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Double Jeopardy: A Systematic Method For Evaluating Evidentiary Sufficiency And Weight Of The Evidence

DOUBLE JEOPARDY: A SYSTEMATIC METHOD FOR EVALUATING EVIDENTIARY SUFFICIENCY AND WEIGHT OF THE EVIDENCE

The double jeopardy clause of the fifth amendment[1] protects criminal defendants from retrial for the same offense after conviction or acquittal.[2] When a jury finds a defendant not guilty, the acquittal unconditionally prevents a government appeal and subsequent retrial.[3] The United States Supreme Court, however, has not clarified whether reversal of a jury's guilty verdict prohibits a second prosecution.[4] If the trial judge or appellate court reverses a jury's guilty verdict because the prosecution failed to present sufficient evidence, the acquittal bars retrial.[5] The Supreme

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[1] U.S. CONST. amend V. The fifth amendment provides in part: " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The double jeopardy clause applies to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969); *see* U.S. CONST. amend. XIV.

[2] North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Double jeopardy protections have ancient origins. *See* 1 DEMOSTHENES 589 (J. Vince trans. 4th ed. 1979). *See generally* Comment, *Double Jeopardy and Post-Verdict Judgments of Acquittal*, 40 WASH. & LEE L. REV. 669, 670 n.2 (1983) (development of double jeopardy protection). Double jeopardy prevents successive prosecution by preserving the finality of convictions. *See* United States v. DiFrancesco, 449 U.S. 117, 128 (1980) (preservation of finality of judgment is design and purpose of double jeopardy clause); United States v. Scott, 437 U.S. 82, 92 (1978) (double jeopardy protects finality of judgments); Crist v. Bretz, 437 U.S. 28, 33 (1978) (double jeopardy protects integrity of final judgments); United States v. Jorn, 400 U.S. 470, 479 (1971) (policy of finality in double jeopardy protects defendant's interests); Bozza v. United States, 330 U.S. 160, 166-67 (1947) (acquittals have qualities of constitutional finality not present in sentencing). *But see* North Carolina v. Pearce, 395 U.S. 711, 720 (1969) (no constitutional limitation on retrial following defendant's successful appeal of conviction). Acquitted defendants receive double jeopardy protection barring retrial. *See* Burks v. United States, 437 U.S. 1, 11 (1978) (double jeopardy bars retrial when acquittal based on insufficient evidence); Sanabria v. United States, 437 U.S. 54, 68-69 (1978) (double jeopardy bars retrial when erroneous evidentiary ruling leads to acquittal for insufficient evidence); United States v. Martin Linen Supply Co., 430 U.S. 564, 576 (1977) (acquittal bars retrial even though mistrial might permit second trial); United States v. Wilson, 420 U.S. 332, 353 (1975) (government appeal of post-verdict acquittal allowed only if defendant cannot be retried); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (preverdict acquittal affirmed even though based on egregiously erroneous foundation); Green v. United States, 355 U.S. 184, 188 (1957) (jury verdict of acquittal is final and ends defendant's jeopardy); United States v. Ball, 163 U.S. 662, 671 (1896) (jury verdict of acquittal not reviewable as error or otherwise).

[3] Burks v. United States, 437 U.S. 1, 16 (1978). Jury verdicts of acquittal are unreviewable. *Id.*; Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 U. MICH. L. REV. 1001, 1010 (1980). Even if the jury erroneously acquits the accused, a jury verdict legally represents a factual finding of innocence barring reversal. *Id.*

[4] *See infra* notes 17-25, 110 and accompanying text.

[5] *See infra* text accompanying notes 17-25.

Court recently ruled that a reversal based on weight of the evidence is not an acquittal barring retrial.[6]

The difference between sufficiency of the evidence and weight of the evidence is elusive.[7] An acquittal based on weight of the evidence falls between evidence so insufficient that no rational factfinder could find guilt beyond a reasonable doubt and evidence sufficient for any rational factfinder to find guilt beyond a reasonable doubt.[8] In *Jackson v. Virginia*,[9] the Supreme Court formulated the standard for review of the evidentiary sufficiency supporting a jury's guilty verdict.[10] The *Jackson* Court noted that the presumption of a defendant's innocence requires proof of guilt beyond a reasonable doubt.[11] The trial judge or appellate court must decide

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[6] *See infra* text accompanying notes 27-45.

[7] Tibbs v. Florida, 457 U.S. 31, 44-45 (1982) (defendant argued that distinction between weight of evidence and sufficiency of evidence is nebulous); *see infra* text accompanying notes 46-53 (difficulty of applying distinction between weight of evidence and sufficiency of evidence). *But see infra* note 115 (Supreme Court in *Tibbs* rejected petitioner's arguments that distinction between weight of evidence and sufficiency of evidence is unworkable). Legally sufficient evidence is the quantum of evidence necessary for a reviewing body to find that, when viewed in the light most favorable to the prosecution, a rational trier of fact could have found guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324-26 (1979); *see infra* text accompanying notes 9-16 (*Jackson* standard of review for sufficiency of evidence). A finding of legally insufficient evidence results in acquittal for the defendant. 443 U.S. at 324-26. Weight of the evidence is legally sufficient evidence that may indicate that the reviewing body, acting as a thirteenth juror, disagrees with the jury's verdict of guilty. Tibbs v. Florida, 457 U.S. 31, 42 (1982); *see* notes 26-45 and accompanying text (discussion of *Tibbs*). If the reviewing body determines that the weight of the evidence is against the jury's verdict of guilty, the trial judge may grant the defendant a new trial. *Id.*

[8] Tibbs v. Florida, 457 U.S. 31, 41-42 (1982).

[9] 443 U.S. 307 (1979).

[10] *Id.* at 324-26. In *Jackson*, the Supreme Court held that an appellate court must review the defendant's motion for acquittal in the light most favorable to the prosecution. *Id.* Viewing the evidence in the light most favorable to the prosecution preserves the factfinder's traditional role of weighing the evidence. *Id.* at 319. The trial judge or appellate court makes a legal conclusion about whether all of the evidence supports the factfinder's conclusion that the defendant was guilty. *Id.* The reviewing body must decide whether any rational factfinder could have found the defendant guilty beyond a reasonable doubt. *Id.* at 324-26. If no rational factfinder could have found guilt beyond a reasonable doubt, the evidence is legally insufficient and the court must grant the defendant's motion for acquittal. *Id.*; *see infra* text accompanying notes 11-15 (discussion of *Jackson*).

[11] 443 U.S. at 309; *see In re* Winship, 397 U.S. 358, 364 (1970) (criminal prosecution requires proof of guilt beyond a reasonable doubt). In *Jackson*, the defendant confessed to an accidental killing, but claimed self-defense. 443 U.S. at 311. The trial judge, sitting without a jury, convicted the defendant of first degree murder. *Id.* at 309. The Virginia Supreme Court denied the defendant's appeal concerning insufficient evidence of specific intent. *Id.* at 311. The defendant filed a *habeas corpus* petition in federal district court claiming the prosecution had produced no evidence of specific intent at trial. *Id.* at 312. The district court granted the peitition and the Fourth Circuit reversed. *Id.* The Fourth Circuit affirmed the existence of some evidence of specific intent since the defendant reloaded the gun and shot again at close range, the defendant was not as intoxicated as he claimed, and the defendant immediately fled from Virginia to North Carolina. *Id.* at 312, 325. The Supreme Court affirmed that a rational factfinder could have found Jackson guilty of first-degree murder beyond a reasonable doubt. *Id.* at 324.

whether any rational trier of fact could find proof of the essential elements of the crime beyond a reasonable doubt.[12] In reaching a conclusion about sufficiency of the evidence, a court should consider the evidence in the light most favorable to the prosecution.[13] The evidentiary sufficiency inquiry does not require the court to weigh sufficiency of the evidence on the basis of the court's personal opinion.[14] The jury is the factfinding body responsible for resolving conflicting testimony and weighing evidence.[15] If the reviewing court finds that no rational trier of fact could have found guilt beyond a reasonable doubt, the court must rule that the evidence is insufficient and acquit the defendant.[16]

In *Burks v. United States*,[17] the Supreme Court applied the *Jackson* standard in considering whether the double jeopardy clause bars retrial after an appellate court has found that legally insufficient evidence required an acquittal.[18] In *Burks*, the defendant asserted insanity as a defense to bank robbery.[19] Defense counsel presented three expert witnesses and the prosecution called two rebuttal witnesses.[20] The jury returned a guilty verdict.[21] The Sixth Circuit reversed the conviction, ruling that the govern-

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[12] 443 U.S. at 324.

[13] *Id.* In *Jackson*, the Supreme Court emphasized that the factfinder must first resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id.* Then, the court must review the factfinder's conclusion by considering all evidence in the light most favorable to the government. *Id.*; *see, e.g.*, Glasser v. United States, 315 U.S. 60, 80 (1942) (jury verdict stands if substantial evidentiary support when viewed in light most favorable to government to determine whether reasonably minded jury could find the defendant guilty); United States v. Jorgenson, 451 F.2d 516, 521 (10th Cir. 1971) (court should view evidence in light most favorable to government to determine whether substantial evidence existed for the jury to find defendant guilty).

