate under federal law, *Burks* precluded retrial.¹⁴⁰ The dissent disagreed, however, with the majority's decision to allow the State another attempt to convict where state law holds the proof inadequate.¹⁴¹ The opinion explained that while *Jackson* established the minimum federal standard for upholding a conviction, Florida law imposed the additional requirement that a conviction could be overturned if it was against the weight of the evidence.¹⁴² The dissent reasoned that the majority failed to explain why the State should be allowed a second chance at convicting a defendant when the conviction is reversed upon inadequate proof under state law, but not when the reversal is based on federal evidentiary grounds.¹⁴³ According to the opinion, in both cases the State has failed to present evidence adequate to sustain the conviction, in both cases the State has the same interests in overcoming the evidentiary shortcomings, and in both cases the interests of the defendant in avoiding further prosecution are the same.¹⁴⁴ In response to the majority's justification for the distinction, the dissent reasoned that the double jeopardy bar should not depend upon a finding that an "acquittal was the only proper verdict."¹⁴⁵ The dissent stated the important factor in determining whether the double jeopardy clause barred retrial was that the prosecution failed to prove the evidentiary requirements as a matter of state law.¹⁴⁶ The majority ruling, according to the dissent, gives the prosecution, not the defendant, a needed second opportunity.¹⁴⁷

¹³⁶ *Id.* (White, J., dissenting).

¹³⁷ *Id.* (White, J., dissenting). The dissent noted that although courts in Florida were no longer allowed to reverse convictions on grounds of evidentiary weight, other jurisdictions, including the federal government, make use of a similar rule with respect to evidentiary weight. *Id.* at 2221-22 n. *. (White, J., dissenting). Thus, the issue remains an important one for future litigation in those jurisdictions with such a rule.

¹³⁸ *Id.* at 2222. (White, J., dissenting).

¹³⁹ *Id.* (White, J., dissenting).

¹⁴⁰ *Id.* (White, J., dissenting).

¹⁴¹ *Id.* (White, J., dissenting).

¹⁴² *Id.* (White, J., dissenting).

¹⁴³ *Id.* (White, J., dissenting).

¹⁴⁴ *Id.* (White, J., dissenting).

¹⁴⁵ *Id.* (White, J., dissenting).

¹⁴⁶ *Id.* (White, J., dissenting).

¹⁴⁷ *Id.* (White, J., dissenting).

Finally, the dissent examined the policies underlying the double jeopardy clause. The important question in a double jeopardy analysis, in Justice White's view, was whether the reversal stemmed from a failure of proof at trial after the State had been given a full opportunity to present its case.¹⁴⁸ Quoting from the majority opinion in *Tibbs*, the dissent stated the prosecution should not be given a second chance to supply evidence it failed to produce in the first proceeding.¹⁴⁹ The dissent explained that the double jeopardy prohibition prevents the State from "honing its trial strategies" and using successive trials to perfect its evidence, thereby creating the risk that a defendant may be found guilty through sheer governmental perseverance.¹⁵⁰ When a court allows retrial following a reversal due to a failure of proof, regardless of whether the proof was insufficient or lacking in weight, in Justice White's view the State with all its resources is being allowed repeated attempts to convict.¹⁵¹ According to the dissent, therefore, the only proper distinction for determining whether the double jeopardy clause applied was that between procedural reversals and evidentiary reversals.¹⁵² In essence, whether the appellate court characterizes its reversal as based upon either the insufficiency or the weight of the evidence, the real question in determining whether the double jeopardy bar should apply is whether the state has met the evidentiary standards for upholding a conviction. To allow a second attempt at conviction following any reversal based on evidentiary grounds is, in Justice White's view, to create the potential for the type of oppression the double jeopardy bar was designed to prevent: the risk of convicting an innocent defendant.¹⁵³

III. THE RATIONALE OF *TIBBS V. FLORIDA*

A. *Validity of the Distinction Between the Weight and Sufficiency of the Evidence*

The weight and the sufficiency of the evidence are two distinct concepts.¹⁵⁴ As a practical matter, however, the distinction is not always easy to make. Sufficiency is said to be a test of adequacy;¹⁵⁵ in a criminal proceeding, a court's determination that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt.¹⁵⁶ The government must present sufficient evidence before the trial judge will submit

¹⁴⁸ *Id.* at 2223 (White, J., dissenting). See *Hudson v. Louisiana*, 450 U.S. 40, 43 (1981).

¹⁴⁹ *Tibbs v. Florida*, 102 S. Ct. at 2222-23 (White, J., dissenting) (quoting *Tibbs v. Florida*, 102 S. Ct. at 2218).

¹⁵⁰ *Id.* at 2222-23 (White, J., dissenting) (quoting *Tibbs v. Florida*, 102 S. Ct. at 2218).

¹⁵¹ *Id.* at 2223 (White, J., dissenting). See *Green v. United States*, 355 U.S. 184, 187 (1957).

¹⁵² *Tibbs v. Florida*, 102 S. Ct. at 2223 (White, J., dissenting).

¹⁵³ *Id.* (White, J., dissenting).

¹⁵⁴ *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981) (per curiam).

¹⁵⁵ *Id.*

¹⁵⁶ *Burks v. United States*, 437 U.S. 1, 16 n.10 (1978). See *Tibbs v. State*, 397 So. 2d at 1123 ("Sufficient evidence is such evidence, in character, weight or amount, as will legally justify the judicial or official action demanded.") (quoting BLACK'S LAW DICTIONARY 1285 (5th ed. 1979)).

the case to the trier of fact.¹⁵⁷ If the government is able to clear this hurdle, then the factfinder may weigh the evidence.¹⁵⁸ Evidentiary weight is a rather more difficult idea to define.¹⁵⁹ The weight of the evidence is essentially the decision of the trier of fact that the greater amount of proffered evidence supports one side of the facts or another.¹⁶⁰ Weight, so understood, is determined by the consideration made by the jury after all of the evidence is submitted.¹⁶¹

Different standards of appellate review are held to govern reversals based on weight and those based on insufficiency.¹⁶² When the motion to reverse a conviction is based on the insufficiency of the evidence, the reviewing court is required to approach the evidence from a standpoint most favorable to the government.¹⁶³ The court must deny the motion for acquittal if substantial evidence exists to justify the inference of guilt.¹⁶⁴ Where a reviewing court must determine whether to reverse a conviction based on weight of the evidence, the power of the court to set aside a conviction is broader.¹⁶⁵ The court is not required to view the evidence more favorably for either party, but instead may weigh conflicting evidence and consider the credibility of witnesses.¹⁶⁶ Although the evidence might be technically sufficient, the reviewing court may set aside the conviction if the preponderance of the evidence goes heavily against the guilty verdict.¹⁶⁷ Although this distinction can be stated easily, it is in fact difficult to make. This section of the casenote will demonstrate that the Supreme Court's opinion in *Tibbs*, by giving such importance to the distinction between reversals based on either the weight or the sufficiency of the evidence, has created problems for reviewing courts.

The problems created by the distinction between reversals based on the insufficiency of evidence and the weight of evidence are demonstrated by the

¹⁵⁷ *Burks v. United States*, 437 U.S. at 16. In *Burks*, the Supreme Court said insufficiency of the evidence means "The government's case was so lacking it should not have even been submitted to the jury." *Id.* See 9 J. WIGMORE, EVIDENCE § 2549, p. 639 (Chadbourn rev. 1981).

¹⁵⁸ 9 J. WIGMORE, EVIDENCE § 2551 p. 664 (Chadbourn rev. 1981).

¹⁵⁹ See *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981) (per curiam) ("Weight, at least in theory, is a somewhat more subjective concept [than sufficiency]").

¹⁶⁰ *Id.*

¹⁶¹ 1 J. WIGMORE, EVIDENCE § 12, p. 299 (3d ed. 1940) ("Weight . . . [has] no application until the evidence is all introduced and the jury is ready to retire.").

¹⁶² See C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 553, 246-48 (1982). Wright distinguishes a motion for a new trial on the ground the the verdict is against the weight of the evidence from a motion for a judgment of acquittal under FED. R. OF CRIM. P. 29. *Id.* According to Wright, when a court is asked to rule on a motion for judgment of acquittal, it must approach the evidence from a standpoint most favorable to the government and assume the truth of the evidence offered by the prosecution. *Id.* at 245. In contrast, when a court is ruling on a motion for new trial on the ground that the verdict is against the weight of the evidence, it may consider the credibility of witnesses and grant a new trial if a miscarriage of justice may have resulted. *Id.* at 245-46.

¹⁶³ *State v. Wilson*, 267 N.W. 2d 550, 553 (N.D. 1978).

¹⁶⁴ *Id.*

¹⁶⁵ C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 553, 245-46 (1982).

¹⁶⁶ *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980).

¹⁶⁷ *Id.*

state court rulings in *Tibbs*. When Delbert Tibbs appealed his original conviction to the Florida Supreme Court, his principal contention was that the totality of the evidence was insufficient to place him at or near the scene of the murder and rape, or to establish his identity as the perpetrator beyond all reasonable doubt.¹⁶⁸ Under Florida law, the prosecution had to produce evidence which would allow the trial court to determine after a careful scrutiny of the victim's testimony, that the conviction was "not unmerited."¹⁶⁹ The Florida Supreme Court reversed Tibbs' conviction and remanded the case for a new trial.¹⁷⁰ In so doing, the court did not expressly state whether the reversal was based on either the insufficiency or weight of the evidence. At the time of the state supreme court's decision, however, *Burks* had not yet been decided. Thus, there was no need for the court to specify the precise grounds for the evidentiary reversal because retrial presumably would have been constitutional whether the reversal was based on either weight or insufficiency.¹⁷¹

While the Florida Supreme Court drew no distinction between the weight and the sufficiency of the evidence, much of the language in its opinion suggested that the grounds were insufficiency of the evidence. After the Florida Supreme Court discussed a number of infirmities in the State's evidence,¹⁷² it added that several features of the victim's testimony also cast doubt on her believability.¹⁷³ The court said that although the resolution of facts was usually the province of the jury, the Florida legislature¹⁷⁴ had directed the court to review the "entire record."¹⁷⁵ The court then quoted from an earlier opinion

¹⁶⁸ *Tibbs v. State*, 337 So. 2d 788, 789 (Fla. 1976).

