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The Sufficiency-Weight Distinction - A Matter of Life or Death

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CASE COMMENTS

The Sufficiency-Weight Distinction — A Matter of Life or Death

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I. INTRODUCTION

Rooted in antiquity, the double jeopardy concept is "one of the oldest ideas found in Western Civilization."¹ Historians do not know its exact origin, but they have traced the concept to the days of the Greeks² and Romans.³ The idea of one trial and one punishment survived even the turmoil of the Dark Ages,⁴ a period when many principles of justice were overturned. When the Pilgrims fled England, the double jeopardy concept sailed with them to the New World⁵ and today it is incorporated into the United States Constitution⁶ and also into the constitutions of all but five states.⁷

1. *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting).

2. "[T]he laws forbid the same man to be tried twice on the same issue" 1 DEMOSTHENES 589 (J. Vince trans., 4th ed. 1970).

3. The Roman expression of the guarantee against double jeopardy is *nemo debet bis vexari pro una et eadem causa*: "It is a rule of law, that a man shall not be twice vexed for one and the same cause." H. BROOM, A SELECTION OF LEGAL MAXIMS *241. The same maxim applied to the plea of *res judicata* in civil cases.

4. See *Bartkus*, 359 U.S. 121, 152 & n.4 (Black, J., dissenting).

5. Comment, *The Supreme Court's Treatment of the Defendant's Double Jeopardy Interests in the 1977 Term*, 48 U. CIN. L. REV. 517, 520 (1979).

6. U.S. CONST. amend. V. The double jeopardy clause provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"

7. *Brock v. North Carolina*, 344 U.S. 424, 435 (1953). State constitutions that lack a double jeopardy provision are: North Carolina, Connecticut, Maryland, Massachusetts, and Vermont. *Id.* Regardless of a state's constitutional provisions the double jeopardy clause applies to the states through the due process clause of the fourteenth amendment. *Benton v.*

Despite this noble history, no consistent line of case precedent supports the guarantee against double jeopardy. As one writer noted, "the riddle of double jeopardy stands out today as one of the . . . most commonly misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion."⁸ The truth of that statement is reflected in the double jeopardy decisions of the United States Supreme Court. In criticizing the Court's inability to alleviate the confusion in double jeopardy jurisprudence, Justice Rehnquist recently admitted that the Court's decisions are "replete with *mea culpa's* occasioned by shifts in assumptions and emphasis."⁹

Amidst this sea of confusion, one truth has flashed repeatedly as a beacon of consistency and clarity: Once a court has entered a verdict of not guilty, the prosecution may not try the defendant again for the same offense. The double jeopardy issues facing most courts, however, rarely involve the simple prohibition against retrial after an acquittal.¹⁰ Perhaps the most perplexing issue is whether double jeopardy protection applies to situations of reversed convictions. The answer, as determined by the Supreme Court in three leading cases, depends upon the basis of the reversal. In *United States v. Ball*,¹¹ the Court held that a reversal based upon trial error does not prevent a retrial.¹² Later, in *Burks v. United States*,¹³ the Court held that a reversal based upon the sufficiency of evidence is an absolute bar to reprosecution.¹⁴ Finally,

Maryland, 395 U.S. 784 (1969).

8. Note, *Criminal Law — Double Jeopardy*, 24 MINN. L. REV. 522, 522 (1940).

9. *Whalen v. United States*, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

10. Double jeopardy protection applies to three situations. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). First, double jeopardy protects against a second trial after acquittal. See *United States v. Ball*, 163 U.S. 662 (1896). Second, it protects against a second trial after conviction. See *In re Nielsen*, 131 U.S. 176 (1889). Third, it protects against multiple punishments. See *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). Unfortunately, in attempting to solve double jeopardy issues, courts have at times erroneously cited examples of one protection as authority for another. See, e.g., *State v. Pinder*, 375 So. 2d 836 (Fla. 1979) (citing *Harris v. Oklahoma*, 433 U.S. 682 (1977), a multiple prosecution case, as controlling authority in deciding *Pinder*, a multiple punishment case).

11. 163 U.S. 662 (1896).

12. *Id.* at 669.

13. 437 U.S. 1 (1978).

14. *Id.* at 18. A companion case to *Burks*, *Greene v. Massey*, 437 U.S. 19 (1978), is also cited for the proposition that cases reversed for insufficient evidence may not be reprosecuted. The Court's disposition of *Greene*, however, differed from its straightforward holding in *Burks*. In *Greene*, two defendants were convicted of first-degree murder in a Florida trial court. On appeal to the Florida Supreme Court, the convictions were reversed and new trials were ordered.

On certiorari, the Supreme Court of the United States noted that *Burks* precluded a

in *Tibbs v. Florida*,¹⁵ the Court held that a reversal based upon the weight of evidence, like a reversal based upon trial error, does not prevent a retrial.¹⁶

These cases have created three distinct categories of reversed convictions—trial error, sufficiency of evidence and weight of evidence. Differentiating the three categories is critical in determining whether a defendant will be released or reprosecuted. Of particular concern is the subtle distinction between the sufficiency and weight of evidence. Despite its importance, the sufficiency-weight distinction has baffled many courts.