[14] 443 U.S. at 319. In *Jackson*, the Supreme Court ruled that a motion based on evidentiary insufficiency does not require the court to inquire into whether the jury's verdict is believable. *Id.* Instead, the court must make the legal inquiry whether any rational factfinder could find the essential elements of the offense beyond a reasonable doubt. *Id.*; *see supra* note 10 (*Jackson* standard for determination of evidentiary sufficiency).

[15] 443 U.S. at 310; *see supra* note 13; *infra* notes 119-24 and accompanying text (jury is traditional factfinding body, therefore judges and appellate courts should defer to jury's factual determinations and verdicts).

[16] 443 U.S. at 324-26; *see supra* note 10 (*Jackson* standard of review for evidentiary sufficiency).

[17] 437 U.S. 1 (1978).

[18] *Id.* at 4.

[19] *Id.* at 2.

[20] *Id.* at 3. In *Burks*, the three expert witnesses for the defense testified that Burks suffered from a mental illness at the time of the robbery. *Id.* The mental illness rendered Burks substantially incapable of conforming his conduct to the lawful requirements of society. *Id.* Both government rebuttal witnesses acknowledged Burks' character disorder. *Id.* One state witness testified that Burks was not mentally ill. *Id.* The second prosecution witness answered ambiguously concerning whether Burks could conform his conduct to the confines of the law. *Id.* The state also used lay witness testimony to prove that Burks was capable of functioning normally at the time of the robbery.

[21] *Id.* In *Burks*, the trial judge denied the defendant's preverdict motions for acquittal and new trial. *Id.* Burks moved post-verdict for a new trial partially on the grounds of insufficient evidence. *Id.* The trial judge also denied the motion for new trial. *Id.*

ment did not present evidence legally sufficient to prove guilt beyond a reasonable doubt.[22] When the government appealed the Sixth Circuit decision, the Supreme Court held that the only permissible remedy was a directed verdict of acquittal.[23] The *Burks* Court reasoned that when the government fails to present sufficient evidence, the trial judge should acquit the defendant before submitting the case to the jury.[24] In short, double jeopardy bars retrial once an appellate court finds the evidence legally insufficient to justify a conviction.[25]

The Supreme Court recently distinguished reversals based on legally insufficient evidence from reversals based on weight of the evidence.[26] In *Tibbs v. Florida*,[27] the Florida Supreme Court, citing six weaknesses in the government's case,[28] reversed a jury verdict finding the defendant

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[22] *Id.* In *Burks*, the Sixth Circuit remanded the case to the district court. *Id.* at 4. The Sixth Circuit stated that the prosecutor's evidence of Burks' mental condition did not effectively rebut Burks' evidence of insanity. *Id.* The Sixth Circuit ruled that the government must prove sanity beyond a reasonable doubt after the defendant presents a prima facie defense of insanity. *Id.* at 3; *see* United States v. Bass, 490 F.2d 846, 852-53 (5th Cir. 1974) (trial judge must determine sufficiency of insanity evidence after government has opportunity to present additional rebuttal evidence of defendant's sanity). On remand, the district court considered whether a directed verdict of acquittal or a new trial was the appropriate course of action. 437 U.S. at 4.

[23] 437 U.S. at 18. In *Burks*, the Supreme Court overruled all prior decisions suggesting that a defendant's motion for a new trial waives his right to a judgment of acquittal. *Id.* The Supreme Court did not overrule specifically any cases by name, but stated the general principle that a defendant does not waive his acquittal right. *Id.* Since the Sixth Circuit found the evidence legally insufficient, the Supreme Court directed the district court to enter a judgment of acquittal. *Id.*

[24] *Id.* at 16. The *Burks* Court stated that when the prosecutor fails to prove the defendant's guilt beyond a reasonable doubt, the state cannot claim prejudice. *Id.* The government has had a fair opportunity to assemble and offer proof. *Id.* An acquittal based on legally insufficient evidence indicates that the state did not have a position worthy of jury consideration. *Id.* If proof of guilt was lacking as a matter of law, a jury could not have returned a guilty verdict. *Id.*

[25] *Id.* at 18; *see supra* notes 23 & 24 (acquittal for insufficient prosecution evidence bars retrial).

[26] *See infra* text accompanying notes 35-39 (Supreme Court's decision and reasoning in *Tibbs v. Florida*).

[27] 457 U.S. 31 (1982).

[28] *Id.* at 35-36. In *Tibbs*, the Florida Supreme Court identified the following weaknesses in the government's case: (1) the state presented no evidence placing Tibbs near the scene of the crime, except for the prosecutrix's testimony; (2) police never found the killer's truck; (3) police never found the killer's gun or car keys; (4) the defendant cooperated fully with the police; (5) the defendant presented unrebutted evidence concerning his reputation for veracity; and (6) the state cast doubt on the prosecutrix's believability. *Id.*

[29] *Id.* In *Tibbs*, the state's chief witness, Nadeau, testified that a man in a green truck picked up her and her boyfriend near Fort Myers. *Id.* at 32. The driver stopped the truck to siphon gas and forced Nadeau to engage in sodomy with him. *Id.* The driver then shot the boyfriend, wounding him in the shoulder. *Id.* After taunting the boyfriend, the driver killed him with a single shot to the head. *Id.* The driver raped Nadeau, who left the scene with the driver, promising to be his "old lady". *Id.* Nadeau escaped after the driver stopped the truck. *Id.* Several days later, the police stopped Tibbs, who was hitchhiking near Ocala,

guilty of first degree murder and rape.[29] The appellate court stated that the weight of the evidence did not prove adequately the defendant's guilt[30] and therefore concluded that the defendant deserved a new trial.[31] Florida Rule of Appellate Procedure 9.140(f) requires review of sufficiency and weight of the evidence in capital cases.[32] The Florida Supreme Court ruled that the reversal resulted from insufficient weight of the evidence rather than insufficient evidence.[33] A reversal based on insufficient evidence indicates that no rational factfinder could have found guilt beyond a reasonable doubt and requires the court to direct a verdict of acquittal.[34] A weight of the evidence reversal is a determination that a greater amount of credible evidence supports one side than the other.[35] Evidentiary suffi-

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Florida. *Id.* Nadeau identified Tibbs as the driver from police photos. *Id.* The defense attempted to discredit Nadeau through evidence that Nadeau had smoked marijuana shortly before the crimes occurred. *Id.* at 34. Tibbs attempted to bolster his credibility by denying ownership of the truck, stating that he was in Daytona Beach at the time of the crime, and emphasizing his college education. *Id.* The jury convicted Tibbs of first degree murder and rape. *Id.* at 35. The judge followed the jury's recommendation and sentenced Tibbs to death. *Id.*

[30] *Id.* at 35-37.

[31] *Id.* at 37. The Florida Supreme Court in *Tibbs* ruled that the weaknesses in the government's case created doubt that the defendant was guilty. Tibbs v. State, 337 So. 2d 788, 791 (Fla. 1976); 457 U.S. at 37; *see supra* note 29 (six weaknesses in the prosecution's case). In a special concurrence, Justice Boyd noted that the standard for a new trial was whether a jury of reasonable men could have returned the verdict. *Id.* at 36; *see* Jackson v. Virginia, 443 U.S. 307, 324 (1979) (proper standard for new trial is whether rational factfinder could have found defendant guilty beyond reasonable doubt).

[32] FLA. R. APP. P. 6.16(b) (1962) (recodified as FLA. R. APP. P. 9.140(f) (Supp. 1982)); 457 U.S. at 36 n.8. Florida Rule of Appellate Procedure 9.140(f) provides in part:

> In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review. FLA. R. APP. P. 9.140(f) (Supp. 1982).

In *Greene v. Massey*, the companion case to *Burks v. United States*, the United States Supreme Court held that reversal of a guilty verdict based on trial error does not bar retrial. 437 U.S. 19, 26 (1978). The Florida Supreme Court in *Greene*, however, reversed the jury's verdict of guilty and ordered a new trial because the state's evidence was legally insufficient to establish guilt beyond a reasonable doubt. Sosa v. State, 215 So. 2d 736, 737 (Fla. 1968) (per curiam). The Florida District Court in *Greene* had held that Florida appellate rules permit retrial when the weight of the evidence is weak, although the evidence is legally sufficient to convict. Sosa v. Maxwell, 234 So. 2d 690, 691 (Fla. Dist. Ct. App. 1970); FLA. R. APP. P. 6.16(b) (1962). In *Greene*, the United States Supreme Court apparently relied on the special concurrence discussing trial error rather than the *per curiam* opinion stating insufficient evidence as justification for a new trial. *See* Greene v. Massey, 437 U.S. 19, 25 (1978) (three of four Florida Supreme Court justices qualified *per curiam* opinion with special concurrence).

[33] Tibbs v. State, 397 So. 2d 1120, 1126 (Fla. 1981) (per curiam).