¹⁶⁹ *Id.* at 790. Under Florida law, two elements were required whenever the State sought to convict a defendant based solely on the uncorroborated testimony of the victim. First, the rape victim must testify against her assailant. *Id.* Second, the trial court must determine that the conviction was not unmerited. *Id.* The first requirement, that of direct testimony, was clearly satisfied because Nadeau did testify that Tibbs committed the crime. *Id.*

¹⁷⁰ *Id.* at 791.

¹⁷¹ *State v. Tibbs*, 370 So. 2d 386, 386 (Fla. Dist. Ct. App. (1979)). Although some states, in pre-*Burks* decisions prohibited retrial following an appellate reversal based on the insufficiency of the evidence under state law (see, e.g., *People v. Brown*, 99 Ill. App. 2d 281, 241 N.E.2d 653 (1968)), Florida did not. See *McArthur v. State*, 351 So., 2d 972, 978 (Fla. 1977) (Boyd, J., dissenting) ("Although some jurisdictions permit a new trial of an accused . . . when convictions are reversed due to insufficient evidence, it is my opinion that such action constitutes double jeopardy. . . . I therefore would dissent to that portion of the opinion requiring a new trial").

¹⁷² *Tibbs v. State*, 337 So. 2d 788, 790 (Fla. 1976). See *supra* note 26 and accompanying text for a detailed description of these infirmities.

¹⁷³ *Id.* at 790. See *supra* note 26 and accompanying text for these discrepancies in the victim's testimony.

¹⁷⁴ See Fla. Stat. § 921.141 (1975) which provided in pertinent part:

(4) Review of Judgment and Sentence—the judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida . . . *Id.* See also Fla. R. App. Pro. 616(b) (rev. 1962) which provides in pertinent part: . . . upon an appeal from the judgment of a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not.

¹⁷⁵ *Tibbs v. State*, 337 So. 2d 788, 791 (Fla. 1976).

which stated that "human 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."¹⁷⁶ This language echoes the definition of the sufficiency of evidence necessary to convict.¹⁷⁷ Specially concurring, Justice Boyd spoke of the "weakness and inadequacy" of the State's evidence, and said that the record did not support the imposition of either capital punishment or imprisonment.¹⁷⁸ Taken together, these statements would seem to indicate that the court was analyzing the problem in terms of the sufficiency of the evidence.

After the case was remanded and the trial court found that retrial was precluded by *Burks*, the appellate court was faced with a difficult question. The appellate court could either characterize the Florida Supreme Court's earlier reversal of Tibbs' conviction as one based on the insufficiency of the evidence and in so doing preclude retrial under *Burks*, or the court could view the reversal as based on some other grounds and allow the defendant to be retried.¹⁷⁹ The appellate court stated that the majority of the Justices in Tibbs' reversal reviewed the entire record and found that the testimony was not believable or substantial in character.¹⁸⁰ The court therefore maintained that the earlier reversal was not based on "pure insufficiency."¹⁸¹ Instead, the court decided that the evidence was weak and contradictory.¹⁸² In determining that the earlier reversal in *Tibbs* was based on weight, the court compared the reversal to a long line of earlier state supreme court decisions in which the evidence that had led to conviction was scrutinized.¹⁸³ The language of these cases did not make clear whether the grounds of the reversals were for insufficiency or weight, but after the appellate court reviewed the decisions, the court concluded that the reversals were based on the weight of the evidence.¹⁸⁴ The court

¹⁷⁶ *Id.* (quoting *McNeil v. State*, 104 Fla. 360, 366, 139 So. 791, 792 (1932)).

¹⁷⁷ See *supra* note 115 and accompanying text.

¹⁷⁸ *Tibbs v. State*, 337 So. 2d 798, 792 (Fla. 1976).

¹⁷⁹ *State v. Tibbs*, 370 So. 2d 386, 387 (Fla. Dist. Ct. App. 1979). After *Burks*, the double jeopardy implications of two categories of appellate reversals were clearly defined. A reversal on the ground of trial error did not bar retrial, but a reversal based on the insufficiency of the evidence did, *Burks v. United States*, 437 U.S. 1, 14 (1978). The United States Supreme Court had recognized the existence of a third category of reversal (one based on the weight of the evidence) in *Greene v. Massey*, 437 U.S. 19, 24 (1978), but did not express opinion as to the double jeopardy consequences of such a reversal, *Id.* at 26 n.10.

¹⁸⁰ *State v. Tibbs*, 370 So. 2d 386, 388 (Fla. Dist. Ct. App. 1979).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 387-88. Three of these cases were similar to the reversal in *Tibbs*. In *McNeil v. State*, 104 Fla. 360, 139 So. 791 (1932), the Supreme Court of Florida reversed a sentence of life imprisonment for armed robbery even though there was direct evidence identifying the defendant as the person guilty. *Id.* at 362, 193 So. at 792. In *McNeil*, the court stated that the evidence was not satisfactory. *Id.* In *Lowe v. State*, 154 Fla. 730, 19 So. 2d 106 (1944), the court reversed a rape conviction where the only evidence of guilt was the victim's testimony. *Id.* at 737, 19 So. 2d at 110. In reversing the conviction, the court said that after a full and fair consideration of the entire record, the inconclusiveness of the evidence offered to establish the elements of the crime

determined, therefore, that the reversal in *Tibbs* was based on the weight of the evidence.¹⁸⁵ Consequently, Tibbs' retrial would not be precluded by *Burks*.

Tibbs appealed the appellate court's decision to the state supreme court.¹⁸⁶ Tibbs asked the court to hold that its earlier reversal was based on the insufficiency of the evidence.¹⁸⁷ The opinion of the court began by explaining that the cases the appellate court relied upon as support for its decision were actually based on insufficiency and not weight.¹⁸⁸ The court noted that the "weight" cases which the appellate court had considered actually involved instances of the state's failure to prove a material element of the offense charged.¹⁸⁹ Although the court stated this did not mean that no Florida appellate reversal had ever relied explicitly on evidentiary weight as the sole basis for reversal, the court failed to cite any decision in which it had done so.¹⁹⁰ The court held that from that point on convictions could not be reversed on appeal on the ground that the weight of the evidence was "tenuous or insubstantial."¹⁹¹ The court explained that eliminating this category of appellate reversals from Florida law would take away any temptation appellate courts might have to characterize their reversals as based on weight in order to avoid the double jeopardy bar.¹⁹²

dictated the granting of a new trial. *Id.* Finally, in *Williams v. State*, 58 Fla. 138, 50 So. 749 (1909), the court reversed three earlier convictions stating that after "carefully weighing the evidence we are irresistibly impelled to the conclusion that there was not sufficient evidence adduced to warrant the verdict" *Id.* at 151-52, 50 So. at 754

¹⁸⁵ *State v. Tibbs*, 370 So. 2d 386,388 (Fla. Dist. Ct. App. 1979).

¹⁸⁶ *Tibbs v. State*, 397 So. 2d 1120, 1122 (Fla. 1981) (per curiam).

¹⁸⁷ *Id.* Prior to this decision, the Florida Supreme Court had not decided the double jeopardy consequences of appellate reversals based on evidentiary weight. See *McArthur v. Nourse*, 369 So. 2d 578, 581 n.11 (Fla. 1979).

¹⁸⁸ *Tibbs v. State*, 397 So. 2d at 1124.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* Although the court stated that two state district court decisions had recognized that evidentiary weight could serve as a basis for appellate reversals of convictions, the supreme court's characterization of its earlier reversal in *Tibbs* as based on weight remains unusual. In *Sosa v. Maxwell*, 234 So. 2d 690 (Fla. 2d Dist. Ct. App. 1970), a reviewing court characterized an earlier state supreme court reversal as based on weight and allowed retrial. *Id.* at 691-92. The Florida Supreme Court in *Tibbs* stated that the reversal in *Sosa* was actually based on insufficiency, rather than the weight, of the evidence. *Tibbs v. State*, 397 So. 2d at 1125. The supreme court stated that the district court simply interpreted its original decision erroneously. *Id.* Because the district courts's interpretation was pre-*Burks*, retrial would have been allowed in either case.

The Florida Supreme Court's characterization of its earlier reversal in *Tibbs* as based on the weight of the evidence is brought under further doubt by the second decision it referred to as relying on evidentiary weight to reverse a conviction. In *Smith v. State*, 239 So. 2d 284 (Fla. 2d Dist. Ct. App. 1970), the district court reversed a conviction, even though it recognized that the evidence was technically sufficient. *Id.* at 290. On appeal, the state supreme court unanimously reversed the district court, stating that once a reviewing court determines the evidence to be technically sufficient its duty was to affirm the conviction. *Smith v. State*, 249 So. 2d 16, 18 (Fla. 1971).

