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Commonwealth Right Of Appeal In Criminal Proceedings

COMMONWEALTH RIGHT OF APPEAL IN CRIMINAL PROCEEDINGS

The issue of whether the English Crown had the right of appeal in criminal proceedings at common law remains in dispute.[1] Clearly the Crown had available informal means of review in criminal proceedings.[2] In spite of the uncertainty of common law practices, and perhaps because of the suspicious eye cast upon the powers of the state government, early American state courts generally denied the state government the right of appeal in

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1. *See* Arizona v. Manypenny, 451 U.S. 232, 245 n.20 (1981) (authorities disagree concerning whether English government had right of appeal at common law). In *United States v. Sanges,* the United States Supreme Court asserted that the common law did not provide for appeals by the Crown in criminal proceedings. United States v. Sanges, 144 U.S. 310, 312 (1892). The Supreme Court stated that, from the time of Lord Hale, the great majority of legal commentators either assumed or asserted that only the defendant, or his representative, could seek a new trial or a writ of error in a criminal proceeding at common law. *Id.* The *Sanges* Court noted that the only authorities supporting the notion that the Crown had the right of appeal in criminal cases at common law are implications in the writings of Coke and Hale. *Id.* In *State v. Buchanan,* however, the Court of Appeals of the State of Maryland asserted that the Crown had a writ of error in criminal proceedings at common law. State v. Buchanan, 5 H. & J. 317, 329 (Md. 1821). The Maryland Court of Appeals noted that the writings of Hale emphasized and "repeated as text law" that the Crown had the right of appeal in criminal trials at common law. *Id.*

2. *See* L. ORFIELD, CRIMINAL APPEALS IN AMERICA 14-28 (1939) (several informal methods of review were available to Crown in criminal proceedings at common law). One informal means of review in a criminal trial available to the Crown at common law was the practice of "appeal of felony," which is different than an appeal as it exists today. Kronenberg, *Right of a State to Appeal in Criminal Cases,* 49 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 473, 474 (1959) [hereinafter cited as *Right of a State].* The appeal of felony procedure enabled the Crown to indict a defendant for a crime even though a court previously had acquitted the defendant of the crime. *Id.* The victim or the victim's family initiated the first proceeding against the defendant with the Crown's permission. *Id.* If acquitted at the conclusion of the first proceeding, the defendant risked reindictment at the request of the Crown. *Id.* A second means of informal review available to the Crown was the practice of "attaint." *Id.* Under the practice of attaint, the Crown could impanel a second, larger jury to review the appropriateness of a prior jury verdict that was unfavorable to the Crown. *Id.* If, in the opinion of the second jury, the first verdict was erroneous, the second jury had the power to reverse the first jury verdict. L. ORFIELD, *supra,* at 16. Furthermore, if the second jury reversed the verdict of the first jury, the members of the first jury received jail terms for a minimum of one year, the Crown confiscated the jurors' possessions, and the jurors were "accounted infamous." *Id.* A third means of informal review available to the Crown in criminal proceedings was the "writ of certiorari." *Id.* The writ of certiorari enabled the Crown to remove a case from a lower court to insure a fair trial, to review a summary proceeding, and to secure the entire record of the lower court on the contention that the record sent up from the lower court was incomplete. *Id.* at 25-26. By the middle of the seventeenth century, the Crown had the right to a new trial in all misdemeanor and some felony cases. *Right of a State, supra,* at 474-75. An early nineteenth century statute abolished informal means of government appeal in England, and the English Criminal Appeals Act of 1907 prohibited formal means of government appeal through writs of error. 59 Geo. III, c. 46 (1819); 7 Edw. VII, c. 23 (1907).

criminal proceedings.[3] Similarly, the United States Supreme Court denied the federal government the right of appeal in criminal proceedings.[4] *United States v. Sanges*[5] was the first case to come before the United States Supreme Court in which the federal government challenged the prohibition against government appeals in criminal trials.[6] In *Sanges,* the Supreme Court held that, in the absence of a statute expressly conferring to the government the right of appeal, the federal government has no right of appeal in criminal cases.[7] The *Sanges* Court implied that Congress could provide for government appeals, but gave no indication of the possible Constitutional limitations on such legislation.[8]