[34] *Id.* at 1123; *see supra* text accompanying notes 9-16 (*Jackson* standard of review for evidentiary sufficiency).

[35] Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981). The trier of fact may find that a greater amount of credible evidence supports acquittal than conviction even though a rational factfinder could have viewed the evidence in the light most favorable to the prosecution and found guilt beyond a reasonable doubt. *Id.*

ciency is a legal determination while weight of the evidence is a credibility determination.[36] A credibility evaluation requires the reviewing body to act as a thirteenth juror to make a factual judgment concerning the weight of the evidence.[37] In Florida, Rule of Appellate Procedure 9.140(f) established that reversals based on weight of the evidence do not bar retrial.[38]

The United States Supreme Court affirmed the *Tibbs* interpretation of Florida Rule of Appellate Procedure 9.140(f) that reversals based on weight of the evidence permit retrial.[39] The Supreme Court accepted the Florida court's distinction between insufficient evidence and weight of the evidence, reasoning that a reversal on the weight of the evidence indicates that acquittal was not the only possible verdict.[40] The *Tibbs* Court recognized that the Florida appellate court did not acquit the defendant, but granted the accused a new trial[41] because the verdict was against the weight of the evidence.[42] Weight of the evidence reversals do not deserve the deference normally accorded acquittals.[43] A reversal based on weight of the evidence does not signify that the evidence was legally insufficient to convict, but rather that the appellate court acted as a thirteenth juror and disagreed with the jury's resolution of conflicting evidence and testimony.[44] Just as a deadlocked jury does not acquit a defendant and bar retrial, an appellate court's reversal based on weight of the evidence does not prevent a second trial.[45]

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[36] *Id.*

[37] Tibbs v. Florida, 457 U.S. 31, 42 (1982); *see infra* text accompanying notes 44-45 (appellate court acting as thirteenth juror).

[38] *See supra* note 32 (Florida courts' application of FLA. R. APP. P. 9.140(f)).

[39] 457 U.S. 31, 46-47. In *Tibbs*, the Florida Supreme Court remanded the case to the trial court for retrial. *Id.* at 36. On remand, the trial court dismissed the indictment relying on *Burks v. United States*. *Id.* at 37-38; *see* 437 U.S. 1, 18 (1978) (double jeopardy bars retrial once appellate court has found state's evidence legally insufficient); *see also supra* notes 17-25 (discussion of *Burks*). The government appealed the dismissal of the indictment to an intermediate appellate court. Tibbs v. State, 370 So. 2d 386 (1979). On further appeal, the Florida Supreme Court affirmed the intermediate appellate court's decision to remand the case for retrial. Tibbs v. State, ___ Fla. ___, ___, 397 So. 2d 1120, 1127 (Fla. 1980) (per curiam). *See supra* text accompanying notes 34-37 (Florida Supreme Court's distinction between weight of evidence and sufficiency of evidence).

[40] 457 U.S. 31, 41-43.

[41] *Id.* at 46-47.

[42] *Id.*

[43] *Id.* at 42; *see infra* note 86 (special weight given acquittals).

[44] 457 U.S. at 42-43.

[45] *Id.* at 42. The appellate court's difference of opinion with the jury is the same as jurors' differences of opinion among themselves. *Id.* A deadlocked jury results in a "manifest necessity" retrial, not an acquittal barring retrial. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). Likewise, an acquittal based on weight of the evidence does not bar retrial. 457 U.S. at 42-43.

When a trial judge terminates the proceedings because of manifest necessity, the need for renewed adjudication supersedes a defendant's interest in repose. United States v. DiFrancesco, 449 U.S. 117, 130 (1980). A jury unable to decide on a verdict is the classic

A reversal based on weight of the evidence affords both the defendant and the government another opportunity to resolve guilt or innocence to the satisfaction of the appellate court, a neutral third party.[46] Although the distinction between weight of the evidence and sufficiency of the evidence seems simple, the difference is unclear in application.[47] For ex-

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justification for allowing retrial on manifest necessity grounds. *See* Keerl v. Montana, 213 U.S. 135, 136 (1909) (hung jury was manifest necessity allowing retrial); Dreyer v. Illinois, 187 U.S. 71, 85-86 (1902) (same); Logan v. United States, 144 U.S. 263, 298 (1892) (same).

In other circumstances, the prosecutor must prove the manifest necessity when the government moves for a mistrial over the defendant's objection. *See* Arizona v. Washington, 434 U.S. 497, 505 (1978). In *Washington*, the Supreme Court allowed retrial because the record adequately disclosed the judge's reasons for granting a mistrial, although the trial judge did not state specifically the words "manifest necessity." *Id.* at 516-17. The *Washington* trial court granted a mistrial because defense counsel referred during jury selection and opening statements to prosecutorial withholding of exculpatory evidence at the prior trial. *Id.* at 498-99.

In *Illinois v. Somerville*, the Supreme Court ruled that an insufficient indictment was the manifest necessity underlying a mistrial ruling. 410 U.S. 458, 471 (1973). The *Somerville* Court reasoned that manifest necessity justifies retrial when either party could have upset the verdict at will. *Id.*; *cf.* Lovato v. New Mexico, 242 U.S. 199, 200-202 (1916) (manifest necessity justified mistrial because defendant had not pleaded to indictment after demurrer overruled); Thompson v. United States, 155 U.S. 271, 273-74 (1894) (manifest necessity mistrial after juror dismissed as having been member of indicting grand jury); Simmons v. United States, 142 U.S. 148, 148-50 (1891) (mistrial after dismissal of jury on grounds that one juror acquainted with defendant). Courts should invoke the manifest necessity doctrine whenever public justice demands discharge of a jury. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). Before allowing retrial on manifest necessity grounds, the court must consider all relevant circumstances. *Id.*

[46] *See supra* notes 5, 6, 26-45 and accompanying text (acquittals based on weight of evidence permit retrial while acquittals for insufficient evidence bar retrial).

Courts should grant new trials only after balancing a criminal defendant's interest in a fair trial against society's interest in punishing the guilty. Burks v. United States, 437 U.S. 1, 15 (1978). In *Burks*, the Supreme Court emphasized that society's interest in convicting the guilty necessitates that courts refuse to grant defendants immunity from punishment for every reversible error. *Id.*; *cf.* United States v. DiFrancesco, 449 U.S. 117, 129 (1980) (strong public interest in finality of judgments does not bar retrial when acquittal based on egregiously erroneous foundation); United States v. Wilson, 420 U.S. 332, 343-44 n.11 (1975) (courts should only allow retrial with reluctance); United States v. Tateo, 377 U.S. 463, 466 (1964) (societal interest in granting immunity from punishment); Wade v. Hunter, 336 U.S. 684, 688-89 (1949) (same); United States v. Curtis, 683 F.2d 769, 772 (3d Cir. 1982) (society has interest in insuring that guilty are punished). *See generally* Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. CHI. L. REV. 365, 370 (1964). Conversely, the defendant has an interest in ending the ordeal of criminal prosecution. Green v. United States, 355 U.S. 184, 187 (1957); *see* Swisher v. Brady, 438 U.S. 204, 216-18 (1978) (defendant's interest in ending prosecution); United States v. Jorn, 400 U.S. 470, 486 (1971) (same); Price v. Georgia, 398 U.S. 323, 331 (1970); United States v. Kuck, 573 F.2d 25, 27 (10th Cir. 1978) (same); United States v. Beckerman, 516 F.2d 905, 906 (2d Cir. 1975) (same); Russo v. Superior Court, 483 F.2d 7, 12 (3d Cir.) (same), *cert. denied*, 414 U.S. 1023 (1973). *But see* United States v. Curtis, 683 F.2d 769, 772 (3d Cir. 1982) (defendant has interest in readjudication that is free from error).

[47] *See supra* note 7 (elusive distinction between weight of evidence and insufficient evidence).

ample, the defendant's guilt or innocence often turns on witness credibility.[48] In *Burks*, the Supreme Court affirmed the Sixth Circuit's finding that the prosecution had not presented evidence legally sufficient to convict the defendant.[49] The legal insufficiency in *Burks* resulted from failure of the prosecution's rebuttal witnesses to impugn the credibility of the defense witnesses.[50] Since the pivitol issue in *Burks*, as in *Tibbs*, was witness credibility,[51] the Supreme Court could have reversed *Burks* on weight of the evidence and allowed retrial.[52] A second prosecution would have permitted Burks the same opportunity as Tibbs to bolster the credibility of the defense witnesses, thereby strengthening the defense case in a readjudication of guilt or innocence.[53] The *Burks* Court did not consider the possibility of a new trial on the basis of insufficient weight of the evidence.[54] As in *Jackson*, the *Burks* Court referred to the evidence only in terms of sufficiency or insufficiency.[55] The Court affirmed that the evidence was insufficient and acquitted the defendant, preventing retrial.[56] Relying on the Sixth Circuit's evaluation, the Supreme Court focused on the issue of whether a finding of legally insufficient evidence permitted retrial.[57] The Supreme Court did not consider the weight of the evidence to determine whether the defendant deserved a new trial since the Court deferred to the Sixth Circuit's judgment.[58]

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[48] *E.g.*, Burks v. United States, 437 U.S. 1, 3 (1978) (battle of defense and government expert witnesses determined whether defendant was not guilty by reason of insanity); United States v. Lincoln, 630 F.2d 1313, 1317-18 (8th Cir. 1980) (jury's not guilty verdict turned on believability of defendant's story as opposed to plausibility of victim's friends' and family's version of events leading to death); United States v. Shipp, 409 F.2d 33, 36-37 (4th Cir. 1969) (jury found stepfather guilty of raping stepdaughter after weighing credibility of stepfather, prosecutrix, and mother).