¹⁹¹ *Tibbs v. State*, 397 So. 2d at 1125. The court said eliminating this category would avoid disparate appellate results and the court's having to review reversals to determine whether they were based on insufficiency or weight. *Id.*

¹⁹² *Id.* at 1125-26. Thus, from that point on a conviction in Florida would stand even if it

After determining that this "distinction" between evidentiary weight and sufficiency should no longer remain in Florida law, the court nonetheless went on to hold that Tibbs' reversal "was one of those rare instances" in which reversal was based on evidentiary weight.¹⁹³ The court stated that Nadeau's testimony alone was legally sufficient and that the court had in effect reweighed the evidence supporting Tibbs' conviction.¹⁹⁴ The Florida Supreme Court said that despite language in its original opinion that there was a very real possibility that Tibbs had nothing to do with these crimes, only by "stretching" its analysis could the supreme court possibly characterize its previous reversal as based on the insufficiency of the evidence.¹⁹⁵ Inasmuch as Tibbs' conviction was therefore based on the weight of the evidence, the Florida Supreme Court concluded the double jeopardy bar did not apply.¹⁹⁶

The difficulty of both making and applying the distinction between the weight and sufficiency of the evidence created by the United States Supreme Court in *Tibbs*¹⁹⁷ is demonstrated by the conflicts and confusion in these earlier state court rulings. First, the state supreme court disagreed with the appellate court on every case the appellate court cited as being reversed on weight.¹⁹⁸ Although the Supreme Court was looking retroactively at pre-*Burks* decisions in which the need to distinguish between reversals based on weight or sufficiency of the evidence was not crucial, this disagreement demonstrates the difficulties an appellate court faces when it attempts to classify a reversal as based on weight or sufficiency of the evidence. The major reason for the difficulty in determining whether a conviction is based on insufficient evidence or whether the evidence is technically sufficient but the conviction is against the weight of the evidence is that the standards for determining legally sufficient evidence are not purely objective.¹⁹⁹

When an appeals court is asked to overturn a conviction based on evidentiary insufficiency, it must determine whether substantial evidence exists to

was against the great weight of the evidence. The court noted that new trials could still be granted "in the interests of justice." This, the court said, would allow appellate courts to correct fundamental injustices unrelated to evidentiary shortcomings. *Id.* at 1126.

¹⁹³ *Id.* As Justice Sundberg pointed out in dissent, this conclusion was reached after the majority of the court had already conceded that it was virtually impossible to characterize earlier reversals as based on weight or insufficiency. *Id.* at 1127 (Sundberg, J., dissenting).

¹⁹⁴ *Id.* at 1126.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1127.

¹⁹⁷ In referring to *Tibbs* as "creating" this distinction, the discussion is concerned only with the different double jeopardy consequences that have been accorded to these two reversals. The general distinction between the weight and the sufficiency of the evidence existed long before *Tibbs*.

¹⁹⁸ *Tibbs v. State*, 397 So. 2d 1120, 1124 (Fla. 1981) (per curiam).

¹⁹⁹ Although the jury's role in balancing conflicting evidence is in theory contrasted to that of the judge who must decide where there is "enough" evidence to allow the case to be submitted to the trier of fact, it is apparent that both the judge and the jury do some "weighing." See generally Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1155-57 (1960). When a case is tried to a judge, clearly these roles become even more entwined.

support the trial court's decision that the standard for legally sufficient evidence has been met.²⁰⁰ Confusion between the weight and the sufficiency of evidence will result because when a reviewing court is deciding whether "substantial" evidence exists it must, at least to some degree, conduct its own evaluation of the evidence. Because the standard for legal sufficiency of the evidence in many cases will naturally require the reviewing court to do some weighing,²⁰¹ there is often at best a fine line between a reversal based on weight and one based on insufficiency. This lack of objective standards for determining evidentiary sufficiency is apparent in Tibbs' case, where the standard for legal sufficiency under Florida law was met if direct testimony by the victim was obtained, provided this testimony would not lead to an unmerited conviction.²⁰² For the Florida Supreme Court to determine whether the conviction was merited, the court had to examine the record to see if the other evidence adduced at trial supported the victim's testimony against Tibbs.²⁰³ In conducting this examination, the court inevitably had to make some judgment of its own about whether the evidence presented justified a guilty verdict. In essence, therefore, some weighing was required by the standard for evidentiary sufficiency. In reversing Tibbs' original conviction, the Florida Supreme Court identified numerous infirmities in the State's case and explained that several features of the victim's testimony created doubt about her believability.²⁰⁴ Although these discrepancies would seem to indicate Tibbs' conviction was unmerited and that, therefore, the Florida standard for legally sufficient evidence was not met, the state supreme court later characterized its earlier reversal of Tibbs' conviction as based on the weight of the evidence.²⁰⁵ The court stated that only by "stretching" its analysis could it term its earlier reversal as one based on the insufficiency of the evidence,²⁰⁶ disregarding the inherent weighing required by the state standard for evidentiary sufficiency.

The second major problem with the distinction between the weight and sufficiency of the evidence is that by creating two classes of reversals, one that

²⁰⁰ See *supra* note 164 and accompanying text.

²⁰¹ See e.g., *State v. Naeole*, 62 Haw. 563, 565, 617 P.2d 820, 823 (1980) ("Substantial evidence . . . is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion. It is evidence which a reasonable mind might accept as adequate to support such a conclusion."); *State v. True*, 438 A.2d 460, 471 (1981) ("The uncorroborated testimony of the prosecutrix is sufficient to support a rape conviction unless the testimony is inherently improbable or incredible and does not meet the test of common sense."); For other examples of standards of sufficiency that necessarily involve some element of weighing, see *State v. Harrington*, 440 A.2d 1078, 1079 (1982); *Williams v. State*, 423 N.E. 2d 598, 599-600 (1981); *State v. Tison*, 129 Ariz. 546, 554-55, 633 P.2d 355, 363-64 (1981); *State v. Schad*, 129 Ariz. 557, 571, 633 P.2d 366, 381 (1981); *United States v. Shipp*, 409 F.2d 33, 35-36 (4th Cir. 1969); *State v. Lima*, 64 Haw. 470, 473, 643 P.2d 536, 539 (1982).

²⁰² *Tibbs v. State*, 337 So. 2d 788, 789-90 (Fla. 1976). See *supra* notes 166-68 and accompanying text.

²⁰³ *Id.* at 790.

²⁰⁴ See *supra* note 26 and accompanying text. The Florida Supreme Court stated it had "considerable doubt" that Tibbs committed the crimes. *Tibbs v. State*, 337 So. 2d at 790.

²⁰⁵ *Tibbs v. State*, 397 So. 2d 1120, 1122 (Fla. 1981) (per curiam).

²⁰⁶ *Id.*

allows for retrials and one that does not, the United States Supreme Court in *Tibbs* has given reviewing judges²⁰⁷ a difficult choice. If an appellate court decides to reverse a conviction that is not warranted by the evidence adduced at trial, the court must either say that the evidence was insufficient and thereby set the defendant free, or base its reversal on the weight of the evidence and in so doing allow a second trial.²⁰⁸ Because a reviewing court will often be faced with an evidentiary standard that involves some weighing, even the most conscientious judge could not be faulted for choosing the "safer" ground of reversing on the weight of the evidence, thereby allowing the state to retry a defendant.²⁰⁹ In so doing, the court would avoid the public outrage that often follows a court's decision to set a convicted defendant free.

²⁰⁷ Although Florida appellate courts are no longer allowed to reverse convictions based on the weight of the evidence, reviewing courts in other jurisdictions sometimes rely upon the weight of the evidence to overturn convictions. *Tibbs*, 102 S. Ct. 2211, 2216 n.12 (1982). For example, Trial Rule 59(a)(4) of the Indiana Rules of Trial Procedure specifies as a ground for relief in the motion to correct errors that the verdict or decision is "contrary to the evidence." Trial Rule 59(J)(7) provides that the trial court shall grant a new trial if the decision is found to be against the weight of the evidence. This rule is incorporated into criminal practice by Rule 16 of the Indiana Rules of Criminal Procedure. See Thompson, *Reversals For Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal*, 8 IND. L. REV. 497, 499 n.3 (1974); Moore v. State, Ind., 403 N.E. 2d 335, 336 (1980). See also *Ricketts v. Williams*, 242 Ga. 303, 304, 248, S.E.2d 673, 674 (1978) (Georgia reviewing courts permitted to reverse based on weight.).

In addition, a number of federal courts under Rule 33 of the Federal Rules of Criminal Procedure, which authorizes a new trial if it is "in the interests of justice," have recognized the authority of a trial judge to set aside a conviction that is against the weight of the evidence. *Tibbs v. Florida*, 102 S. Ct. at 2216 n.12. For purposes of the present analysis, it must be noted that under the Federal Rules of Criminal Procedure a motion for a new trial on the ground that a verdict is against the weight of the evidence can be combined with a motion for a judgement of acquittal under Rule 29. See, e.g., *United States v. Rojas*, 574 F. 2d 476, 476 (9th Cir. 1976); *United States v. Kohlman*, 491 F.2d 1250, 1251 (5th Cir. 1974).

²⁰⁸ This second trial following a reversal based on weight will result in all federal courts, and also in those states that view the double jeopardy provisions of their own constitutions as imposing no requirements greater than the federal law demands. See *supra* notes 51-52.

Additionally, it must be recognized that even in jurisdictions bound by the Supreme Court's ruling in *Tibbs* an appellate or reviewing court would not always have such a "choice." If the standard of sufficiency truly did not involve any weighing of the evidence, or the evidence was so clearly lacking that in no way could it be characterized as sufficient, then the court obviously would be required to characterize the evidence as insufficient and in so doing set the defendant free.