The procedural history of *Tibbs* illustrates the complexity of the courts' struggle with the double jeopardy concept and the sufficiency-weight distinction.¹⁷ In 1974, the State of Florida charged Delbert Tibbs with the murder of Terry Milroy and the rape of Cynthia Nadeau.¹⁸ A jury convicted Tibbs of first-degree murder and rape and sentenced him to death.¹⁹

On appeal, the Florida Supreme Court reversed and remanded²⁰ after finding severe weaknesses in the state's case.²¹

second trial after a reversal based on insufficient evidence. The Florida Supreme Court's reversal, however, prevented the United States Supreme Court from applying the *Burks* rule to bar another trial. The Court noted that the per curiam opinion of the Florida court was based on insufficient evidence. Nevertheless, the Court was reluctant to apply the *Burks* rule because the Florida court justices had qualified the per curiam opinion with special concurrences that discussed only trial error. According to the Court, the Florida justices may have been "concerned simply with trial error and joined in the remand solely to afford [the defendants] a fair, error-free trial." 437 U.S. at 26. A reversal based on the concern for an error-free trial would not have precluded a new trial. *Id.* The ambiguity of the Florida court's holding prompted the court to remand to the court of appeals for reconsideration in light of *Burks*. *Id.* at 26-27.

15. 457 U.S. 31 (1982).

16. *Id.* at 47.

17. See *infra* text accompanying note 33.

18. *Tibbs v. State* (Tibbs I), 337 So. 2d 788 (Fla. 1976). Milroy and Nadeau were hitchhiking from St. Petersburg to Marathon, Florida on February 3, 1974, when a man driving a green truck picked them up near Fort Myers. After traveling a short distance, the man drove into a field, stopped the truck, and asked Milroy to help him siphon gas from some farm machinery. Nadeau waited a few minutes, then stepped out and walked to the rear of the truck where she saw the driver pointing a gun at Milroy. The gunman ordered Nadeau to undress and shot Milroy in the shoulder. Despite Milroy's frantic pleas, the man fired a second, and fatal, shot into Milroy's head. The killer then raped Nadeau. *Id.* at 789.

Afterwards, Nadeau was told to dress and get back into the truck. When they returned to the highway, the killer ordered Nadeau to get out and walk in front of the truck. Once outside, Nadeau turned the other way and ran. Frightened by an approaching vehicle, the killer fled in the truck. That night, Nadeau gave the police a detailed description of the killer and the truck. Police later arrested Tibbs because his appearance matched Nadeau's description. *Id.* at 790.

19. *Id.* at 789.

20. *Id.* at 791.

However, the court did not clarify its reversal in terms of the sufficiency or weight of evidence.²² On remand, the trial court concluded that retrial would violate the double jeopardy clause of the United States Constitution and dismissed the indictment.²³ The state then appealed to a Florida appellate court, which reversed the dismissal and remanded for a new trial.²⁴

The Florida Supreme Court affirmed the appellate court's decision. This time, the court classified its earlier reversal as one based upon the weight of evidence as opposed to the sufficiency of evidence.²⁵ Finally, on certiorari, the Supreme Court of the United States affirmed the decision of the Florida Supreme Court and held that the double jeopardy clause does not bar reprosecution after a conviction is reversed based upon the weight of evidence.²⁶

The Court's decision in *Tibbs* raises important questions about the sufficiency-weight distinction and the concept of double jeopardy. This comment will examine the validity of the "sufficiency-weight distinction" and consider its impact within the judicial system. An examination of the arguments raised in both the majority and dissenting opinions of *Tibbs* follows a brief history of the pertinent cases preceding *Tibbs*. An alternative analysis of the sufficiency-weight distinction will be suggested, by tracing English common law as it was adopted into American jurisprudence. Fi-

21. *Id.* at 790-91. The court enumerated the infirmities in the evidence: (1) No evidence, other than Nadeau's testimony, placed Tibbs in or near Fort Myers on the day of the crimes; (2) the truck allegedly driven by Tibbs was never found; (3) Tibbs did not have possession of a gun or car keys when stopped by police; (4) Tibbs cooperated fully with the police throughout their investigation; (5) the state introduced no evidence that cast doubt upon Tibbs's veracity; and (6) several features of Nadeau's testimony cast doubt upon her credibility as a witness. *Id.*

22. The court emphasized that because Delbert Tibbs's life was in jeopardy it had reviewed the facts — a function usually within the province of the jury. The court described its obligation:

While the weight of the evidence and the credibility of the witnesses is ordinarily a matter which is exclusively within the province of the jury to decide, and this court will as a rule not reverse a judgment based upon a verdict returned by the jury and approved by the trial judge, when there is substantial evidence to support the verdict rendered, it is also the rule that the evidence relied on to have this effect must be substantial in character.

When such evidence is not substantial in character, this court is committed to the rule that a conviction will be reversed and a new trial ordered, where the evidence relied on is not satisfactory to establish the identity of an accused as a participant in a crime in which he has been found guilty.

337 So. 2d at 791 (quoting *McNeil v. State*, 104 Fla. 360, 139 So. 791 (1932)).

23. *State v. Tibbs*, 370 So. 2d 386, 386 (Fla. 3d DCA 1979).

24. *Id.* at 386.

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

26. 457 U.S. at 47.

nally, the author will analyze the elimination of "weight of evidence" reversals in the Florida appellate courts.