Since the Supreme Court ruling in *Sanges,* Congress has been the leader in the movement away from an absolute prohibition against government appeals and toward the statutory authorization of government appeals in

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3. *See* Miller, *Appeals by the State in Criminal Cases,* 36 YALE L.J. 486, 491 (1927). Since the common law provided little guidance to states regarding the right of government appeal in criminal cases, nineteenth century juristic thought, which emphasized the rights of the individual and minimized the powers of the government, influenced states' decisions to deny government appeals in criminal proceedings. *Id.; see* State v. Solomons, 14 Tenn. (6 Yer.) 249, 249-50 (1834) (state act regarding appeals in criminal proceedings construed to deny right of appeal to state); People v. Corning, 2 N.Y. 9, 18 (1848) (same). A few nineteenth century state courts, however, permitted the state a right of appeal in criminal proceedings, even in the absence of a statute granting the state a right of appeal. *See* State v. Buchanan, 5 H. & J. 317, 330 (Md. 1821) (sustaining writ of error by state to reverse judgment in favor of criminal defendant); Commonwealth v. Capp, 48 Pa. 53, 56 (1864) (Commonwealth may sue out writ of error in criminal case unless expressly denied by statute).

4. *See* United States v. More, 1 U.S. (3 Cranch) 550, 551 (1805) (United States Supreme Court has no writ of error jurisdiction in criminal cases).

5. 144 U.S. 310 (1892).

6. *Id.* In *United States v. Sanges,* the federal government sued out a writ of error after the trial court sustained the defendant's demurrer and quashed an indictment for conspiracy. *Id.* The United States Supreme Court held that a writ of error does not lie to the federal government in a criminal proceeding. *Id.*

7. *Id.* at 318. In *Sanges,* the United States Supreme Court noted that the appellate jurisdiction of the Supreme Court rests entirely on the acts of Congress. *Id.* at 319. The *Sanges* Court based jurisdiction over the issue of the Government's right of appeal in criminal proceedings on the Judiciary Act of 1891. *See id.* at 311. The Judiciary Act of 1891 provided for appeals or writs of error from the district courts or circuit courts directly to the Supreme Court in any case involving the construction or application of the federal constitution. Act of March 3, 1891, ch. 517, § 5, 26 Stat. 827, 828. The *Sanges* Court held that, because the Judiciary Act of March 3, 1891 did not provide specifically for a government right of appeal in criminal proceedings, the courts may not assume that Congress intended to extend to the government the right of appeal in criminal proceedings. *Id.* at 323; *see* Act of March 3, 1891, ch. 517, § 5, 26 Stat. 827, 828 (failing to provide specifically for government appeals in criminal proceedings).

8. *Sanges,* 144 U.S. at 323. In *Sanges,* the United States Supreme Court implied that Congress could grant to the government the right of appeal in criminal proceedings by specifying in appropriate legislation that the government may bring a writ of error against a criminal defendant. *Id.* The *Sanges* Court, however, noted that such congressional legislation would constitute a serious and far reaching innovation because the common law, from which the American system of jurisprudence derived, did not provide for government appeals in criminal proceedings. *Id.* at 311, 323.

criminal proceedings. Congress has provided for federal government appeals in criminal proceedings primarily through the Criminal Appeals Act.[9] In addition, all states, with the exception of Virginia, Texas and New Hampshire, have enacted statutory provisions that permit government appeals in criminal cases.[10] State statutes providing for government appeals, however,