²⁰⁹ See *Tibbs v. Florida*, 102 S. Ct. at 2223 (White, J., dissenting) ("It must also be noted that judges having doubts about the sufficiency of the evidence under the *Jackson* standard may prefer to reverse on the weight of the evidence, since retrial would not be barred."). The Supreme Court in other double jeopardy decisions has expressed concern over the implications its rulings would have on appellate judges. For example, in *United States v. Wilson*, 420 U.S. 332 (1975), the Court explained that the rationale for the general rule of *Ball* that a defendant who is able to get his conviction overturned on appeal may be retried was that it "is simply . . . fairer to both the defendant and the Government." *Id.* at 343 n.11. This explanation for the *Ball* rule rests on the assumption that the rule "enhances the probability that appellate courts will be more vigilant to strike down previous convictions . . . tainted with reversible error." *United States v. Ewell*, 383 U.S. 116, 121 (1966). The Court has stated that if the rule were otherwise, appellate courts would become less zealous in their protection of defendant's rights. *United*

Once again, the earlier state court decisions provide the most vivid example of the difficult choices created by *Tibbs*. When the Florida Supreme Court was faced with the task of characterizing its earlier reversal as based on either weight or sufficiency, the court knew that "choosing" the latter would set Tibbs free.²¹⁰ The court determined that the reversal was based on weight even though the state standard for sufficiency provided that a conviction could not stand if unmerited; the court was unable to point to any other case in Florida history where it reversed a conviction based on weight;²¹¹ three justices who joined in the original opinion reversing Tibbs' conviction dissented in the court's decision to allow Tibbs to be retried;²¹² and the court's prior opinion reversing Tibbs's conviction had quoted an earlier state decision that spoke in terms usually connected with an insufficiency analysis.²¹³ The ability of the Florida Supreme Court to label its reversal as based on weight despite these factors demonstrates that the distinction between weight and sufficiency of the evidence is not a workable one. If a reviewing court can characterize its reversal as based on weight despite an earlier published opinion with language suggesting that the evidence was insufficient, clearly a court examining evidence for the first time could use a sufficiency analysis but term its reversal as based on weight. It would seem likely, therefore, that some courts might be unwilling to set defendants free and would avoid characterizing reversals as based upon sufficiency.

This "compromise" of setting aside a defendant's conviction but characterizing the reversal as based on weight, and thus allowing retrial, will serve to limit the effectiveness of the exception created by *Burks*. By allowing an appellate court the option of reversing an unmerited conviction without precluding the retrial of the defendant, *Tibbs* will inevitably lead to retrial of defendants who under *Burks* should not have to face further prosecution. Defendants who seek reversal of their convictions on the grounds of insufficient evidence will be faced with the formidable task of persuading a reviewing court that the evidentiary weighing done by the court should go to the standard for

States v. Tateo, 337 U.S. 463, 466 (1964).

²¹⁰ *Tibbs v. State*, 397 So. 2d 1120, 1122, 1127 (Fla. 1981) (per curiam).

²¹¹ *Id.* at 1124-25. Chief Justice Sundberg, who concurred in part and dissented in part of the state supreme court's opinion, said not only would the original reversal on weight have been "novel," it would also have been unlawful. He said the court's only authority was to reverse based on the insufficiency of the evidence, explaining that earlier decisions had recognized that appellate courts in Florida were not allowed to reweigh evidence. *Id.* at 1127 (Sundberg, J., dissenting). See *Herzog v. Herzog*, 346 So. 2d 56, 58 (1977); *Shaw v. Shaw*, 334 So. 2d 13, 16 (1977).

²¹² *Tibbs v. State*, 397 So. 2d at 1127-31. Justices Sundberg, England, and Boyd all dissented in the state supreme court's decision to allow retrial. *Id.* Chief Justice Sundberg suggested that the double jeopardy clause should prohibit retrial whenever the appellate court reverses "for a substantive lack of evidence to support the verdict." *Id.* at 1128. Justice England stated that Tibbs should be discharged "in the interests of justice," while Justice Boyd expained that Tibbs' original reversal was based on evidentiary insufficiency. *Id.* at 1130-31.

²¹³ See *supra* note 176 and accompanying text.

legal sufficiency, and not to a more general re-weighing of the evidence.²¹⁴ The defendant must convince the court that in its examination of the evidence, it is reviewing the evidence for legal sufficiency, and not weight. Only if the defendant is successful in persuading the appellate court that the evidence was insufficient will he be free from further prosecution.

The objection that *Burks* would be undermined if different outcomes could be reached depending on how the reversal was characterized did not seem to trouble the Supreme Court. In *Tibbs*, the majority of the United States Supreme Court rejected this argument on two grounds.²¹⁵ First, the majority said that trial and appellate judges often distinguish between evidentiary weight and sufficiency.²¹⁶ The *Tibbs* Court said there was no reason to believe that its decision would erode the demonstrated ability of judges to distinguish between evidence that is legally sufficient and that which is not.²¹⁷ Second, the Court said that its opinion in *Jackson v. Virginia*²¹⁸ placed some limitations on an appellate court's power to mask its reversals as based on weight when they actually concerned the insufficiency of the evidence.²¹⁹ In *Jackson*, the Court held that the due process clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt.²²⁰ The *Tibbs* Court maintained that *Jackson* would set an enforceable lower limit on a reviewing court's definition of evidentiary sufficiency.²²¹ In addition, the Court stated its belief that appellate judges would faithfully honor their obligations, and as a result *Burks* would not be undermined.²²²

The majority's reasoning in *Tibbs* is unpersuasive for two reasons. First, in support of the Court's belief that reviewing judges are fully able to distinguish between evidentiary weight and sufficiency, the opinion only cites decisions that have described the different standards that apply to reversals on

²¹⁴ Following *Burks*, at least one commentator suggested that in questionable cases appellate courts would be less likely to hold evidence insufficient because such a decision would shield the defendant from further prosecution. Note, *Double Jeopardy: When is an Acquittal an Acquittal?*, 20 B.C. L. REV. 925, 947 (1978) [hereinafter cited as Note, *Double Jeopardy*]. ("[A]ppellate courts will be less likely to find the evidence insufficient in marginal cases when the consequence of such a judgment is to immunize the defendant from the possibility of reprosecution."). The Supreme Court's ruling in *Tibbs* gives reviewing courts an attractive alternative if they are at all uncertain that the standard for evidentiary sufficiency has been met. By reversing based on weight, appellate courts will free themselves from having to make a final decision as to the defendant's guilt. Prior to *Tibbs*, reviewing courts either had to hold the evidence insufficient, leaving the defendant free from any further prosecution, or determine that the evidence was sufficient, thereby making a final determination as to the defendant's guilt. Because reviewing courts now have the option to reverse based on weight, it will be even more difficult for defendants to get their convictions reversed based on the insufficiency of the evidence.

²¹⁵ *Tibbs v. Florida*, 102 S. Ct. 2211, 2220 (1982).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ 443 U.S. 307 (1979).

²¹⁹ *Tibbs v. Florida*, 102 S. Ct. 2211, 2220 (1982).

²²⁰ *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

²²¹ *Tibbs v. Florida*, 102 S. Ct. 2211, 2220 (1982).

²²² *Id.*

weight and those on insufficiency.²²³ In none of these decisions, however, did an appellate court reverse a conviction on the ground that although the evidence was technically sufficient, the conviction was against the great weight.²²⁴ The *Tibbs* Court, by simply stating that appellate judges are capable of making this distinction between evidentiary weight and sufficiency, has failed to give reviewing courts any guidance in applying the different standards. As was indicated, the difficulty with distinguishing between the weight and sufficiency of evidence is not in articulating the standards. Courts encounter difficulty in applying the standards, and the majority in *Tibbs*, by simply stating that judges will faithfully attempt to honor their obligations, does nothing to lessen this problem.

The second major problem with the majority's assertion that the *Tibbs* decision will not undermine *Burks* is the Court's belief that *Jackson* provides a safeguard from violation of the defendant's rights created by *Burks*.²²⁵ In *Jackson*, the Court held that the due process clause required the reversal of a criminal defendant's conviction if no rational trier of fact could find guilt beyond a reasonable doubt.²²⁶ The majority in *Tibbs* stated that *Jackson* imposed a constitutional requirement on appellate courts to free defendants who had been convicted based on insufficient evidence.²²⁷ The effectiveness of the *Jackson* safeguard is based on the Court's assumption that an appellate court is capable of determining whether a "rational trier of fact would have found guilt

²²³ *Id.* at n.20.

²²⁴ *See, e.g.*, *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 (1981); *Ridley v. State*, 236 Ga. 147, 149, 223 S.E.2d 131, 132 (1976); *State v. McGranaham*, 415 A.2d 1298, 1301-03 (1980); *Tyack v. State*, 65 Wis. 2d 513, 521, 223 N.W.2d 595, 599 (1974).

It should be noted that although *United States v. Weinstein*, 452 F.2d 704, appears to involve the reversal of a conviction based on weight, a close reading of that opinion reveals a very narrow holding. In *Weinstein*, the Second Circuit Court of Appeals held that a trial judge did not have the power to dismiss an indictment in the interests of justice if it found the evidence was legally sufficient. *Id.* at 715-16. The appeals court did not, however, reverse a conviction based on weight.

Furthermore, the Supreme Court's opinion that reviewing courts are able to distinguish between reversals based on weight and those based on insufficiency could receive little support from any pre-*Burks* decisions that reversed on weight. Because the double jeopardy clause would have permitted retrial whether a court termed its reversal as based on either weight or sufficiency, decisions prior to *Burks* do not "demonstrate" the ability of reviewing judges to distinguish between the two reversals.

²²⁵ *Tibbs v. Florida*, 102 S. Ct. 2211, 2220 (1982). The Court's reliance on the due process protections of *Jackson* is based on a belief that appellate courts might attempt to "mask" their reversals as based on weight even if the courts believed that the evidence was insufficient. *Id.* The Court's recognition that "masking" could take place is an indication that the Court also realizes that the distinction between the weight and the sufficiency of the evidence is not a clear one.

²²⁶ *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A defendant who obtained such a reversal could not be retried.