[49] Burks v. United States, 437 U.S. 1, 18 (1978); *see supra* text accompanying notes 17-25 (discussion of *Burks*).

[50] Burks v. United States, 437 U.S. 1, 3-4 (1978); *see supra* note 20 (witness' testimony in *Burks*).

[51] Burks v. United States, 437 U.S. 1, 3-4 (1978); *see* Tibbs v. Florida, 457 U.S. 31, 35-36 (1982) (six weaknesses in state's case constituted lack of physical evidence that forced jury to decide whether prosecutrix or defendant was more credible); *supra* note 28 (*Tibbs* Court identified six weaknesses in government's case).

[52] *See supra* text accompanying notes 48-51 (*Burks* evidentiary sufficiency problem very similar to *Tibbs* witness credibility issue).

[53] *See* Tibbs v. Florida, 457 U.S. 31, 43-44 n.19, (1982).

[54] Burks v. United States, 437 U.S. 1, 17-18 (1978). In *Burks*, the Sixth Circuit ruled that the government's evidence was legally insufficient to support the jury verdict of guilty. United States v. Burks, 547 F.2d 968, 969-70 (6th Cir. 1976). *See infra* text accompanying notes 57-58 (Supreme Court relied on Sixth Circuit's ruling and did not consider weight of evidence).

[55] Burks v. United States, 437 U.S. 1, 10-18 (1978).

[56] *Id.* at 17-18. In *Burks*, the Supreme Court held that a finding of legally insufficient evidence bars retrial, even though the defendant has moved for a new trial. *Id.* at 17. The *Burks* Court emphasized that a defendant's motion for a new trial does not constitute a waiver of his right to a judgment of acquittal based on evidentiary insufficiency. *Id.* at 18.

[57] *Id.* at 10-18.

[58] *Id.*

In *Hudson v. Louisiana*,[59] the Supreme Court first suggested that a trial judge could evaluate evidence to determine weight as well as sufficiency.[60] The *Hudson* Court held that the trial judge granted a new trial based on insufficient evidence in the original prosecution.[61] The new trial ruling, therefore, was the equivalent of an acquittal and barred retrial.[62] The Supreme Court, however, continued the analysis, suggesting that if the trial judge has acted as a thirteenth juror and weighed the evidence, the judge could have granted a new trial even though the evidence was legally sufficient to support a guilty verdict.[63]

Following the *Hudson* analysis, the *Tibbs* Court considered weight and sufficiency as the two possibilities for evidentiary analysis when a defendant moves for new trial or acquittal after a jury verdict of guilty.[64] After *Tibbs*, the trial judge should consider the evidence systematically as if the defendant had made both motions.[65] First, the trial judge should determine whether the evidence is legally sufficient to survive the defendant's motion to acquit.[66] If the evidence is insufficient according to the *Jackson* standard,[67] the trial judge must acquit the defendant and the double jeop-

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[59] 450 U.S. 40 (1981).

[60] *Id.* at 44; *see infra* text accompanying notes 61-63 (*Hudson* suggests trial judge could function as thirteenth juror and weigh evidence).

[61] *Id.* at 44-45. In *Hudson*, the jury returned a verdict of guilty. *Id.* at 41. Hudson moved for a new trial because a new trial motion was the only available avenue of challenging evidentiary sufficiency under Louisiana law. *Id.* The court granted a new trial and the second jury also convicted Hudson. *Id.* 41-42. The Supreme Court concluded that the trial judge granted the motion for new trial on the basis of legally insufficient evidence. *Id.* at 43-44. The trial judge, therefore, did not decide as a thirteenth juror that the weight of the evidence did not support the jury's verdict. *Id.* at 44.

[62] *Id.* at 44. The *Hudson* Court held that when a trial court grants a motion for new trial on the grounds of insufficient evidence, double jeopardy bars retrial. *Id.* In *Hudson*, the state had ample opportunity to offer proof of the defendant's guilt. *Id.* at 43; *see* Burks v. United States, 437 U.S. 1, 16 (1978) (when state has fair chance to offer proof of guilt, double jeopardy bars retrial).

[63] 450 U.S. at 44-45. In *Hudson*, the Supreme Court held that no significant facts distinguished *Hudson* from *Burks*. *Id.* The Supreme Court suggested that if *Hudson* had been distinguishable from *Burks*, the trial judge could have weighed the evidence as a thirteenth juror and granted a new trial. *Id.* at 44 n.5.

[64] *See supra* text accompanying notes 26-45 (*Tibbs* Court distinguished weight of evidence from sufficiency of evidence).

[65] Burks v. United States, 437 U.S. 1, 17-18 (1978). *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). In *Martin Linen*, the Supreme Court determined that the form of the trial judge's action does not determine whether the ruling is an acquittal. *Id.* If the judge's decision represents a resolution of some or all of the factual elements of the crime, the appellate court can determine whether the action was an acquittal or not, regardless of the label. *Id.* The trial court can grant an acquittal on the defendant's motion or on the court's own motion. FED. R. CRIM. P. 29(a); *see infra* text accompanying notes 66-77 (systematic method for evaluation of motions for new trial and acquittal).

[66] *See* Burks v. United States, 437 U.S. 1, 10-11 (1978) (determination of evidentiary insufficiency leads to judgment of acquittal, making evaluation of motion for new trial unnecessary).

[67] *See supra* note 10 (*Jackson* standard of review for sufficiency of evidence).

ardy clause bars retrial.[68] If the evidence is legally sufficient to support the jury's verdict of guilty, the trial judge should then consider the defendant's motion for a new trial.[69] When evaluating the necessity for a new trial, the trial judge must assume the factfinding functions of a thirteenth juror.[70] After weighing evidence and witness credibility, the trial judge should grant a new trial if the weight of the evidence does not support the jury's verdict of guilty.[71] If the weight of the evidence favors the jury's verdict of guilty, the trial judge should affirm the conviction and deny the defendant's motion for a new trial.[72]

The defendant may appeal the trial judge's denial of an acquittal or a new trial.[73] The appellate court should retrace the steps of the trial judge's analyses and first evaluate the legal sufficiency of the evidence.[74] An appellate court can usually judge the legal sufficiency of the evidence from a written record without an evidentiary hearing.[75] If the appellate court determines that the evidence was legally insufficient, the appellate court must grant an acquittal barring retrial.[76] A finding of legally sufficient evidence initiates the factual review of the trial judge's denial of a new trial.[77] The trial judge, however, is in a better position than the appellate court to evaluate the necessity of a new trial for several reasons.[78] A written record cannot convey witness demeanor and the impact certain witnesses may have had on the jury.[79] The record also often cannot convey whether or not the trial judge has refused to grant a new trial on weight of the evidence.[80] Written explanations of reasons for rulings

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[68] *See supra* text accompanying notes 9-16 (acquittal based on insufficient evidence prohibits retrial).

[69] Tibbs v. Florida, 457 U.S. 31, 42-44 (1982). In *Tibbs*, the Supreme Court found that a court may make a weight of the evidence evaluation only after the court has determined that the government has presented legally sufficient evidence. *Id.*

[70] *Id.* at 42; *see supra* text accompanying notes 44-45 (appellate court acting as thirteenth juror).

[71] Tibbs v. Florida, 457 U.S. 31, 42-47 (1982).

[72] *Id.*

[73] *Id.* at 36-40.

[74] *See supra* text accompanying notes 66-72 (systematic evaluation method for trial judges).

[75] Jackson v. Virginia, 443 U.S. 307, 322 (1979).

[76] Burks v. United States, 437 U.S. 1, 18 (1978).

[77] *See supra* note 69 (motion for new trial considered after evaluation of motion for acquittal and evidentiary sufficiency).

[78] *See infra* text accompanying notes 79-84 (trial judge's presence at trial enables him to evaluate witness credibility whereas appellate courts must depend on written record); *cf.* Jackson v. Virginia, 443 U.S. 307, 322 (1979) (written record almost always shows simple sufficiency of the evidence; *infra* note 86 (appellate court should defer to state court evidentiary rulings unless ruling violates due process).

[79] *Cf. infra* text accompanying notes 80-84 (appellate courts should defer to trial judges' credibility determination and reasons for granting acquittal).