II. THREE CATEGORIES OF REVERSED CONVICTIONS

A. Trial Error

The Court considered the applicability of the double jeopardy principle to the first category of reversals—those based upon trial error—in *United States v. Ball*.²⁷ In *Ball*, the Court held that a defendant may be retried after his conviction is reversed because of trial error.²⁸ In reaching its conclusion, the Court balanced the defendant's interest in finality against the government's interest in obtaining a conviction.²⁹

Finality, for double jeopardy purposes, refers to a defendant's right to "repose"³⁰ after judgment—the knowledge that the prosecution cannot initiate further action. The defendant's interest in finality, however, is not absolute. It must be balanced against the government's interest in reprosecution.³¹ After an acquittal, the government's interest is weak, and therefore, the defendant's interest must prevail. But after a reversed conviction based upon trial error, the balance tips in favor of the government's interest in a final determination of guilt or innocence. Justice Harlan articulated the balancing theory in *United States v. Tateo*:³² "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction."³³

B. Sufficiency of Evidence

The Supreme Court dealt with the second category of reversals—those based upon the sufficiency of evidence—in *Burks v. United States*.³⁴ The Court held that a second trial is barred after

27. 163 U.S. at 662.

28. *Id.* at 672. In *Ball*, the Court stated for the first time that a verdict of acquittal is an absolute bar to a subsequent indictment against the same defendant for the same offense. *Id.* at 669.

29. *Id.* at 669.

30. *Benton v. Maryland*, 395 U.S. 784, 810 (1964) (Harlan, J., dissenting).

31. See, Note, *What is Double Jeopardy? No Clear Answer in United States v. DiFrancesco*, 1981 DET. C.L. REV. 1147, 1156.

32. 377 U.S. 403 (1964).

33. *Id.* at 466.

34. 437 U.S. 1 (1978).

an appellate court reverses a conviction because the evidence presented at trial was insufficient to support a jury verdict of guilty.³⁵

In considering double jeopardy and the sufficiency of evidence, the Court explicitly distinguished sufficiency of evidence from trial error.³⁶ A reversal based upon trial error indicates that the judicial process that led to conviction was in some way defective.³⁷ On the contrary, a reversal based upon insufficient evidence does not require a new trial³⁸ because, in such a case, the government has failed to prove the defendant guilty beyond a reasonable doubt. The double jeopardy clause, in this situation, forbids the prosecution to take a second bite of the apple.³⁹

The *Burks* Court emphasized that the failure to recognize the differences between trial error and sufficiency of evidence had created much confusion: "[C]ases which have arisen since *Ball* generally do not distinguish between reversals due to trial error and those resulting from evidentiary insufficiency. We believe, however, that the failure to make this distinction has contributed substantially to the present state of conceptual confusion existing in this area of the law."⁴⁰

After *Burks*, the double jeopardy implications of two categories of appellate reversal became clear: Reversals based upon trial error are remanded for a new trial, while reversals based upon insufficient evidence carry the same finality as acquittals.⁴¹ Unfortu-

35. *Id.* at 18. *Burks* explicitly overruled *Bryan v. United States*, 338 U.S. 552 (1950). *Burks*, 437 U.S. at 2. In *Bryan*, the Court held that a reversal based upon the sufficiency of evidence does not prevent a retrial. 338 U.S. at 560. The *Bryan* decision also implied that there was no qualitative distinction between reversals based upon trial error and those based upon insufficient evidence. *Burks* also overruled three other cases, *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), to the extent that they suggested that a defendant waives his right to a judgment of acquittal by moving for a new trial. 437 U.S. at 2.

36. 437 U.S. at 15.

37. *Id.*

38. *Id.* at 16.

39. *Id.*

40. *Id.* at 14-15.

41. One potential issue not resolved by *Burks* is how courts should decide cases where trial error has contaminated the sufficiency of evidence. For example, suppose that a reviewing court has reversed the conviction because it found that the trial court erroneously admitted incriminating evidence against the defendant. Since the reversal is based upon trial error, one would expect that the court would be free to remand the case for a second trial. But should the reviewing court be allowed to determine whether it was the erroneously-admitted evidence which allowed the prosecution to meet the sufficiency of evidence test? If the court reached such a conclusion, the double jeopardy interpretation in *Burks* would bar a second trial.

nately, the double jeopardy concept has proven too complex to be so easily pigeonholed. A third category of reversal—the weight of evidence—adds more confusion to the realm of double jeopardy jurisprudence.

This final category arises when the evidence is technically sufficient but its weight is so tenuous or insubstantial that a new trial is ordered in the interest of justice.⁴² Interestingly, the distinction between a reversal based upon the sufficiency of evidence and one based upon the weight of evidence was of no consequence until *Burks*. Prior to *Burks*, a defendant could presumably be retried under either category. The irony of *Burks*, therefore, is that in resolving one confusing aspect of double jeopardy—the sufficiency-trial error distinction—the Court simultaneously created another area of confusion—the sufficiency-weight distinction.

C. *Weight of Evidence*

*Tibbs v. Florida*⁴³ forced the Court to resolve the issue of double jeopardy and reversals based upon the weight of evidence.⁴⁴ In a five to four decision,⁴⁵ the Court held that the double jeopardy clause does not bar retrial when a conviction is reversed based upon the weight of evidence as opposed to the sufficiency of evidence.⁴⁶

In analyzing the *Tibbs* decision, it is first necessary to distinguish between the “sufficiency of evidence” and the “weight of evidence.” Essentially, sufficiency of evidence is a test of quantity, while weight of evidence is a test of quality. In determining sufficiency, the court measures the adequacy of evidence; in determining weight, the court measures the probative value and credibility of evidence. When an appellate tribunal, after viewing the evidence in the light most favorable to the prosecution, believes that the prosecution has failed to prove guilt beyond a reasonable doubt,

42. See *infra* notes 43-50 and accompanying text.

43. 457 U.S. at 31.