²²⁷ *Tibbs v. Florida*, 102 S. Ct. 2211, 2220 (1982).

beyond a reasonable doubt" without in any way substituting the court's own judgment for that of the jury.²²⁸ This assumption is erroneous, however, because when an appeals court is reviewing the trial record to see if any rational trier of fact could find guilt beyond a reasonable doubt, it must necessarily do some weighing of the evidence presented. In order for a court to hold that a conviction violates the *Jackson* standard, it must determine that the evidence was so weak that no rational factfinder could have returned a guilty verdict. Because a reviewing court must clearly make some judgment concerning the weight of the evidence when it determines whether a jury acted "rationally," the majority's reliance on the due process clause is misplaced.²²⁹ As a result of the fact that a reviewing court must do some "weighing" of the evidence whether the reversal is characterized as based upon weight or insufficiency, it would be difficult, if not impossible, for the court to determine at what point a conviction was not only against the weight of the evidence, but also violated the due process safeguard. The due process protection articulated in *Jackson*, therefore, would for the most part be an illusory safeguard for protecting defendants who under *Burks* should not have to face further prosecution.

In summary, the distinction between reversals based on weight and those based on the insufficiency of the evidence is questionable. Because the process of determining whether evidence is legally sufficient necessarily involves some element of "weighing," according different double jeopardy consequences to the two types of reversals is inappropriate. Moreover, courts faced with the difficult decision of reversing a conviction based either on the weight or the sufficiency of the evidence may err toward reversal based on weight so that the defendant may be retried. The Court's decision in *Tibbs*, therefore, has the effect of limiting the exception recognized in *Burks*. Although the majority in *Tibbs* contrasts reversals based on weight from those based on insufficiency in attempting to distinguish *Burks*, the Court, in fact, allows *Burks* to be undermined. The *Tibbs* decision will inevitably lead to retrial of defendants who under *Burks* should be set free.

B. *The Weaknesses In The Supreme Court's Double Jeopardy Analysis In Tibbs*

The Supreme Court in *Tibbs* concluded that allowing the retrial of a defendant who obtained a reversal of his conviction based on the weight of the evidence did not violate the double jeopardy clause.²³⁰ The Court's justifica-

²²⁸ For a good discussion of the *Jackson* standard and the issues it raises by extending the reasonable doubt standard to appellate court review of the sufficiency of the evidence, see Comment, *The Jackson v. Virginia Standard For Sufficiency of the Evidence*, 65 IOWA L. REV. 799 (1980).

²²⁹ *Id.* at 807-10. ("[W]hen an appeals court determines whether the factfinder has acted reasonably, it must inevitably make some determination as to the weight of the evidence, even while giving the trial court very broad discretion. This necessarily results in some substitution of the appellate court's judgment for that of the trial court." *Id.* at 807.).

²³⁰ *Tibbs v. Florida*, 102 S. Ct. 2211, 2220 (1982).

tions for this conclusion were not persuasive, however, either in terms of the Court's earlier decisions or in light of established double jeopardy policy. This section of the casenote will be divided into two parts. The first demonstrates that the distinction drawn by the Court in *Tibbs* fails to follow the reasoning of other recent Supreme Court double jeopardy decisions. The second part shows that the Court in *Tibbs* lost sight of the primary protection sought to be provided by the double jeopardy clause, namely, the prevention of multiple trials where governmental oppression might result.²³¹

1. The Relationship of the *Tibbs* Distinction Between the Weight and Sufficiency of the Evidence to the Reasoning of Recent Supreme Court Double Jeopardy Decisions

The *Tibbs* opinion fails to follow the double jeopardy analysis the Supreme Court announced in *Burks* and *Scott*. In those opinions, the Court pointed out that the important distinction for double jeopardy analysis was that between judicial determinations based on trial error and those based on a failure of proof.²³² In *Burks*, the Court stressed that its earlier failure to distinguish between reversals based on evidentiary grounds and those on procedural grounds had helped to create much of the confusion existing in double jeopardy law.²³³ In holding that the double jeopardy clause does not bar retrial after a reversal for trial error, the Court reasoned society would pay too high a price, in the form of defendants released who might otherwise be convicted, if retrial were barred following reversal of a conviction for trial error.²³⁴ Moreover, the Court emphasized that a reversal for trial error implies nothing with respect to the guilt or innocence of the defendant.²³⁵ The Court suggested that when a defendant is convicted through a defect in the judicial process, both the accused and society have a strong interest in retrial.²³⁶ In contrast, the Court said that when a conviction is overturned because of a "failure of proof" at trial, society's interest in the enforcement of criminal laws is vindicated because the prosecution has been given "one full and fair opportunity to offer whatever proof it could assemble."²³⁷

Based on the language of the Court in *Burks*, the double jeopardy bar should also be raised following a reversal based on weight. When the Florida Supreme Court reversed *Tibbs*' conviction stating that the great weight of the evidence indicated that *Tibbs* should not have been convicted, the reversal im-

²³¹ See *United States v. Scott*, 437 U.S. 82, 105 (1978) (Brennan, J., dissenting) ("The purpose of the Clause . . . is to protect the accused against the agony and risks attendant upon undergoing more than one criminal trial for any single offense. A retrial . . . enhances the risk that an innocent defendant may be convicted.").

²³² *Burks v. United States*, 437 U.S. 1, 15 (1978); *United States v. Scott*, 437 U.S. at 96-99. See Note, *Double Jeopardy*, *supra* note 214, at 939.

²³³ *Burks v. United States*, 437 U.S. at 14-15.

²³⁴ *Id.* at 15 (quoting *United States v. Tateo*, 377 U.S. 463, 466 (1964)).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 16.

plied that the prosecution had not produced evidence adequate to support a conviction. As such, the reversal clearly implied something with respect to Tibb's guilt or innocence,²³⁸ even if it did not mean the evidence was legally insufficient. When a court reverses a conviction based on the weight of the evidence the prosecution has had the same full, error-free opportunity to convict that it is allowed when a conviction is reversed based on insufficiency.²³⁹ Tibbs' conviction was not reversed because of a procedural defect in the judicial process that deprived him of the opportunity for a fair trial or the State of its interest in the enforcement of criminal laws, but instead because of a "failure of proof."²⁴⁰

The Supreme Court's decision in *Scott* would also seem to indicate that re-trial following a reversal based on weight should be prohibited by the double jeopardy clause. In *Scott*, the Court held that when a defendant avoids conviction without even having the issue of guilt submitted to the trier of fact, the double jeopardy clause poses no bar to further prosecution.²⁴¹ The Court stressed that in such a case the defendant is not asserting that the Government failed to make out its case against him.²⁴² Instead, the defendant argues that because of a "legal claim" the prosecution's case must fail even though the prosecution might otherwise have convinced the trier of fact to convict.²⁴³ In *Tibbs*, the defendant not only had the issue of his guilt submitted to the trier of fact, but he also obtained a reversal from the reviewing court because the conviction was against the great weight of the evidence.²⁴⁴ A reversal based on weight, by definition, indicates that the Government failed to make out its case adequately to support a conviction.²⁴⁵ As Justice White, writing for the dissent in *Tibbs*, stated, the fact that the State's proof was held inadequate under Florida law, rather than on federal grounds, is irrelevant.²⁴⁶ In both situations, if the Government had produced the required evidence, the conviction would have stood. Tibbs did not appeal his conviction on the basis of a "legal claim," but rather on the grounds that the totality of evidence produced at trial was not sufficient to support a guilty verdict.²⁴⁷ Based on the reasoning of the Court in

²³⁸ The Supreme Court of Florida stated in reversing Tibbs' conviction that there was a "very real possibility that Tibbs had nothing to do with these crimes. . . ." *Tibbs v. State*, 337 So. 2d 788, 791 (Fla. 1976).

²³⁹ *Tibbs v. Florida*, 102 S. Ct. 2211, 2221-22 (White, J., dissenting).

²⁴⁰ *Id.* at 2223 (White, J., dissenting). See *Hudson v. Louisiana*, 450 U.S. 40, 43 (1981).

²⁴¹ *United States v. Scott*, 437 U.S. 82, 96 (1978).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Tibbs v. State*, 337 So. 2d 788, 791 (Fla. 1976).

²⁴⁵ *Tibbs v. Florida*, 102 S. Ct. 2211, 2223 (1982) (White, J., dissenting).

²⁴⁶ *Id.* at 2222 (White, J., dissenting).

²⁴⁷ *Tibbs v. State*, 337 So. 2d 788, 789 (Fla. 1976).

both *Burks* and *Scott*, therefore, a defendant should not be retried if he is able to obtain a reversal of his conviction based on the weight of the evidence.

2. The Validity of *Tibbs* In Light of Fundamental Double Jeopardy Policy

Although the *Tibbs* Court did not refer to its earlier decision in *Scott*, it sought to distinguish its opinion in *Burks* on two grounds. First, the Court acknowledged that judgments of acquittal are given special weight in a double jeopardy analysis.²⁴⁸ The Court reasoned that a reversal based on insufficiency, unlike one based on weight, was the functional equivalent of an acquittal.²⁴⁹ The Court stressed that the reversal in *Tibbs*, which was based on the weight of the evidence, did not mean that acquittal was the only proper verdict.²⁵⁰ According to the Court, a reversal on the weight of the evidence should not therefore be accorded the same treatment as an acquittal.²⁵¹ Second, recognizing that the double jeopardy clause forbids a second trial for the purpose of giving the prosecution a second opportunity to supply evidence, the *Tibbs* Court maintained that this policy does not have the same force when a reviewing judge simply "disagrees" with a jury's verdict.²⁵² A study of the basic policies that underlie the double jeopardy clause is necessary to determine the validity of these distinctions drawn by the Court.