[80] *See* Arizona v. Washington, 434 U.S. 497, 516-17 (1978). In *Washington*, the trial judge ordered a mistrial without explaining his reasoning. *Id.* at 501. On review, the Supreme Court held that the trial court need not specifically find "manifest necessity" to grant a

are helpful and desirable, but not constitutionally required.[81] Since the trial judge has review power over jury verdicts,[82] the appellate court should defer to the trial judge's denial of a new trial.[83] If the appellate court disagrees with the trial judge's ruling on the new trial motion, the appellate court could remand the ruling for reconsideration.[84]

The double jeopardy clause limits the government's right to appeal the trial judge's rulings.[85] Although a judgment of acquittal following a jury verdict of guilty deserves special weight,[86] an acquittal by a trial judge does not necessarily prevent a government appeal.[87] The govern-

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valid mistrial. *Id.* at 517. The Supreme Court reasoned that the record provided sufficient justification for the state court ruling. *Id.* at 516. The United States Constitution does not require a full explanation of the decision to declare a mistrial. *Id.* at 516-17. Of course, disclosure by the trial judge of the basis for the ruling facilitates review of the ruling. *Id.* at 517. *See supra* note 45 (manifest necessity retrials).

[81] *Cf. id.* at 516-17 (1978) (Constitution does not require written explanation for mistrial).

[82] *See* FED. R. CRIM. P. 29, 33 (trial judges review motions for new trial and acquittal following jury verdicts).

[83] Carter v. Estelle, 691 F.2d 777, 782-84 (5th Cir. 1982); *see infra* note 89 (discussion of *Carter*). *Carter* is the first federal case to interpret carefully the *Tibbs* distinction between weight and sufficiency of the evidence. *See* Robinson v. Wade, 686 F.2d 298, 305 n.15 (5th Cir. 1982) (citing *Tibbs* for the general proposition that weight of evidence reversal is exception to rule precluding prosecution when defendant has in fact or effect won acquittal on merits); United States v. Curtis, 683 F.2d 769, 773 (3d Cir. 1982) (citing *Tibbs* as support for proposition that courts should construe narrowly exception to rule barring retrial after acquittal). In *Carter*, the Fifth Circuit ruled that appellate courts must accept the state court's characterization of reasons for reversal. 691 F.2d at 782. Unless the state court's characterization conflicts with due process, the appellate court should defer to the state court's determination of insufficient evidence, insufficient weight of the evidence or trial error. *Id.* Appellate courts should respect state court judgments based on state standards of evidentiary sufficiency, even if the ruling is incorrect. *Id.* at 784.

[84] Tibbs v. Florida, 457 U.S. 31, 36-40 (1982).

[85] *See infra* text accompanying notes 86-92 (*Wilson* rule barring governmental appeal when reversal of acquittal would subject defendant to second trial).

[86] United States v. DiFrancesco, 449 U.S. 117, 129 (1980). Acquittals deserve special weight since an acquittal terminates a proceeding after jeopardy has attached. United States v. Martin Linen Supply Co., 430 U.S. 564, 570-71 (1977). When a defendant has won an acquittal on the merits of his defense, a presumption exists for the preclusion of reprosecution. Robinson v. Wade, 686 F.2d 298, 305 n.15 (5th Cir. 1982); *see supra* note 2 (finality of judgments). An acquittal should prevent repeated government attempts to convict the defendant. Green v. United States, 355 U.S. 184, 187-88 (1957). Subsequent trials subject the defendant to embarrassment, expense, anxiety, and insecurity. *Id.* Acquittals may bar subsequent prosecutions for the same offense even if erroneous. United States v. Ball, 163 U.S. 662, 671 (1896); *see* Sanabria v. United States, 437 U.S. 54, 64 (1978) (acquittal bars retrial even if based on egregiously erroneous foundation); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (same). The double jeopardy policy barring retrial is so important that courts should narrowly construe exceptions to the rule. United States v. Curtis, 683 F.2d 769, 773 (3d Cir. 1982).

[87] Criminal Appeals Act of 1970, 18 U.S.C. § 3731 (1976). Section 3731 of title eighteen of the United States Code amended the Criminal Appeals Act of 1907, ch. 2564, Pub. L. No. 59-223, 34 Stat. 1246 (1907), which authorized government appeals only in limited situations. *See* United States v. Sanges, 144 U.S. 310, 318 (1892) (statutory authorization necessary

ment may appeal a judgment of acquittal whenever constitutionally permissible.[88] Prior to *Tibbs*, the Supreme Court had established that the United States Constitution prevented government appeal of an acquittal when reversal of the acquittal would subject the defendant to retrial.[89] In *United States v. Wilson*,[90] the Supreme Court reasoned that the defendant would not suffer from reprosecution when a reversal of judgment of acquittal would result only in reinstatement of a jury's verdict of guilty.[91] The *Wilson* Court noted that the double jeopardy clause primarily protects criminal defendants against multiple prosecutions.[92] The *Tibbs* Court

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for government appeal in criminal cases). Legislative history of the Criminal Appeals Act of 1970 indicates that Congress intended to broaden the government's right to appeal by allowing courts to define the constitutional boundaries of double jeopardy. S. REP. No. 1296, 91st Cong., 2d Sess. 18 (1970); *see* United States v. Wilson, 420 U.S. 332, 337-39 (1975). In *Wilson*, the Supreme Court reviewed the legislative history surrounding the 1970 Act. 420 U.S. at 337-39. The Conference Committee rejected language that would have permitted a government appeal from any termination of a prosecution in favor of a defendant. *Id.* at 338. The Committee also omitted a provision that would have barred government appeal of an acquittal. *Id.* The resulting language indicates that Congress intended to bar only unconstitutional government appeals. *Id.* at 339. Congress did not define the constitutional limits of government appeals, allowing the courts to determine constitutional boundaries. *Id.*

[88] 18 U.S.C. § 3731 (1976). The government has no right of appeal in criminal cases absent explicit statutory authority. United States v. Wilson, 420 U.S. 332, 336 (1975). Section 3731 of the Criminal Appeals Act of 1970 allows government appeals from any decision, judgment, or order dismissing an indictment except when the double jeopardy clause prohibits retrial. 18 U.S.C. § 3731 (1976); *see supra* note 87 (courts define constitutional boundaries of government appeals). If the prosecutor does not appeal to delay trial and if excluded evidence is material to the proceedings, the government may appeal an order suppressing or excluding evidence, as long as the appeal is made before the defendant has been put into jeopardy. *Id.* Whether or not the Constitution permits the appeal is a judicial decision. *See generally* United States v. Wilson, 420 U.S. at 336-42 (legislative history of 18 U.S.C. § 3731); Note, *Double Jeopardy and Post-Verdict Judgments of Acquittal*, 40 WASH. & LEE L. REV.669, 670-72 & nn.3-8 (1983) (legislative history and purpose of the Criminal Appeals Act).

[89] United States v. Wilson, 420 U.S. 332, 342 (1975).

[90] *Id.*

[91] *Id.* at 336. In *Wilson*, the jury returned a verdict of guilty. *Id.* at 333. On the defendant's motion, the district court dismissed the indictment due to prejudicial delay. *Id.* The government appealed under § 3731 of the Criminal Appeals Act of 1970. *Id.*; *see* 18 U.S.C. § 3731 (1976); *supra* notes 87-88 (government's right to appeal under Act). The Third Circuit held that double jeopardy barred the government's appeal. 420 U.S. at 333. The Supreme Court reversed, reasoning that the Constitution provides no absolute ban on appeals by the state. *Id.* at 342.

[92] 420 U.S. at 342. The *Wilson* Court concluded that double jeopardy is not directed at government appeals when retrial is not an option. *Id. See generally supra* notes 53-62 and accompanying text (arguments against retrial). Double jeopardy protects a defendant from double punishment for the same offense. *See* Helvering v. Mitchell, 303 U.S. 391, 399 (1938) (double jeopardy primarily prohibits double punishment); *see also* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235-36 (1972) (double jeopardy protects against multiple punishment); Stroud v. United States, 251 U.S. 15, 18 (1919) (double punishment prohibited by double jeopardy); *Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 168-69 (1873) (double jeopardy forbids multiple punishment). *See generally* Schulhofer, *Jeopardy and Mistrials*,

formulated an exception to the *Wilson* rule by allowing a new trial following a weight of the evidence reversal of an acquittal.[93]

To reconcile *Tibbs* with *Wilson*, the Supreme Court in *Tibbs* should have reviewed the appellate court actions as a ruling on a motion for new trial instead of as a grant of a new trial resulting from reversal of an acquittal.[94] The *Tibbs* Court should have characterized the outcome of the appeal as a new trial justified by weight of the evidence and impliedly requested by the defendant.[95] By referring to the result as the reversal of an acquittal based on weight of the evidence, the *Tibbs* Court carved an exception to the *Wilson* rule barring government appeal of an acquittal when reversal of the acquittal would result in retrial for the defendant.[96]

Although the *Wilson* bar against retrial was designed to protect defendants, a *Tibbs* new trial based on weight of the evidence may benefit

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125 U. PA. L. REV. 449, 454 (1977) (finality of judgment and prevention of multiple punishments embodied in double jeopardy clause); Kirk, *"Jeopardy" During the Period of the Year Books*, 82 U. PA. L. REV. 602, 603 (1934) (no court should try or punish a defendant twice for same offense).