44. Courts have been reluctant to interpret this third category of reversal. In *MacArthur v. Nourse*, the Florida Supreme Court noted, “[w]e specifically decline to rule upon the double jeopardy implications of appellate reversals based upon considerations of evidentiary weight.” 369 So. 2d 578, 581 n.11 (Fla. 1979). Similarly, in *Greene v. Massey*, the Supreme Court of the United States was not “willing to express an opinion as to the double jeopardy implications of a retrial ordered on [grounds of evidentiary weight].” 437 U.S. at 26 n.10.

45. Justice O'Connor delivered the majority opinion, joined by Chief Justice Burger and Justices Powell, Rehnquist, and Stevens. Justice White dissented, joined by Justices Brennan, Marshall, and Blackmun.

46. 457 U.S. at 47.

the evidence is not legally sufficient to support a conviction.⁴⁷ As mentioned earlier, reversal of a conviction based upon the sufficiency of evidence means that the prosecution has failed to prove its case, and the defendant is therefore acquitted. When the evidence is technically sufficient but the appellate court concludes that the evidence preponderates heavily against the verdict, the verdict is contrary to the weight of the evidence.⁴⁸ After *Tibbs*, the reversal of a conviction based upon evidentiary weight allows the court to remand for a new trial.

III. ANALYSIS OF THE SUFFICIENCY-WEIGHT DISTINCTION

In reversing a conviction based upon a verdict contrary to the weight of evidence, a court acts as a member of the jury, casting its own vote. In *Tibbs*, Justice O'Connor analogized a reversal based upon the weight of evidence to the situation of a deadlocked jury:

A reversal on this ground, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. This difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves.⁴⁹

Under prevailing notions of double jeopardy, if a jury is unable to reach a unanimous decision, the court may grant a new trial.⁵⁰ Thus, if the *Tibbs* analogy is accurate, a second trial should also be permissible when an appellate court disagrees with the jury's verdict. There is, however, a caveat to the application of the "thirteenth juror" analogy since the standard for upsetting a jury verdict is very strict. It has been argued that allowing the judge to reverse a conviction based upon the weight of evidence permits the judge to usurp a function traditionally within the province of the jury. By invading the province of the jury, the judge then becomes the real trier of fact. Recognizing this danger, courts must use caution when reweighing evidence. Accordingly, courts reversing a jury

47. See *American Tobacco Co. v. United States*, 328 U.S. 781, 787 n.4 (1946).

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

49. 457 U.S. at 42.

50. See, e.g., *Arizona v. Washington*, 434 U.S. 497, 509 (1978); *United States v. Sanford*, 429 U.S. 14, 16 (1976) (per curiam); *Johnson v. Louisiana*, 406 U.S. 356, 401-02 (1972) (Marshall, J., dissenting); *Downum v. United States*, 372 U.S. 734, 735-36 (1963); *Wade v. Hunter*, 336 U.S. 684, 689 (1949); *Keel v. Montana*, 213 U.S. 135 (1909); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *Logan v. United States*, 144 U.S. 263, 298 (1892); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824).

verdict based upon the weight of evidence couch their decisions in terms of "exceptional cases,"⁵¹ "preventing injustice,"⁵² or the "evidence preponderating heavily against the verdict."⁵³

The dissent in *Tibbs* argued that there is no justification for a retrial following a reversal that purports to prevent a serious miscarriage of justice. Justice White noted that if the evidence presented in the first trial lacked the necessary weight to support a conviction and the same evidence were presented on remand, one must assume that the appellate court would again reverse any conviction that was based upon that evidence.⁵⁴ The second trial would serve only to harass the defendant. This argument neglects the possibility that the second trial may vary substantially from the first. On retrial the prosecution might succeed in making its case stronger. Or its case may be weaker;⁵⁵ the mere lapse of time may lessen the strength of the state's case. Furthermore, "new evidence may be available, old evidence may have disappeared, and even the same evidence may appear in a different light if, for ex-

51. *United States v. Pepe*, 209 F. Supp. 592, 595 (D. Del. 1962), *aff'd*, 339 F.2d 264 (3d Cir. 1964) (prosecution for alleged gambling violations where the defendant operated behind a false store front, was an associate of known gamblers and had previously been convicted of gambling charges is not an exceptional case justifying a reviewing court's finding that the verdict is contrary to the weight of the evidence).

52. *Unites States v. Parelius*, 83 F. Supp. 617, 618 (D. Haw. 1949) (court found a miscarriage of justice where the defendant had been convicted of first-degree murder despite well-trained psychiatrist's "persuasive testimony" in behalf of defendant).

53. *Unites States v. Robinson*, 71 F. Supp. 9, 10-11 (D.C.D.C. 1947) (in prosecution for robbery, the "evidence preponderates heavily against the verdict" of guilty where two other men pleaded guilty to the same crime and also fully corroborated defendant's testimony).

54. 457 U.S. at 47-48. The dissent's argument is based upon the presumption that at retrial the prosecution would submit the same evidence used in the first trial. If the defendant were reconvicted on the same evidence, one would logically expect that a second appellate court would also view the verdict as contrary to the weight of evidence. Therefore, the case would once again be remanded. Theoretically, the cycle would continue ad infinitum. The majority, however, did not agree with this argument:

We do not join in the . . . forecast that the granting of a new trial would doom the defendant and the Government to an infinite regression. . . . [I]f a third jury were to find [the defendant] guilty, we should suppose any judge would hesitate a long time before concluding that the interests of justice required still another trial.