Unquestionably, the Supreme Court attaches special weight to judgments of acquittal. In *Kepner v. United States*,²⁵³ the Court adopted earlier dicta in *Ball* that stated the government should not be permitted to appeal verdicts of acquittal.²⁵⁴ Moreover, decisions subsequent to *Kepner* have firmly established that the double jeopardy clause forbids retrial of a defendant who has been acquitted of the crime alleged.²⁵⁵ The classic policy consideration for barring retrial in such cases was articulated in *Green v. United States*.²⁵⁶ In *Green*, the Court recognized two important reasons for barring retrial after an acquittal.²⁵⁷ First, the State with all its resources should not be allowed to make repeated attempts to convict, thereby subjecting the defendant to the agony

²⁴⁸ *Tibbs v. Florida*, 102 S. Ct. 2211, 2218 (1982).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 2218-19.

²⁵³ 195 U.S. 100 (1904).

²⁵⁴ *Id.* at 129.

²⁵⁵ See, e.g., *United States v. DiFrancesco*, 449 U.S. 117, 129-30 (1980); *Burks v. United States*, 437 U.S. 1, 15 (1978); *United States v. Martin Linen Supply*, 430 U.S. 564, 571 (1977); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

²⁵⁶ *Green v. United States*, 355 U.S. 184, 187 (1957).

²⁵⁷ *Id.* at 187-88. See Note, *The Supreme Court's Treatment of the Defendant's Double Jeopardy*

and risks associated with undergoing a second criminal trial for the same offense.²⁵⁸ Retrial subjects the defendant to embarrassment,²⁵⁹ expense²⁶⁰ and ordeal,²⁶¹ as well as compelling the accused to live in a continuing state of anxiety and insecurity.²⁶² Second, allowing retrial after an acquittal enhances the risk that an innocent defendant may be convicted.²⁶³ The Government would be allowed the opportunity to persuade a second trier of fact of the defendant's guilt and to strengthen any weaknesses in its initial attempt at convicting the defendant.²⁶⁴ If the Government were allowed such repeated attempts at conviction following an acquittal, a defendant's interest in obtaining a final judgment would never be served—an accused would never be conclusively “inno-

Interests In the 1977 Term, 48 U. CIN. L. REV. 517, 536-37 (1979) [hereinafter cited as Note, *Double Jeopardy Interests*].

²⁵⁸ *Green v. United States*, 355 U.S. 184, 187-88 (1957).

²⁵⁹ See *Crist v. Bretz*, 437 U.S. 28, 51-52 (1978) (Powell, J., dissenting) (“[T]he evidence of the alleged criminal conduct . . . becomes a matter of public record.”).

²⁶⁰ See *Scott v. United States*, 437 U.S. 82, 105 (1978) (Brennan, J., dissenting) (“A retrial increases the financial and emotional burden that any criminal trial represents for the accused. . . .”). Aside from the financial costs directly associated with trial, lost wages and decreased prospects for future employment also result.

²⁶¹ See *United States v. Jorn*, 400 U.S. 400, 479 (1970) (“Society’s awareness of the heavy personal strain which a criminal trial represents for the criminal defendant is manifested in its willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.”).

²⁶² See *Arizona v. Washington*, 434 U.S. 497, 503-04 (1978) (“[Retrial] increases the financial and emotional burden on the accused, [and] prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing. . . .”). See generally Note, *Criminal Procedure—Double Jeopardy—Government May Appeal From Successful Defense Motion For Midtrial Dismissal Unrelated To Guilt Or Innocence—United States v. Scott*, 437 U.S. 82 (1978), 9 SETON HALL L. REV. 579, 595 n.125 (1978) [hereinafter cited as Note, *Criminal Procedure*]. (“The heavy strain, embarrassment and expense of repeated criminal trials subject the defendant to burdens not unlike criminal punishment itself, even where he is not incarcerated between trials.”).

²⁶³ *Green v. United States*, 355 U.S. 184, 188 (1957). For a good discussion of this danger of unjust conviction, see Note, *Criminal Procedure*, *supra* note 262, at 601 (“To allow reprosecution after the government has viewed the defendant’s evidence would unfairly strengthen the already powerful prosecutorial arsenal. Having gained penetrating insight into defense tactics and substantive defenses, the government could strengthen its case upon retrial. The prosecution . . . would be given a second chance, thus enhancing the possibility of the unjust conviction of the innocent.”).

²⁶⁴ *United States v. Scott*, 437 U.S. 82, 106 (1978) (Brennan, J., dissenting). In *Burks*, the Court stated that a central purpose of the double jeopardy protection was preventing the State from making repeated attempts at conviction. *United States v. Burks*, 437 U.S. 1, 11 (1978).

In considering the danger of unjust conviction at a second prosecution, it is important to recognize that the prosecution is not limited to the evidence introduced in the initial proceeding. *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 243 (1957) (“It is undeniable, of course, that upon appellate reversal of a conviction the Government is not limited at a new trial to the evidence presented at the first, but is free to strengthen its case in any way it can by the introduction of new evidence.”).

cent.”²⁶⁵ This policy forbidding retrial following an acquittal has been held so vital to the double jeopardy protection that defendants may not be retried even if their acquittals were clearly erroneous.²⁶⁶

The key to understanding the double jeopardy analysis relevant to *Tibbs* is realizing why retrial is barred following an acquittal. Because even clearly erroneous acquittals cannot be appealed,²⁶⁷ the rule obviously does not rest on a conclusion that the defendant was innocent and therefore should not be retried.²⁶⁸ Instead, retrial is prohibited because an acquittal, or an appellate court reversal of a conviction based on the insufficiency of the evidence, constitutes a decision to the effect that the Government has failed to prove its case.²⁶⁹ To permit retrial following an acquittal would present all of the dangers the double jeopardy clause was designed to prevent.²⁷⁰ Allowing a second prosecution would create the grave risk that the Government, with its superior resources, would convict an innocent defendant.²⁷¹ If retrial were allowed

²⁶⁵ *Tibbs v. Florida*, 102 S. Ct. 2211, 2218 (1982). (“Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance.”). See Note, *Government Appeals of “Dismissals” In Criminal Cases*, 87 Harv. L. Rev. 1822, 1838 (1974) [hereinafter cited as Note, *Government Appeals*] (“The rule against a second trial after acquittal bars a prosecution from subjecting the defendant to repeated trials until a factfinder will agree to convict.”); Note, *Twice in Jeopardy*, *supra* note 3, at 278 (“Without a rule of finality no procession of juries could effectively acquit a defendant, but a single jury could convict. The prosecutor could keep trying until he found an accommodating panel.”); Findlater, *supra* note 52, at 725 (“[N]o jury could ever finally acquit, and sooner or later, through attrition, luck or otherwise, the prosecutor could in all probability obtain a conviction.”).

²⁶⁶ *Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

²⁶⁷ See *Arizona v. Washington*, 434 U.S. 497 (1978) (“The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though ‘the acquittal was based on an egregiously erroneous foundation.’” *Id.*, at 503 (quoting *Fong Foo v. United States*, 369 U.S. at 143)).

²⁶⁸ *United States v. Scott*, 437 U.S. 82, 108 (1978) (Brennan, J., dissenting). A number of commentators have noted that the prohibition of retrial following an acquittal could in no way rest on the notion that the defendant was absolutely “innocent.” See, e.g., Comment, *Burks v. United States: Redrawing the Lines in Double Jeopardy*, 1979 DET. C. L. REV. 193, 201 n.66 (“The policy of the [double jeopardy] clause is to prevent multiple prosecutions for the same offense, without regard to the question of guilt.”); Note, *United States v. Scott: Government Appeals of Midtrial Dismissals Granted on Defendant’s Motion*, 43 ALB. L. REV. 595, 614 (1979) (“[T]he principle prohibiting retrial after acquittal is not based on the defendant’s factual innocence, otherwise the government would be able to appeal a clearly erroneous acquittal.”); Note, *Double Jeopardy Interests*, *supra* note 257, at 545 (“The requirement that a defendant must be found factually innocent has no relevance to double jeopardy interests.”).

²⁶⁹ See *Burks v. United States*, 437 U.S. 1, 15-16 (1978); *United States v. Scott*, 437 U.S. at 106, 107 (1978) (Brennan, J., dissenting).

²⁷⁰ *United States v. Scott*, 437 U.S. at 106 (Brennan, J., dissenting). See Findlater, *supra* note 52, at 726-27.

²⁷¹ See *Tibbs v. Florida*, 102 S. Ct. 2211, 2218 (1982) (“This prohibition [of retrial following an acquittal or an appellate reversal based on insufficiency] prevents the state from

following an acquittal the danger of convicting an innocent defendant would be significant because the prosecution would have great incentive to remedy any defects in its case.²⁷² A central objective of the double jeopardy protection is that the prosecution should not be given such a second opportunity to supply evidence which it failed to muster in the first proceeding.²⁷³ Retrial after a reversal based on evidentiary shortcomings would allow the prosecution the opportunity to strengthen its case and enable it to benefit from the first proceeding.²⁷⁴ The government would be given an opportunity to re-examine witnesses, seek new evidence and otherwise strengthen any weaknesses in its first presentation.²⁷⁵ The resulting delay might also create the potential for inaccurate reproduction of evidence that originally had been favorable to the defendant.²⁷⁶ Consequently, the double jeopardy clause forbids retrial following an acquittal or an appellate reversal based on the sufficiency of the evidence because "the State with all its resources and power should not be allowed repeated attempts to convict an individual for an alleged offense."²⁷⁷

honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." See also *United States v. Scott*, 437 U.S. at 91.

²⁷² See Findlater, *supra* note 52, where the commentator said the risk of unjust conviction if retrial were allowed following an acquittal would be intolerable because "revanchist" prosecutors would be determined to win their cases the second time around. A defendant faced with retrial following an acquittal would not only be drained by the effects of his first trial, he would also have to face a prosecutor who had the benefit of a trial run and was determined not to lose again. *Id.* at 725-27.