[93] *See supra* text accompanying notes 26-45 (*Tibbs* Court allowed retrial after weight of evidence reversal); *supra* text accompanying notes 89-92 (*Wilson* rule barring government appeal of acquittal when retrial possible).

[94] *See infra* text accompanying notes 95-96 (*Tibbs* Court could have characterized reversal as ruling on new trial, avoiding conflict with *Wilson* rule barring reversal of acquittal when defendant subject to retrial). Before *Tibbs*, the trial judge usually did not weigh evidence or assess credibility when determining the merits of a defendant's acquittal motion. Burks v. United States, 437 U.S. 1, 16 (1978). In *Burks*, the Supreme Court cautioned that the trial judge should not weigh evidence or assess witness credibility. *Id.*; *see* United States v. Wolfenbarger, 426 F.2d 992, 994 (6th Cir. 1970) (court should not weigh evidence but should view evidence in light most favorable to prosecution to determine sufficiency of evidence for conviction); United States v. Nelson, 419 F.2d 1237, 1241 (9th Cir. 1969) (same); McClard v. United States, 386 F.2d 495, 497 (8th Cir. 1967) (same); Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir.) (same), *cert. denied*, 331 U.S. 837 (1947); *supra* text accompanying notes 7-16 (discussion of *Jackson* standard that requires trial judge to determine evidentiary sufficiency and leave question of weight and credibility to jury); *infra* text accompanying notes 119-24 (jury's traditional factfinding role).

In contrast, judges are permitted to weigh the evidence when considering the defendant's motion for a new trial. United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980). In *Lincoln*, the defendant moved for a new trial on weight of the evidence. *Id.* The Fifth Circuit permitted the trial court to weigh the evidence to convict even if the evidence had legal sufficiency. *Id.* The trial judge could direct a new trial on the basis of newly discovered evidence or a miscarriage of justice. *See* FED. R. CRIM. P. 33 (new trial). If the judge ruled that the jury's verdict contradicted the weight of the evidence, the judge could direct a new trial. United States v. Shipp, 409 F.2d 33, 36 (4th Cir. 1969). The trial judge has broader discretion to weigh credibility than the appellate court. *Id.* The judge may direct a new trial if the jury verdict is against the weight of the evidence or the verdict constitutes a miscarriage of justice. *Id.*

[95] *See supra* text accompanying notes 65-84 (systematic evaluation of motions for new trial and acquittal in which weight of evidence is determination made when considering actual or implied motion for new trial).

[96] *See supra* text accompanying notes 26-45 (*Tibbs* Court allowed retrial based on weight of evidence); *supra* text accompanying notes 89-92 (*Wilson* rule bars government appeal of acquittal when retrial possible).

a criminal defendant.[97] The government has a second opportunity to convict, but the defendant also receives another chance to vindicate himself.[98] The possibility of a new trial enables the court to prevent punishment of the innocent and vindication of the guilty.[99] If conviction and acquittal are the sole options for trial and appellate courts, the courts, considering that society's interest in punishing criminals supersedes a defendant's interest in a grant of immunity from punishment, might affirm a conviction rather than acquit when the evidence borders on insufficiency.[100] Every trial containing reversible error should not result in immunity to the defendant.[101] A new trial based on a weight of the evidence reversal, therefore, is a viable option to prevent unjustified immunity or punishment for the defendant. When a trial judge or appellate court grants a new trial, both the accused and the state receive another opportunity to prove their cases.[102]

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[97] *See infra* note 98 (possibility that passage of time weakens government's case). The Supreme Court has sanctioned retrial of criminal defendants. *See, e.g.*, United States v. DiFrancesco, 449 U.S. 117, 131 (1980) (no limits on retrial of defendant who succeeds in setting aside conviction); United States v. Scott, 437 U.S. 82, 91 (1978) (retrial after reversal of acquittal following guilty verdict is not form of government oppression barred by double jeopardy); North Carolina v. Pearce, 395 U.S. 711, 720 (1969) (double jeopardy does not prohibit second trial after defendant's successful reversal of post-verdict acquittal).

[98] Tibbs v. Florida, 457 U.S. 31, 42-44 & n.19 (1982). In *Tibbs*, the Court noted that the passage of time may weaken the state's case. *Id.* at 43-44 n.19. Over time, witnesses may lose the ability to recall clearly the events in question. *Id.* A jury may be less likely to convict the accused on the basis of a blurred recollection by the prosecutrix. *Id.*

[99] *See* Tibbs v. Florida, 457 U.S. 31, 41-43 (1982).

[100] *See* United States v. Tateo, 377 U.S. 463, 466 (1964) (grant of immunity from punishment to defendant burdens society).

[101] Burks v. United States, 437 U.S. 1, 15 (1978). Courts may subject a defendant to a new trial following reversal of a guilty verdict due to procedural error. United States v. Tateo, 377 U.S. 463, 465 (1964). In *United States v. Wilson*, the Supreme Court concluded that a defendant has no legitimate claim of double jeopardy when the trial judge erroneously acquits after a jury guilty verdict. 420 U.S. 332, 345 (1975). *See* 420 U.S. at 341 n.9 (error in proceedings no bar to retrial); Forman v. United States, 361 U.S. 416, 425 (1960) (same); United States v. Ball, 163 U.S. 662, 672 (1896) (same). *But see* Sanabria v. United States, 437 U.S. 54, 68-69 (1978) (judge's erroneous evidentiary ruling led to acquittal for insufficient evidence and barred retrial); United States v. Jorn, 400 U.S. 470, 486-87 (1971) (retrial barred when trial judge abused discretion by discharging jury because judge feared taxpayer witnesses would incriminate themselves).

Double jeopardy protection may not prevent a second prosecution if the defendant's appeal is based on grounds unrelated to guilt or innocence. United States v. DiFrancesco, 449 U.S. 117, 130 (1980); *see* United States v. Scott, 437 U.S. 82, 84 (1978) (government appeal allowed when defendant moved to dismiss two counts of indictment based on preindictment delay); Lee v. United States, 432 U.S. 23, 34 (1977) (double jeopardy no bar to retrial when defendant moved to dismiss information for failure to allege an element of the crime); *cf.* Gori v. United States, 367 U.S. 364, 369 (1961) (judge dismissed jury and allowed retrial as in defendant's best interest since questioning might have led to evidence of previous crimes).

[102] Tibbs v. Florida, 457 U.S. 31, 42-44 (1982).

Retrial, however, will not always benefit the defendant.[103] Double jeopardy cases reiterate the potential evils of retrial.[104] A new trial entails the risk that the state will use superior resources to oppress defendants incapable of providing adequate multiple defenses.[105] The accused should be able to prepare his defense with the expectation that one trial will resolve his guilt or innocence.[106] Repeated trials could encourage the defendant to conserve resources in the original trial anticipating future litigation.[107] By allowing an unlimited number of successive trials based on weight of the evidence, the *Tibbs* decision increases the possibility that repeated prosecutions will be detrimental to the defendant.[108] When the prosecution fails to muster sufficient evidence to convict in the first trial, courts should not subject the defendant to the embarrassment, expense, ordeal, anxiety, and insecurity of readjudication.[109] Repeated attempts to

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[103] *See infra* notes 104-107 and accompanying text (infringement on defendant's rights through successive trials).

[104] United States v. Wilson, 420 U.S. 332, 347 n.16 (1975); *see* Tibbs v. Florida, 457 U.S. 31, 44 (1982). In *Tibbs*, the Court warned that retrial allows repeated prosecutorial sallies in an attempt to obtain the defendant's conviction. *Id.* Successive trials unfairly burden the defendant by allowing the government to hone trial strategies. *Id.* The risk of conviction through sheer governmental perseverance increases with each new trial. *Id.*

[105] United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977). A new trial gives the government the proverbial "second bite at the apple". Burks v. United States, 437 U.S. 1, 17 (1978). Readjudication gives the government repeated opportunities to convict. Benton v. Maryland, 395 U.S. 784, 796 (1969). Retrial carries the risk of official abuse. Westen, *supra* note 3, at 1036. The government could burden the defense with excessive discovery. *See* FED. R. CRIM. P. 16 (discovery and inspection). Retrial also allows the state to use the defendant's previous trial strategy to bolster its case. Tibbs v. Florida, 457 U.S. 31, 43-44 n.19 (1982). If the state cannot present additional evidence, retrial serves no purpose other than harassment of the accused. *Id.* at 48 (White, J., dissenting).

[106] Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 MICH. L. REV. 1073, 1082 (1982) [hereinafter cited as *Prosecution After Acquittal*]; *see infra* note 124 (presumption of unfairness of retrial).

[107] *Prosecution After Acquittal*, *supra* note 106, at 1082. When a defendant has expended all of his resources and successfully obtained an acquittal, retrial enhances the possibility that a second trial will result in a conviction. *Id.* at 1083; *see supra* notes 104-105 (successful trials increase probability of guilty verdicts).