Id. at 43 n.18 (quoting *Unites States v. Weinstein*, 452 F.2d 704, 714 n.14 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972)). See also *Louisville and Nashville R.R. v. Woodson*, 134 U.S. 614, 623 (1890) ("courts rarely grant a new trial after two verdicts upon the facts in favor of the same party, except for error of law . . .").

55. On remand, the state of Florida dropped the charges against Delbert Tibbs because it believed that the credibility of the rape victim had weakened. The author obtained this information from a telephone conversation with Louis Beller, Attorney for Delbert Tibbs (Sept. 19, 1983).

ample, the demeanor of witnesses is different.”⁵⁶ Undoubtedly, factfinding is a dynamic and temporal process, and a second trial is likely to add new life to any case.

The dissent was unwilling to permit a revitalized case on retrial. Its reluctance stemmed from the double jeopardy clause’s prohibition against retrial “for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”⁵⁷ In *Green v. United States*,⁵⁸ the Court emphasized the policy underlying the clause:

The underlying idea [of the double jeopardy clause] . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.⁵⁹

The majority in *Tibbs*, however, refused to view a defendant on remand as a target of government oppression. “An appellate court’s decision to give the defendant this second chance does not create ‘an unacceptably high risk that the government, with its superior resources [will] wear down [the] defendant’ and obtain conviction solely through its persistence.”⁶⁰ The majority viewed a new trial as beneficial to the defendant—despite evidence sufficient to support a conviction, the defendant is given another opportunity to win acquittal.⁶¹ Conversely, the dissent regarded a new trial as unfair to the defendant because the prosecution, which could not produce enough evidence to overcome reasonable doubt in the first trial, now has a second chance to bolster its case.⁶²

Concern for fairness to the defendant in a second trial has prompted the suggestion that the state be excluded from introducing new evidence on retrial in its case in chief:

On a theoretical level, the prosecution need not adduce addi-

56. *Johnson v. Louisiana*, 406 U.S. 356, 402 (1972) (Marshall, J., dissenting).

57. *Burks*, 437 U.S. at 11.

58. 355 U.S. 184 (1957).

59. *Id.* at 187-88.

60. 457 U.S. at 43 (quoting *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980)). A retrial after a reversed conviction based upon the weight of the evidence is another illustration of the balancing theory. Until a second verdict is rendered, the government’s interest in a final adjudication of guilt or innocence is superior to the defendant’s immediate interest in finality. See *supra* text accompanying notes 27-31.

61. 457 U.S. at 43-44.

62. *Id.* at 49-50.

tional evidence on retrial, as it already has introduced a legally sufficient amount of evidence. On a practical level, however, the prosecution has been alerted to the fact that its case is not solid. The reversal will motivate the prosecution to uncover and produce more evidence and make a more effective presentation at retrial. If the purpose in granting retrial is to "allow the defendant a second chance," the prosecution should not be given another chance to introduce evidence, because this is in contradiction to the established policies supporting the protection against double jeopardy.⁶³

This argument is circular. It supports the dissent's position that a defendant's reconviction on retrial *in the absence of new evidence* would be reversed again on appeal on the weight of evidence. The interests of justice demand that both the government and the defendant be allowed to strengthen their cases. The government's introduction of new evidence on retrial does not undermine the *Green* policy; it is the defendant who requested and received another chance to win acquittal.

In addition to criticizing the sufficiency-weight distinction as undermining the *Green* policy, the *Tibbs* dissent argued that the distinction will also undermine the *Burks* rule⁶⁴ by encouraging judges to reverse on the basis of the weight rather than the sufficiency of evidence.⁶⁵ This claim stems from a fear that appellate judges will put the cart before the horse by first deciding whether a retrial is necessary and later categorizing the reversal as based upon the sufficiency of evidence or the weight of evidence. If that assumption is accurate, our notions of judicial integrity are hollow indeed.

The majority might have attacked the dissent's argument by focusing on the fear of judicial misuse of the distinction. The dissent feared that a judge having doubts about the sufficiency of evidence might choose to reverse based upon the weight of evidence. Obviously, the motive behind this decision would be to prevent a defendant from being set free and to ensure a retrial. Without the *Tibbs* sufficiency-weight distinction, however, a judge having doubts about the adequacy of evidence might still prevent the defendant from being set free by simply affirming the conviction. In

63. Note, *Double Jeopardy: Retrial After Reversal of a Conviction on Evidentiary Grounds*, 42 LA. L. REV. 1061, 1075 (1983).

64. 457 U.S. at 51. *Burks* mandated acquittal when the evidence is legally insufficient to justify conviction. See *supra* note 35 and accompanying text.