²⁷³ *Burks v. United States*, 437 U.S. 1, 11 (1978). See also Note, *Government Appeals*, *supra* note 265, at 1840 ("[By allowing retrial] the prosecution would be given another opportunity to convict the defendant, and thus its burden of persuasion would be effectively reduced. . .").

²⁷⁴ See *United States v. Scott*, 437 U.S. 82, 105 n.4 (1978) (Brennan, J., dissenting); *United States v. Burks*, 437 U.S. at 11.

²⁷⁵ *United States v. Scott*, 437 U.S. at 105-06 (Brennan, J., dissenting).

²⁷⁶ See *Arizona v. Washington*, 434 U.S. 497, 504 n.14 (1978), for an example of how testimony originally favorable to the defendant may change at retrial:

"[A] key prosecution witness, the last person to see the appellant and the deceased together, who began by testifying that they had acted that evening like newlyweds on a honeymoon, without an un-friendly spoken word, ended up by saying for the first time in four trials that the words between them had been 'firm,' and possibly harsh and 'cross.'"

Id. (quoting *Carsey v. United States*, 392 F.2d 810, 813-14 (D.C. Cir. 1967) (Leventhal, J., concurring)).

Commentators have also recognized the potential evidentiary changes that can occur as a result of a second trial. See, e.g., Recent Cases, *Constitutional Law—Fifth Amendment—Double Jeopardy—The Double Jeopardy Clause Bars Appellate Review Following A Judgment of Acquittal Entered Under federal Rule of Criminal Procedure 29(c)—U.S. v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), 46 U. CIN. L. REV. 1055, 1061-62 (1978) ("The opportunity opened to the government to present a better case on appeal, after having heard the defendant's case and eliminated the weaknesses in its own case, is a potent weapon."); Note, *Double Jeopardy Interests*, *supra* note 257, at 537 ("Additional evidence against the accused may be introduced at the second trial. Facts resolved in the defendant's favor at the first trial will have to be resolved again. . . . The defendant may be financially and emotionally less able to defend himself at the second trial. The result may be that the burden of proof the government bears is more easily met.").

²⁷⁷ *Green v. United States*, 355 U.S. 184, 187 (1957).

Although the double jeopardy clause prohibits retrial when a conviction is reversed based on the insufficiency of the evidence, defendants who are able to secure reversals based on trial error must face further prosecution. In order to understand the different treatment accorded the two types of reversals, the double jeopardy considerations forbidding retrial following an appellate reversal based on the insufficiency of the evidence should be contrasted with the situation when a conviction is reversed based on trial error. First, when a conviction is reversed because of trial error, the state maintains its valid interest in the enforcement of its criminal laws.²⁷⁸ Because the prosecution has not been given a complete opportunity to convict the defendant when there is a fundamental flaw in the judicial process, and the defendant retains his right to be given a fair trial, it is simply "fairer" to both the state and the accused to allow retrial.²⁷⁹ Second, a reversal for trial error does not constitute a decision to the effect that the government has failed to prove its case.²⁸⁰ Allowing retrial after a conviction is reversed based on trial error does not present the same danger of convicting an innocent defendant that would exist in a second prosecution following an acquittal because such a ruling implies nothing with respect to the defendant's guilt or innocence.²⁸¹ When a conviction is reversed based on trial error, the prosecution has no reason to go out and strengthen its case, but instead is justified in believing that if it presents the same case again on retrial, this time omitting the trial error, the defendant would once again be convicted.²⁸² Permitting retrial following a reversal based on the state's failure of proof, therefore, unlike a second prosecution after a reversal based on trial error, greatly increases the possibility of convicting an innocent defendant.²⁸³

The double jeopardy policies which have led the Supreme Court to hold that the double jeopardy clause forbids retrial following an acquittal or a reversal based on the insufficiency of the evidence also support the prohibition of retrial following a reversal based on weight.²⁸⁴ As the dissent in *Tibbs* pointed

²⁷⁸ *Burks v. United States*, 437 U.S. 1, 15 (1978).

²⁷⁹ See, e.g., Carusona, *Double Jeopardy: The Prevention of Multiple Prosecutions*, 54 CHIKENT L. REV. 549, 550 (1977) ("The fairness rationale means that it is simply fairer to both the defendant and the government to allow retrial [when a conviction is reversed based on trial error] because the accused's right to a fair trial corresponds to society's interest in punishing the guilty."); Note, *Double Jeopardy*, *supra* note 214, at 942 ("This cost [of allowing retrial of a defendant] may not be especially high in relation to the price society would have to pay if guilty defendants were able to avoid punishment by virtue of undeserved legal defenses.").

²⁸⁰ *Burks v. United States*, 437 U.S. 1, 15 (1978).

²⁸¹ *Id.* See Findlater, *supra* note 52, at 729-30.

²⁸² Findlater, *supra* note 52, at 730 ("Further, the prosecution need not feel he certainly must do a better job on retrial. . . . The prosecutor . . . has no special incentive to seek out a more favorable judge or 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.").

²⁸³ See *United States v. Scott*, 437 U.S. 82, 91 (1978). See also Atlas, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 TEX. L. REV. 303 (1974); Note, *Government Appeals*, *supra* note 273, at 1838-39 (1974).

²⁸⁴ See *Tibbs v. Florida*, 102 S. Ct. 2211, 2223 (1982) (White, J., dissenting).

out, the state has the same interests in overcoming its evidentiary shortcomings following a reversal based on weight as it does following a reversal based on evidentiary insufficiency.²⁸⁵ When a reviewing court, such as the Florida Supreme Court in *Tibbs*'s case, determines that a conviction is against the weight of the evidence, certainly this creates an incentive for the prosecution to go out and "hone its trial strategies" and perfect its evidence.²⁸⁶ Knowing that the evidence it presented at *Tibbs*' first trial was not adequate, on retrial the State could improve its case by correcting some of the weaknesses the state supreme court identified in the State's original presentation of the evidence.²⁸⁷ Moreover, because the prosecution has already been given a full and fair opportunity to convict the defendant when a conviction is reversed on weight, the only purpose in allowing a second trial would be to enable the State to strengthen its case.²⁸⁸ Recognizing that if it produced the same evidence on retrial a guilty verdict would again be against the weight of the evidence,²⁸⁹ it is doubtful that the State would be content to present the same case at a second prosecution.²⁹⁰

The United States Supreme Court in *Tibbs* determined that retrial was permissible following a reversal based on weight, thereby according it the same treatment given to reversals based on trial error, even though the Court recognized the possibility that allowing retrial following a reversal based on weight would permit the prosecution to strengthen its case.²⁹¹ The Court noted that new evidence and an advanced understanding of the defendant's case might strengthen the prosecution's presentation.²⁹² The Court mentioned, however, that possibly the defendant's case would be the one strengthened.²⁹³

²⁸⁵ *Id.* at 2222 (White, J., dissenting).

²⁸⁶ *Id.* at 2218. See Findlater, *supra* note 52, at 732.

²⁸⁷ See *supra* note 26 and accompanying text for a list of these weaknesses.

²⁸⁸ *Tibbs v. Florida*, 102 S. Ct. 2211, 2222 (1982) (White, J., dissenting).

²⁸⁹ See *id.* at 2221-22 (White, J., dissenting).

²⁹⁰ The majority in *Tibbs* stated that following a reversal on weight the prosecution is not necessarily required to introduce new evidence. *Id.* at 2219 n.18. The Court reasoned that because a reviewing court is often acting "in the interests of justice" when it reverses based on weight, it would be most reluctant to say that a conviction was against the weight of the evidence if two juries rendered guilty verdicts. *Id.* The obvious difficulty with this reasoning is that it assumes the prosecution would be willing to take its chances that a second jury would convict the defendant after a reviewing court determined its first presentation to be inadequate. When the state was preparing for retrial it would not be concerned with what a second reviewing court would decide, but instead with what decision the new jury will reach. The problem with the majority's contention is that it ignores the issue relevant to the double jeopardy protection. The important question is not whether the prosecution must introduce new evidence in a second prosecution in order to satisfy a reviewing court, but instead whether it will do so to attempt to convince the new factfinder. See Findlater, *supra* note 52, at 735.

²⁹¹ *Id.* at 2219 n.19. The Court noted that the "second chance" it was giving to defendants also meant the prosecution would be afforded a second try. *Id.*

²⁹² *Id.*

²⁹³ *Id.* The Court went on to explain that because the State had already secured a conviction based on sufficient evidence, it had everything to lose and little to gain on retrial. *Id.* This reasoning would seem to go against allowing retrial, however, because the State does have

The Court further justified allowing retrial following a reversal based on weight by stating that such a reversal does not mean that acquittal was the only proper verdict, and characterizing the appellate court in such a situation as a "thirteenth juror" that merely disagrees with the jury's verdict.²⁹⁴ The Court reasoned that this "difference of opinion" no more signifies an acquittal than a deadlocked jury does.²⁹⁵

The Court's analysis in this area is faulty for two reasons. First, as was indicated above, acquittals are not given special weight in double jeopardy analysis because they prove unquestioned innocence.²⁹⁶ Rather, judgments of acquittal bar retrial because of the danger that innocent defendants possibly would be convicted in a second prosecution.²⁹⁷ As Justice White, writing for the dissent in *Tibbs*, explained, because this danger exists whenever a reviewing court makes a ruling based on the State's failure of proof, the determination should not have to constitute an "acquittal" in order to prevent retrial.²⁹⁸ A reversal on weight should, therefore, properly be held to bar retrial not because such a ruling means the defendant was not guilty of the alleged offense. Instead, retrial should be prohibited following a reversal based on the weight of the evidence because further prosecution after such a ruling increases the likelihood that an innocent defendant will be convicted.²⁹⁹ Unlike a reversal

"everything to lose" on retrial. The prosecution would have great incentive to go out and obtain additional evidence, re-advise witnesses, etc., because it would not want to see all of its earlier efforts wasted. It should also be noted that the adversarial capabilities of the two litigants are not equal and as a result the State's advantage on retrial is even greater than it would appear at first glance. See, e.g., Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960) ("Both doctrinally and practically, criminal procedure . . . gives overwhelming advantage to the prosecution."); Casenote, *Double Jeopardy—Finality of Judgment of Acquittal In Criminal Prosecutions*, 30 FORDHAM L. REV. 518, 523 (1962) ("It is generally recognized that pitted against the limited resources of the defendant are the comparatively unlimited resources of the prosecution. . . .").