[108] *Contra* Tibbs v. Florida, 457 U.S. 31, 41 (1982) (double jeopardy prevents state from honing trial strategies and perfecting evidence through successive trials). *Cf.* Green v. United States, 355 U.S. 184, 187-88 (1957). The United States Constitution prevents repeated prosecution through the double jeopardy clause. *Id.* The double jeopardy clause, therefore, represents the intent of the framers of the Constitution to limit the government to a single trial. *Id.* Retrials based on weight of the evidence are an exception to the double jeopardy bar against a second prosecution. *See supra* text accompanying notes 26-45 (weight of evidence reversals permit retrial following jury verdicts of guilty).

[109] Green v. United States, 355 U.S. 184, 187-88 (1957). Double jeopardy prohibits retrial when the government fails to present sufficient evidence in the first proceeding. United States v. DiFrancesco, 449 U.S. 117, 128 (1980); Swisher v. Brady, 438 U.S. 204, 215-16 (1978); Burks v. United States, 437 U.S. 1, 11 (1978); Serfass v. United States, 420 U.S. 377, 387-88 (1975); United States v. Jorn, 400 U.S. 470, 479 (1971); Green v. United States, 355 U.S. at 187.

convict enhance the possibility that a new jury will find the innocent guilty.[110] Successive trials also erode public trust in the judicial system and the finality of judgments.[111]

Before *Tibbs*, trial judges usually did not exercise the option of successive trials based on weight of the evidence reversals of jury verdicts of guilty.[112] Trial judges had to be decisive and parse the evidence to determine whether sufficient evidence supported the guilty verdict or whether insufficient evidence required acquittal.[113] A new trial based on weight of the evidence allows a timorous judge to declare insufficient weight of the evidence, order a retrial, and hope that the next jury relieves him of the obligation to acquit.[114] Theoretically, prosecutors could encourage judges to base all post-verdict decisions following jury guilty verdicts on weight of the evidence.[115] The difficulty of distinguishing between weight

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[110] United States v. DiFrancesco, 449 U.S. 117, 136 (1980); Benton v. Maryland, 395 U.S. 784, 796 (1969). Government perseverance alone creates the risk of erroneous conviction. Tibbs v. Florida, 457 U.S. 31, 41-42 (1982); *see supra* text accompanying notes 103-107 (potential evils of retrial include risk that repeated prosecutions burden defendants financially).

The Supreme Court, however, has recognized circumstances in which double jeopardy should not bar retrial. *See supra* note 45 (manifest necessity reversals permit retrial); *supra* note 101 (retrial permitted when reversal based on procedural error or grounds unrelated to guilt or innocence); *infra* note 115 (retrial possible when prosecutor does not intentionally manipulate mistrial).

[111] *Prosecution After Acquittal*, *supra* note 106, at 1082; *see supra* note 2 (double jeopardy protects finality of judgments).

[112] *See supra* text accompanying notes 54-65 (*Burks* Court ruled on basis of sufficiency or insufficiency only while *Hudson Court* first suggested weight of evidence standard used in *Tibbs*). In Florida, for example, state law permitted review of the weight of the evidence as an additional procedural safeguard for criminal defendants. *See supra* note 32 and text accompanying notes 32-38 (Florida appellate rule requiring distinction between weight of evidence and sufficiency of evidence).

[113] *See* Jackson v. Virginia, 443 U.S. 307, 324 (1979) (appellate court does not weigh evidence, but assesses evidence in light most favorable to prosecution to determine if rational factfinder could have found guilt beyond reasonable doubt); Burks v. United States, 437 U.S. 1, 16, 18 (1978) (trial judges should not weigh evidence or assess witness credibility, but determine whether evidence is legally sufficient to sustain jury's guilty verdict); *supra* note 10 (*Jackson* standard of review).

[114] *See supra* text accompanying notes 103-107 (successive trials present increased opportunity for government to convict).

[115] Carter v. Estelle, 691 F.2d 777, 778 (5th Cir. 1982). In *Carter*, the defendant appealed his embezzlement conviction. Carter v. State, 510 S.W.2d 323, 324, (Tex. Crim. App. 1974). The state contended that the president of the corporation owned the checks that Carter converted to his own use. *Id.* at 325-26. The prosecution did not prove the president's ownership, and therefore failed to prove an essential element of the crime. *Id.* The appellate court reversed Carter's conviction. *Id.* at 326. The jury convicted Carter on retrial and Carter petitioned the Fifth Circuit for rehearing in light of *Tibbs*. 691 F.2d at 777; Tibbs v. Florida, 457, U.S. 31 (1982). The *Carter* court emphasized that the appellate court should accept the characterization of the state court's reasons for reversal. *Id.* at 782. The Fifth Circuit held that the Texas appellate court's reversal was for insufficient evidence and denied rehearing. *Id.* at 785. The *Carter* court warned that the "inevitable consequence of *Tibbs* is that unsuccessful prosecutors will be tempted to recast every reversal for evidentiary sufficiency by an appellate court as a reversal based on weight so as to gain the 'second bite

of the evidence and sufficiency of the evidence enhances the potential for prosecutorial and judicial confusion and abuse.[116] A new trial based on weight of the evidence indicates that the evidence was legally sufficient to convict.[117] Arguably, the only purpose in permitting a second trial would be to allow the state to present additional evidence to bolster its case.[118]

A trial judge who grants a second trial on weight of the evidence might be invading the jury's traditional factfinding role.[119] As a factfinding body, the jury should resolve conflicting testimony, weigh contradictory evidence, and draw inferences from basic facts to ultimate facts.[120] The issue of witness credibility is especially well-suited to resolution by a properly instructed jury.[121] The jury observes direct examination and

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of the apple.' " *Id.* at 778. The Supreme Court noted that the petitioner in *Tibbs* predicted that the distinction between weight of the evidence and sufficiency of the evidence would encourage appellate judges to base reversals on weight. Tibbs v. Florida, 457 U.S. 31, 41-45 (1982). The Supreme Court rejected petitioner Tibb's argument. *Id.*; *see id.* 457 U.S. at 43-44 nn.18 & 20 (appellate judges commonly distinguish weight of evidence from sufficiency of evidence and distinction would not lead to successive trials).

The Supreme Court has acted to minimize prosecutorial manipulation of trial judges' rulings in other circumstances. The Court has ruled that when a prosecutor intentionally manipulates a mistrial, the mistrial becomes an acquittal barring retrial. United States v. DiFrancesco, 449 U.S. 117, 130 (1980). The motives of the prosecutor determine whether double jeopardy bars retrial for prosecutorial misconduct. United States v. Curtis, 683 F.2d 769, 774 (3d Cir. 1982). If the court finds no evidence of the prosecutor's intent to cause a mistrial, the prosecutor's action does not invoke double jeopardy protection. *Id.* at 778. The prosecutor need not intend specifically to cause a mistrial to trigger double jeopardy protection. Oregon v. Kennedy, 456 U.S. 667, 675-79 (1982). When prosecutorial misconduct is intentional and intended to prejudice the defendant, double jeopardy bars retrial. *Id. Compare* United States v. Dinitz, 424 U.S. 606, 611 (1976) (no finding of judicial or prosecutorial bad faith indicating intent to harrass or prejudice defendant); *and* Illinois v. Somerville, 410 U.S. 458, 471 (1973) (no prosecutorial overreaching when faulty indictment triggered mistrial) *and* Robinson v. Wade, 686 F.2d 298, 309 (5th Cir. 1982) (prosecutorial overreaching insufficient to prevent retrial); *with* Downum v. United States, 372 U.S. 734, 735-36 (1963) (retrial barred when prosecution moved to dismiss jury because of missing key witnesses and prosecutor knew at jury selection that witnesses were unavailable).

[116] *See supra* text accompanying notes 112-15 (potential abuse of weight of evidence reversals); *see also* Downum v. United States, 372 U.S. 734, 738 (1963) (doubt resolved in favor of citizen's liberty rather than permitting unlimited, uncertain, and arbitrary judicial discretion).

[117] *See* Tibbs v. Florida, 457 U.S. 31, 38 (1982) (difference between reviewing sufficiency of evidence and weight of evidence); *id.* 457 U.S. at 47-48 (White, J., dissenting) (court must first determine if evidence meets *Burks* sufficiency requirement, then review weight of evidence); *see supra* notes 9-25 and accompanying text (*Burks* application of *Jackson* standard of evidentiary sufficiency).

[118] Tibbs v. Florida, 457 U.S. 31, 47-48 (1982) (White, J., dissenting). In dissent, Justice White reasoned that if the state presented the same evidence in a second trial, the state court should reverse the conviction for insufficient weight of the evidence. *Id.* If the state has no new evidence, reprosecution only would harrass the defendant. *Id.* at 48.

[119] *See infra* text accompanying notes 120-24 (jury's factfinding role).