65. See 457 U.S. at 51.

this sense the sufficiency-weight distinction actually serves to protect defendants against unfair convictions.⁶⁶

A more plausible criticism of *Tibbs* is not that judges will misuse the sufficiency-weight distinction, but rather that they will be unable to make the distinction. Unfortunately, the majority cavalierly dismissed this argument as "unpersuasive."⁶⁷ The Court stated that trial and appellate judges have regularly demonstrated the ability to distinguish between the weight and the sufficiency of evidence.⁶⁸ This assertion gives the courts more credit than they deserve, especially considering the Supreme Court's admission in *Burks* of its own failure to distinguish between reversals based upon trial error and those based upon the sufficiency of evidence.⁶⁹ The suggestion in *Tibbs* that lower courts will have no difficulty distinguishing between reversals based upon the sufficiency of evidence and those based upon the weight of evidence, a much more subtle distinction, is overly optimistic. Indeed, the suggestion lacks hindsight. The Court either overlooked or ignored the Florida Supreme Court's opinion in *Tibbs II*,⁷⁰ where the state supreme court expressly acknowledged the failure of its lower courts to make the distinction:

The district court in this case reviewed a number of Florida appellate decisions reversing convictions on the *alleged basis of evidentiary weight*. Although the court's analysis is plausible, we prefer to view these *ambiguous decisions* as reversals which were based on *sufficiency*; that is, as cases in which the state failed to prove the defendant's guilt beyond a reasonable doubt.⁷¹

66. The majority noted that without the sufficiency-weight distinction, state legislators might simply forbid appellate courts to reweigh the evidence and thereby "eliminate practices that help shield defendants from unjust convictions." *Id.* at 45 n.22.

67. *Id.* at 44.

68. *See id.*

69. *See supra* text accompanying note 33; *see also* *Forman v. United States*, 361 U.S. 416 (1960). Without distinguishing between a reversal based upon trial error and a reversal based upon the sufficiency of evidence, the *Forman* Court held, "[i]t is elementary in our law that a person can be tried a second time for an offense when his prior conviction for that same offense has been set aside by his appeal." Therefore, "his plea of double jeopardy must fail." *Id.* at 425.

70. 397 So. 2d 1120 (Fla. 1981) (per curiam).

71. *Id.* at 1124 (emphasis added). Specifically, the Florida Supreme Court interpreted the following cases as reversals based upon the sufficiency and not the weight of evidence: *Smith v. State*, 239 So. 2d 284 (Fla. 2d DCA 1970) (although there was some evidence to support a conviction for rape the record as a whole was not conclusive); *Sosa v. Maxwell*, 234 So. 2d 690 (Fla. 2d DCA 1970) (state failed to meet its burden of proof in establishing beyond a reasonable doubt that defendants committed murder); *Lowe v. State*, 154 Fla. 730,

One might wonder why the sufficiency-weight distinction would create such a problem. Ideally, a judge must first decide whether the evidence presented at trial was sufficient to support the verdict. If he concludes that there was sufficient evidence, the judge must then decide whether the verdict was contrary to the weight of evidence. Viewed as a simple two-step process, the sufficiency-weight distinction does not appear to be a difficult concept: the judge does not consider questions of weight until after determining if the evidence was sufficient to support the verdict. However, the process is not that simple. A judge cannot be expected to completely isolate his thoughts with respect to the two categories. His ultimate decision about the weight of evidence will affect his determination of the sufficiency of evidence. The more strongly a judge believes that the verdict is contrary to the weight of evidence, the more likely he is to reverse based upon the sufficiency of evidence. For this reason, reversals based upon the weight of evidence are rare.

Undoubtedly, many judges in the past have found themselves tangled in the threadwork of the sufficiency-weight distinction. Some of the confusion may be attributed to the fact that the importance of the distinction was not clear until *Tibbs*. *Tibbs* has alerted courts to the fact that they must concentrate on accurately distinguishing the sufficiency from the weight of evidence. Nonetheless, the line that separates the two categories is not always easily identified. Even competent judges will at times hesitate before categorizing a reversal as based upon either the sufficiency or the weight of evidence.

IV. AN ALTERNATIVE VIEW: THE COMMON LAW ROOTS OF THE SUFFICIENCY-WEIGHT DISTINCTION

Although the Court did not rely on the early double jeopardy case law, there is substantial support for its conclusion that an ap-

19 So. 2d 106 (1944) (state failed to prove beyond a reasonable doubt that defendant had had sexual intercourse with a minor); *Woodward v. State*, 133 Fla. 301, 151 So. 509 (1933) (uncertainties in evidence prevented state from proving beyond a reasonable doubt that defendant had committed incest with his daughter); *Skiff v. State*, 107 Fla. 90, 144 So. 323 (1932) (court reversed a rape conviction because the prosecution's evidence was unconvincing); *McNeil v. State*, 104 Fla. 360, 139 So. 791 (1932) (court reversed a conviction for armed robbery after finding that the evidence of defendant's identity as the guilty party was not satisfactory); *Fuller v. State*, 92 Fla. 873, 110 So. 528 (1926) (evidence purporting to establish that defendant was guilty of homicide was not sufficient); *Williams v. State*, 58 Fla. 138, 50 So. 749 (1909) (state failed to place defendants at the scene of the crime or to prove that they fired any shots).

pellate court may grant a new trial after reversing a conviction based on a verdict contrary to the weight of evidence. English legal history reveals that as early as the seventeenth century, a common law judge could set aside a verdict and grant a new trial if he was not satisfied with the results or if the verdict was contrary to the weight of evidence.⁷² In the United States, courts have always followed the English rule allowing judges to grant new trials on this basis.⁷³ In 1790, the Supreme Court of the United States declared that whenever it appears "that actual and manifest injustice is done, or that the jury have proceeded . . . *contrary to strong evidence* . . . the Court will always give an opportunity, *by a new trial*, of rectifying the mistakes of the former jury, and of doing complete justice to the parties."⁷⁴