²⁹⁴ *Tibbs v. Florida*, 102 S. Ct. at 2218-19.

²⁹⁵ *Id.* at 2219.

²⁹⁶ See *supra* notes 266-72 and accompanying text.

²⁹⁷ *Green v. United States*, 355 U.S. 184, 187-88 (1957). The *Tibbs* Court's heavy reliance on the fact that reversal based on weight does not mean that acquittal was the only proper verdict becomes even more suspect when it is recognized that the Court's definition of an "acquittal" has not remained constant. For example, in *United States v. Sisson*, 399 U.S. 267 (1970), the Court defined an acquittal as a "legal determination on the basis of facts adduced at trial relating to the general issues of the case." *Id.* at 290 n. 19, while in *Scott* the Court developed the definition of an acquittal as "the ruling of a judge . . . which actually represents a resolution [in the defendant's favor] . . . of some or all of the factual elements charged." 437 U.S. at 97. The four Justices who dissented in *Scott* argued that the majority "indefensibly adopt[ed] an overly restrictive definition of 'acquittal.'" *Id.* at 103 (Brennan, J., dissenting). Because a reversal based on the weight of the evidence could arguably come under the definition of acquittal adopted in *Sisson*, one way for the Court correctly to resolve *Tibbs* would have been to return to that standard. The other way, of course, would be to realize that a court's determination should not have to constitute an "acquittal" for the double jeopardy bar to be raised.

²⁹⁸ *Tibbs v. Florida*, 102 S. Ct. at 2222 (White, J., dissenting).

²⁹⁹ Other commentators have recognized that the double jeopardy considerations that prohibit retrial following an acquittal also support the imposition of a bar to reprosecution in other situations where factual determinations are made by a court. See, e.g., Note, *Government Ap-*

based on trial error, a conviction that is overturned based on the weight of the evidence constitutes a decision that the government has failed to prove its case. The State should not be allowed to use the first proceeding as a "trial run."³⁰⁰ Indeed, it is even more important to forbid retrial following a reversal based on the weight of the evidence than it is after a reversal based on insufficient evidence. When a reviewing court reverses a conviction based on weight the State has theoretically produced evidence sufficient to support a conviction and thus all the prosecution is required to do on retrial is to provide enough additional evidence to allow a court also to hold that the weight of the evidence supports conviction. Although the State might sometimes be inclined to dismiss an indictment if its evidence is determined to be insufficient,³⁰¹ the prosecution almost certainly will retry a defendant if it need only bolster its case enough to have the weight of the evidence support conviction.

The second problem with the majority opinion in *Tibbs* is that the Court's characterization of an appellate reversal based on weight as a mere "difference of opinion" with the trier of fact is misleading. Reviewing courts do not reverse convictions based on the weight of the evidence just because they would have decided the case differently,³⁰² but instead because the evidence preponderates heavily against the guilty verdict.³⁰³ Such a ruling certainly leads to the dangers that initially led the Supreme Court to prohibit retrial following an acquittal; the State would be allowed a second opportunity to present evidence it failed to produce in the initial proceeding and consequently the chances of convicting an innocent defendant would be greatly increased. As a result, further prosecution following a reversal of a conviction based on the weight of the evidence should not be allowed. The important distinction in determining the applicability of

peals, *supra* note 265, at 1839 ("[A]cquittal should be defined according to whether the [court's] disposition was based on a factual resolution in the defendant's favor."); Note, *Criminal Procedure*, *supra* note 261, at 597 ("What is relevant to the issue of appealability is the effect of reprosecution upon the underlying double jeopardy interests, not the label that may be attached. . . .").

³⁰⁰ See *Burks v. United States*, 437 U.S. 1, 15 (1978); *Arizona v. Washington*, 434 U.S. 497, 508 n.24 (1978); *Crist v. Bretz*, 437 U.S. 28, 52 (1978) (Powell, J., dissenting).

³⁰¹ See *Findlater*, *supra* note 52, at 732 ("[W]hen the defendant's conviction is reversed for insufficiency of the evidence, the prosecution knows that he has failed to present enough evidence to convict and will usually seek to retry the defendant only if he thinks he can remedy the deficiency.").

³⁰² For an excellent commentary that concludes these same dangers of unjust conviction should also bar retrial following a deadlocked jury, see *Findlater*, *supra* note 52. The author states that following a hung jury, the prosecution knows its first presentation has not led to a conviction and the chances that it will attempt to improve its case are great. *Id.* at 735. See also Note, *Double Jeopardy Interests*, *supra* note 257, at 541 n.141.

Whatever the merits of prohibiting retrial after a dismissal is declared because a jury is unable to reach a verdict, certainly the indication of factual innocence, and correspondingly the danger of convicting an innocent defendant if retrial is allowed, is greater when a reviewing court determines that a conviction is against the weight of the evidence.

³⁰³ See C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* 2d § 553, 246-48 (1982). "The motion is addressed to the discretion of the court, which should be exercised with caution, and the power [to reverse a conviction based on the weight of the evidence] should be involved only in exceptional cases in which the evidence preponderates heavily against the verdict." *Id.*

the double jeopardy clause, as the dissent in *Tibbs* pointed out, is whether the reversal was based on trial error or on evidentiary shortcomings in the prosecution's case.³⁰⁴ Whenever a conviction is reversed because of a failure of proof, the danger of convicting an innocent defendant exists, and therefore the double jeopardy clause should bar further proceedings.

In summary, the Supreme Court in *Tibbs v. Florida* determined that retrial following an appellate reversal of a conviction based on the weight of the evidence was not barred by the double jeopardy clause. The Court, in so doing, accorded reversals based on weight the same treatment given to reversals based on trial error, despite the fact that none of the justifications for allowing retrial after a conviction is overturned for trial error exist when a reversal is based on weight. First, the state's interest in the enforcement of its criminal laws would not be infringed if retrial were prohibited following a reversal based on weight. Unlike the situation when a conviction is set aside because of a defect in the initial proceeding, the state has already received a full, error-free opportunity to convict when a reversal is based on weight. The second justification for allowing retrial after a reversal due to a procedural error at trial is that such a decision implies nothing as to the defendant's guilt or innocence. Clearly, a reversal based on weight does imply something with respect to the defendant's guilt or innocence: it constitutes a decision that the great preponderance of the evidence does not support a guilty verdict. As such, the decision by the Supreme Court in *Tibbs* to allow retrial following a reversal based on weight greatly increases the chances of convicting an innocent defendant. Because this danger is the principal reason for the Court's holding that retrial following an acquittal or an appellate reversal based on the insufficiency of the evidence is barred by the double jeopardy clause, the *Tibbs* decision, in effect, imposes an additional limitation on a defendant's ability to invoke the double jeopardy protection. Even if a conviction is reversed on evidentiary grounds and retrial would allow the prosecution a second opportunity to supply evidence it failed to muster in the first proceeding, the defendant will be able to raise the double jeopardy protection only if he is able to secure an "acquittal."

CONCLUSION

Prior to *Tibbs*, the double jeopardy consequences of two classes of appellate reversals of convictions were clear. Retrial was allowed where a conviction was reversed because of trial error, but the double jeopardy clause prohibited further prosecution where a defendant was able to get a conviction overturned based on the insufficiency of the evidence. In *Tibbs*, the United States Supreme Court held that retrial of a criminal defendant is not prohibited by the double jeopardy clause when an appellate court reverses a conviction based on the weight of the evidence. As a result of *Tibbs*, some defendants who

³⁰⁴ *Tibbs v. Florida*, 102 S. Ct. 2211, 2223 (1982) (White, J., dissenting).

succeed in getting their convictions set aside by a reviewing court based on evidentiary shortcomings will have to face retrial.

The *Tibbs* decision has restricted defendants' protections from multiple trials for three reasons. First, reviewing courts will encounter problems in trying to distinguish between reversals based on weight and those based on insufficiency. Because the distinction established in *Tibbs* is a difficult one to make, some defendants who under *Burks* should be set free will have to face further prosecution. Second, the Supreme Court in *Tibbs* failed to follow the reasoning stressed in recent double jeopardy decisions. The Court allowed retrial following a reversal based on the weight of the evidence even though *Burks* and *Scott* explained that it was important to distinguish between reversals based on evidentiary grounds and those based on trial error. Those decisions stated that retrial should be allowed when a defect in the initial proceeding causes a conviction to be set aside, but that a second prosecution should be forbidden where the earlier proceeding suggests the factual innocence of the defendant. Third, and most important, the Supreme Court in *Tibbs* lost sight of the basic policies that underlie the double jeopardy protection. The Court held that retrial was permitted following a reversal based on weight even though the rationale that prohibits a second trial following an acquittal or an appellate reversal of a conviction based on the insufficiency of the evidence applies with equal force to a reversal based on weight. In both situations retrial presents the danger of convicting an innocent defendant. In holding that retrial is allowed after a reversal based on weight, the *Tibbs* Court gave the double jeopardy clause an unwarrantedly narrow application and as a result significantly limited a criminal defendant's protection from being placed twice in jeopardy.

WILLIAM P. GELNAW, JR.