[120] Jackson v. Virginia, 443 U.S. 307, 319 (1979). In *Jackson*, the Supreme Court noted that judges should preserve the jury's findings by viewing all evidence in the light most favorable to the government. *Id.*

[121] Hoffa v. United States, 385 U.S. 293, 311 (1966).

cross-examination and is capable of judging witness veracity.[122] Juries have the responsibility of protecting the accused from a potentially arbitrary and oppressive government that controls criminal sanctions.[123] When a jury resolves the facts in favor of the prosecution, the trial court should defer to the jury's verdict unless the evidence is legally insufficient to convict.[124]

The *Tibbs* Court, however, found that judicial oversight of juries requires the flexibility of a retrial based on weight of the evidence in addition to the option of acquittal based on insufficient evidence.[125] The reversal, by a trial judge or appellate court of a jury's guilty verdict, based on weight of the evidence permits a second trial, while a reversal based on legally insufficient evidence prevents retrial.[126] A new trial affords the

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[122] *Id.* Cross-examination is an established safeguard of the Anglo-American legal system that preserves the defendant's right to confrontation. *Id.* Credibility is a matter for the jury that observes the cross-examination. United States v. Weinstein, 452 F.2d 704, 707 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972). When witnesses' credibility evidence conflicts, the jury's opportunity to observe the witnesses' demeanor is important. United States v. Shipp, 409 F.2d 33, 36 (4th Cir. 1969).

[123] United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977).

[124] *See* Glasser v. United States, 315 U.S. 60, 80 (1942) (court should not weigh evidence or judge credibility, but court should sustain jury verdict if, when viewed in light most favorable to government, substantial evidence supports verdict); United States v. Lincoln, 630 F.2d 1313, 1316-17 (8th Cir. 1980) (evidence sufficient to support verdict if substantial evidence, including circumstantial evidence, justifies inference of guilt irrespective of countervailing testimony). *But see* Downum v. United States, 372 U.S. 734, 738 (1963) (rather than reassess evidentiary weight through weight of evidence reversals, court should resolve doubt in favor of citizen's liberty).

Civil law resolves issues in favor of a preponderance of the evidence. Braud v. Kinchen, 310 So.2d 657, 659 (La. Ct. App. 1975). A preponderance of the evidence is evidence that has greater weight or is more convincing than evidence offered in opposition. *Id.* A preponderance of the evidence demonstrates that the conclusion raised by the proponent of the evidence is more probable than not. *Id.* The American system of criminal justice presumes innocence and requires proof of guilt beyond a reasonable doubt. United States v. Friday, 404 F. Supp. 1343, 1346 (E.D. Mich. 1975). If the prosecution failed to present evidence legally sufficient to prove guilt beyond a reasonable doubt, the court should acquit the defendant. *See supra* notes 9-25 and accompanying text (*Jackson* standard of review for legally insufficient evidence and *Burks* application of *Jackson* standard). The requirement of proof beyond a reasonable doubt facilitates fourteenth amendment due process. *See, e.g.*, Cool v. United States, 409 U.S. 100, 104 (1972) (per curiam) (courts cannot require defendants to prove innocence beyond reasonable doubt); Ivan v. City of New York, 407 U.S. 203, 204 (1972) (per curiam) (reasonable doubt reduces risks of convictions based on factual error); Lego v. Twomey, 404 U.S. 477, 486-87 (1972) (presumption of innocence requires high standard of proof for guilt). The presumption of innocence requires the government to defer to the jury's verdict and bear the risks and consequences of erroneous acquittals. *Cf.* Bullington v. Missouri, 451 U.S. 430, 446 (1981) (in capital sentencing, government should bear risk and consequences when jury gives defendant life sentence and effectively acquits defendant of death penalty); Addington v. Texas, 441 U.S. 418, 424 (1979) (defendant sentenced to life imprisonment cannot receive death penalty upon retrial).

[125] *See supra* text accompanying notes 26-45 (reviewing body should review jury's verdict to determine if weight of evidence requires retrial).

[126] *See supra* notes 17-45 and accompanying text (*Burks* application of legally insuffi-

state and the defendant another opportunity to adjudicate guilt or innocence.[127] Retrial, however, can result in capricious verdicts and hardship for defendants.[128] Courts, therefore, should be cautious in granting weight of the evidence exceptions to the double jeopardy bar against reprosecution.[129]

The *Tibbs* weight of the evidence exception allowing retrial potentially is not only subject to abuse, but also is difficult to apply.[130] The distinction between sufficiency of the evidence and weight of the evidence is unclear.[131] Courts can judge more easily the evidentiary weight and sufficiency through systematic evaluation.[132] Trial judges first should consider the legal sufficiency of the evidence to decide between acquittal and conviction.[133] If the judge concludes that the evidence was sufficient according to the standard of *Jackson* and *Burks*,[134] the judge should then evaluate the weight of the evidence.[135] According to *Hudson* and *Tibbs*, the trial judge must act as a thirteenth juror to consider evidentiary weight and the advisability of a new trial.[136] The appellate court also should determine first legal sufficiency and then evidentiary weight.[137] Although the appellate court can judge the legal sufficiency of the evidence as well as the trial court, the appellate court cannot function as a thirteenth juror.[138] The appellate court, therefore, should defer to the trial judge's ruling on

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cient evidence as barring retrial while *Tibbs* allows retrial following weight of evidence reversal).

[127] *See supra* text accompanying notes 97-102 (benefits of retrial to state and defendant).

[128] *See supra* text accompanying notes 104-111 (pitfalls of retrial).

[129] United States v. Wilson, 420 U.S. 332, 343 (1975). The double jeopardy policy against multiple prosecution is important, and courts should hesitate to allow exceptions. *Id.*; *see supra* notes 45, 46, 101, 115 (exceptions to double jeopardy bar against retrial); *supra* notes 103-111, 128 and accompanying text (potential evils of retrial).

[130] *See supra* note 7 (distinction between weight of evidence and sufficiency of evidence unclear); text accompanying notes 46-53 (problems in discerning weight of evidence from sufficiency of evidence).

[131] *See supra* note 7 (elusive quality of distinction between weight of evidence and sufficiency of evidence).

[132] *See supra* text accompanying notes 64-77 (systematic method for evaluation of motions for new trial and acquittal).

[133] Tibbs v. Florida, 457 U.S. 31, 47-48 (White, J., dissenting); *see supra* text accompanying notes 66-69 (court should determine whether evidence is legally sufficient to support jury's verdict of guilty before evaluating weight of evidence).

[134] *See supra* notes 9-25 and accompanying text (*Jackson* standard for review of evidentiary sufficiency and *Burks* application of *Jackson* standard).

[135] *See supra* text accompanying notes 69-72 (second step in evaluating evidence is weight of evidence standard for considering motions for new trial).

[136] Tibbs v. Florida, 457 U.S. 31, 42-43 (1982); Hudson v. Louisiana, 450 U.S. 40, 44-45 (1981); *see supra* text accompanying notes 44-45 and 56-63 (trial judges and appellate courts function as thirteenth jurors to evaluate weight of evidence).

[137] *See supra* text accompanying notes 74-77 (appellate courts first evaluate evidentiary sufficiency, then weight of evidence).

[138] *See supra* text accompanying notes 78-84 (appellate courts should hesitate to weigh evidence and should remand to trial courts for reconsideration of motions for new trial).

the new trial motion or remand for further consideration by the trial court.[139]

The *Tibbs* Court still would have allowed retrial if the trial and appellate courts had used the systematic method of evaluating actual or implicit motions for new trial and acquittal.[140] In *Tibbs*, the Florida Supreme Court examined the motion for acquittal on the weight of the evidence, the same basis the court would have used to consider a motion for a new trial.[141] The confusion in the *Tibbs* decision is semantic.[142] The result, nevertheless, is valid. Denial of a new trial, even though weight of the evidence justified retrial, would have abolished the possibility of new trials for criminal defendants on grounds other than newly discovered evidence.[143] Wholesale grants of new trials based on weight of the evidence, however, could lead to prosecutorial and judicial abuse.[144] A new trial is a procedural safeguard that effectively protects criminal defendants only when courts carefully and systematically consider the sufficiency and weight of the evidence.[145]

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[139] *See supra* notes 78, 80, 83 (trial judges in better postion to evaluate evidentiary weight than appellate courts).

[140] *See infra* text accompanying notes 141-43 (appellate court should have characterized ruling as new trial necessitated by weight of evidence instead of as reversal of acquittal based on weight of evidence).

[141] Tibbs. v. Florida, 457 U.S. 31, 41-47 (1982).

[142] *See supra* text accompanying notes 94-96 (*Tibbs* Court could have avoided formulating exception to *Wilson* rule barring retrial after reversal of post-verdict acquittal by characterizing post-verdict reversal as ruling on motion for new trial instead of as ruling on validity of post-verdict acquittal).

[143] *See* FED. R. CRIM. P. 33 (judges may grant motions for new trial to prevent miscarriage of justice on grounds that weight of evidence requires retrial); *see also supra* notes 45, 46, 94, 101, 115 (other proper grounds for grant of new trial).

[144] *See supra* text accompanying notes 103-118 (potential abuse of *Tibbs* grant of new trials based on weight of evidence).

[145] *See supra* text accompanying notes 64-84 (systematic method for evaluation of motions for new trial and acquittal).