If a state allows its appellate courts to reweigh evidence, it should also allow those courts to grant new trials when finding verdicts contrary to the weight of evidence. Not all states, however, grant their appellate courts the power to reweigh evidence. At the time of *Tibbs II*, Florida permitted its appellate courts to reverse convictions based upon the weight of evidence.⁷⁵ Yet in that decision the Florida Supreme Court revoked the right of its appellate tribunals to grant such reversals in the future. The paradox of the court's decision is that in recognizing the reversal of Tibb's conviction as one based upon the weight of evidence, the court simultaneously decided that Florida appellate courts may no longer reverse for that reason.⁷⁶ By eliminating the third category of reversal, the court stated that it was returning the state's appellate courts to their proper role of examining the sufficiency of evidence

72. In 1665, an English court granted a new trial to remedy mistakes of the jury. W. FORSYTH, *HISTORY OF TRIAL BY JURY* (1852). Chief Justice Holt believed that courts had granted new trials even before that date. *Id.* at 186 n.2.

73. In *Metropolitan R.R. v. Moore*, 121 U.S. 558 (1887), the Court stated that the trial judge had a "duty" to set aside the verdict and grant a new trial when the verdict was contrary to the weight of the evidence. *Id.* at 570.

In *Mt. Adams & E.P. Inclined Ry. v. Lowery*, 74 F. 463 (6th Cir. 1896), the court stated: "the rule in the American courts seems to be that, if the verdict be clearly and manifestly against the evidence or the weight of evidence, a new trial should be granted." *Id.* at 472 (citations omitted).

Later, the fourth circuit stated: "[I]t is the duty of the judge to set aside the verdict and grant a new trial if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice" *Aetna Casualty & Sur. Co. v. Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941).

74. *Cowperthwaite v. Jones*, 2 U.S. (2 Dall.) 55, 56 (1790) (emphasis added).

75. See 457 U.S. at 38 n.12.

76. 397 So. 2d at 1125.

and leaving questions of weight for the jury.⁷⁷ The court's rationale arises from the assumption that a judge granting a new trial acts in derogation of the defendant's right to trial by jury. That assumption is not accurate. A jury cannot function without the assistance of the judge. "They [jurors] are not, and have never been, independent of the court . . . their verdicts must meet the approval, or at least they must not offend the sense of justice, of the presiding judge, who [is] by virtue of his position 'the thirteenth juror.'"⁷⁸

In light of the unity of function between the judge and jury, the right to trial by jury is strengthened, not weakened, when the court exercises its discretionary power to grant a new trial. When ruling that a verdict is contrary to the weight of evidence, the judge does not invade the province of the jury; he simply transfers the defendant from the province of an unfair or inept jury to the province of a new jury. Even in the absence of intentional misconduct, many factors might cause a jury to render a faulty verdict. For example, the jurors might be inadvertently exposed to media coverage and thereby prejudiced; or they might be confused by the complexity of the jury instructions; or they might mistakenly examine legal issues as well as factual issues and draw conclusions that are contrary to law. If these facts are known to exist, then a conviction might be reversed on the basis of trial error. But it is quite possible that the existence of any single factor cannot be proved. In this situation, it is the duty of the trial judge to discard the unjust verdict as contrary to the weight of the evidence. If he fails to do so, then the appellate court must reverse and remand the case for a new trial.

77. *Id.*

78. *Smith v. Times Pub. Co.*, 178 Pa. 481, 497, 36 A. 296, 309 (1897) (Williams, J., concurring). Judge Williams traced the history of the judge's power to set aside the verdict and grant a new trial. Originally, Judge Williams explained, a defendant injured by a false verdict had only one means of redress: he could take action directly against the jury. This method proved circuitous and inadequate. Later, judges were allowed to assess fines against jurors for unjust verdicts on the theory that the jurors had been negligent. This practice, however, did not help the injured defendant. Finally, in the 1600's, judges adopted a more direct method of correcting unjust verdicts by setting them aside and granting new trials. According to Judge Williams, the reason for this new practice was simple: "As it had been within the undoubted discretion of the judges to fine and imprison jurors for a false verdict, a fortiori it was within their discretionary power to set the false verdict aside, and so relieve against the injustice done by it." *Id.* at 508, 36 A. at 308.

V. ELIMINATION OF "WEIGHT OF EVIDENCE" REVERSALS IN FLORIDA

The Florida Supreme Court's position is that although it is proper for the trial judge to exercise a broad discretionary power to reweigh the evidence, set aside the verdict, and grant a new trial, it is not appropriate for an appellate judge to exercise that same power. The justification for allowing a trial judge to set aside a verdict is his firsthand exposure to the witnesses and their testimony, an opportunity the appellate judge does not have.⁷⁹ Nonetheless, the lack of firsthand exposure to the trial should not preclude an appellate court's reversal based upon the weight of evidence.

The primary function of an appellate court is to determine if the interests of justice require a new trial. The interests of justice demand not only sufficient evidence but also a judge's determination that the prosecution's testimony was more reliable than that of the defendant. If the court decides that the prosecution's testimony was not more reliable, it must conclude that the verdict was contrary to the weight of evidence. Therefore, it appears that a reversal based upon the weight of evidence is, at the same time, a reversal based upon the interests of justice. Yet, in ruling that its appellate courts may no longer reverse based upon the weight of evidence, the Florida Supreme Court stated, "By eliminating evidentiary weight as a ground for appellate reversal, we do not mean to imply that an appellate court cannot reverse a judgment or conviction 'in the interest[s] of justice.' The latter has long been, and still remains, a viable and independent ground for appellate reversal."⁸⁰

The problem with the Florida Supreme Court's analysis is that a reversal based upon the interests of justice will often result from a conclusion drawn from the weight of evidence. Conversely, many reversals based upon the weight of evidence are phrased in terms of the interests of justice.⁸¹ Therefore, the distinction between *evidentiary* reversals⁸² based upon the weight of evidence and those

79. *Metropolitan R.R. v. Moore*, 121 U.S. 558, 572-73 (1887).

80. 397 So. 2d at 1126. The court cited Rule 9.140(f) of the Florida Rules of Appellate Procedure (1977), which provides: "In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial" *Id.*

81. See *supra* notes 51-52 and accompanying text.

82. Outside the scope of evidentiary shortcomings, appellate courts have used the interests of justice reversal to correct fundamental errors that occurred at trial. See, e.g., *Wright v. State*, 348 So. 2d 26 (Fla. 1st DCA 1977) (error to admit testimony of unqualified medical

based upon the interests of justice is illusory.

The Florida Supreme Court's review of Tibb's conviction demonstrates the problem. The court stated, "[I]t is our obligation to review a conviction for which the death sentence has been imposed to determine if the *interests of justice* require a new trial."⁸³ The court then analyzed the severe weaknesses⁸⁴ in the prosecution's case (i.e., *reweighed* the evidence) and concluded, "[r]ather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction [based upon the weight of evidence] and remand for a new trial."⁸⁵ If the court had not reversed Tibb's conviction based upon the weight of evidence, it probably would have reversed his conviction based upon the interests of justice. In this sense, the distinction between evidentiary reversals based upon the weight of evidence and those based upon the interests of justice is a semantical peculiarity.

If, on the other hand, the distinction has any merit, the Florida Supreme Court could be forced to affirm the death sentence conviction of a defendant who is the victim of an unjust verdict. For example, if the prohibition of weight of evidence reversals in *Tibbs II*⁸⁶ did not apply prospectively, the Florida Supreme Court would have been forced to reverse its decision in *Tibbs I*⁸⁷ despite its conclusion in *Tibbs II* that Tibbs was very likely innocent. One might assume that the court would nonetheless reverse the conviction in the interests of justice. However, strict adherence to its rule against reweighing evidence would preclude reversal in the interests of justice because that conclusion could only be reached after the court has reweighed the evidence.

To prevent this injustice, it is suggested that all states should allow their appellate courts to reweigh evidence.⁸⁸ An appellate court's power to do so is a necessary safeguard to the integrity of our jury system. Defendants must be protected from unfair jury verdicts whether that protection is afforded by the trial court or

examiner); *In re Tierney*, 328 So. 2d 40 (Fla. 4th DCA 1976) (news reporter held in contempt for failure to answer grand jury questions erroneously held in contempt again for subsequent refusal to answer same questions); *Cleveland v. State*, 287 So. 2d 347 (Fla. 3d DCA 1973) (error in unauthorized and improper sentencing provision).

83. *Tibbs v. State*, 337 So. 2d 788, 790 (emphasis added).

84. See *supra* note 21.

85. 337 So. 2d at 791.

86. 397 So. 2d 1120.

87. 337 So. 2d 788.

88. In one sense, all states do allow their appellate courts to reweigh evidence. Even in Florida, an appellate court must reweigh evidence to determine if trial error was harmless or prejudicial.

the appellate court. And where either court finds a verdict contrary to the weight of evidence, the defendant must be placed in the province of a new jury.

VI. CONCLUSION

At the trial level, the sufficiency-weight distinction has existed for hundreds of years. In *Tibbs*, the Supreme Court of the United States recognized that the sufficiency-weight distinction is also a viable tool for appellate review. Although the Court did not refer to early American case law, our jurisprudential heritage has long recognized that appellate reversals, based upon either the sufficiency or the weight of evidence, protect the defendant against unfair jury verdicts.⁸⁹ And just as the trial court may grant a new trial when the verdict is contrary to the weight of evidence, an appellate court should also be allowed to do so.

The critical factor in the exercise of this broad discretionary power is that judges must accurately distinguish between the sufficiency and weight of evidence. The majority's utmost confidence in the ability of judges to apply the distinction results from an oversimplification of a complex issue. Although the ramifications of the *Tibbs* decision are not yet clear,⁹⁰ the grave nature of the sufficiency-weight distinction is suggested by the fact that, to men like Delbert Tibbs, it could mean the difference between life and death.

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89. See *supra* note 80 and accompanying text.

90. Although not explicitly stated in the opinion, *Tibbs* may apply retroactively. In *Carter v. Estelle*, 691 F.2d 77, *modifying* 677 F.2d 427 (5th Cir. 1982), the fifth circuit declared: "For purposes of this opinion, we assume, without deciding, that since *Burks* applies retroactively, so does *Tibbs*." 691 F.2d at 778 n.2. Therefore, an inevitable consequence of *Tibbs* may be that unsuccessful prosecutors will attempt to convince appellate courts that previous reversals allegedly based on sufficiency were actually based on weight. Prosecutors would gain that "second bite of the apple." In *Carter*, however, the prosecutor was unsuccessful — the court held: "The inescapable conclusion is that the reversal [of *Carter's* conviction for embezzlement] was based upon a perceived evidentiary insufficiency and not a reweighing of the evidence" *Id.* at 781.