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9. *See* Criminal Appeals Act, 18 U.S.C. § 3731 (Supp. 1985) (providing for appeals by federal government in criminal proceedings). The Criminal Appeals Act provides statutory authority for appeals by the federal government in criminal cases. *Id.* As originally enacted, the Criminal Appeals Act of 1907 provided for Supreme Court review of the dismissals of indictments, the granting of motions in arrest of judgments in cases involving the constitutionality of statutes, and the review of cases sustaining pleas in bar before a defendant risked double jeopardy. Criminal Appeals Act, ch. 2564, 34 Stat. 1246 (1907) (current version at 18 U.S.C. § 3731 (Supp. 1985)). The Criminal Appeals Act remained essentially unchanged until 1942, when Congress provided for United States Circuit Courts of Appeals review of cases dismissing an indictment or information based on defective pleading or unlawfully obtained evidence. Criminal Appeals Act, ch. 295, 56 Stat. 271, 271-72 (1942). In 1971, Congress again amended the Act, substantially expanding the grounds of appeal by the federal government. Criminal Appeals Act, 84 Stat. 1890 (1971). Under the 1971 Amendment, the Criminal Appeals Act provides for government appeals whenever constitutionally permissible. Criminal Appeals Act, Pub. L. No. 91-644, 84 Stat. 1890 (codified at 18 U.S.C. § 3731 (Supp. 1985)); United States v. Wilson, 420 U.S. 332, 337-39 (1975). Congress, however, left to the courts the task of defining the constitutional limits of government appeals in criminal proceedings. *Wilson,* 420 U.S. at 339.

The United States Courts of Appeals for the Third, Fifth, and Tenth Circuits have held that the grant of general appellate jurisdiction to the federal court of appeals contained in 28 U.S.C. § 1291 provides an alternative authorization for government appeals in criminal proceedings. *See* 28 U.S.C. § 1291 (Supp. 1985) (federal circuit courts of appeals have jurisdiction of appeals from final decisions of federal district courts); United States v. Prescon Corp., 695 F.2d 1236, 1241-42 (10th Cir. 1982) (federal government has right of appeal in criminal proceedings pursuant to 18 U.S.C. § 3731 and 28 U.S.C. § 1291); *In re* Grand Jury Subpoena, 646 F.2d 963, 967 (5th Cir. 1981) (same); In the Matter of Grand Jury Empanelled, 597 F.2d 851, 857 (3d Cir. 1979) (same). The Supreme Court, however, has held that 28 U.S.C. § 1291 does not authorize government appeals in criminal cases. Arizona v. Manypenny, 451 U.S. 232, 246 (1981).

10. *See* Commonwealth Right of Appeal: Hearings on SJR 53 Before the Committee on Privileges and Elections, Virginia General Assembly (1985) (statement of Gerald L. Baliles, Attorney General, Virginia) (forty-seven states provide for state appeal of pretrial rulings in criminal proceedings); VA. CONST. art. VI, § 1 (Commonwealth has no right of appeal in criminal proceedings except in cases involving State revenue); TEX. CONST. art. 5, § 26 (State shall have no right of appeal in criminal case); State v. Nocella, 124 N.H. 163,____, 467 A.2d 575, 576 (1983) (State has no general right of appeal in criminal proceedings). Although the Texas constitution denies to the State the right of appeal in criminal proceedings, the State has statutory authority to petition the Texas Court of Appeals to review a case on the Court's own motion. TEX. CRIM. PROC. CODE ANN. § 44.01 (Vernon Supp. 1985). In *Todd v. State,* the Court of Criminal Appeals of Texas held that the Texas statute permitting the State to seek discretionary review of Texas Court of Appeals decisions is not in conflict with the Texas constitutional provision that denies the State the right of appeal in criminal proceedings. Todd v. State, 661 S.W.2d 116, 118 (Tex. Crim. App. 1983). The *Todd* Court explained that, when the Texas Court of Criminal Appeals grants discretionary review of Court of Appeals decisions, the Texas Court of Criminal Appeals is in effect granting the appeal on the Court of Criminal Appeals' own motion, not on motion of the State. *Id.* Therefore, the State of Texas may avoid the State constitutional prohibition of State appeals by pursuing its statutory right to seek discretionary review in criminal proceedings. *Id.* In addition to the State of Texas, New

vary considerably in the latitude the statutes allow to government appeals.[11] At one end of the spectrum are state statutes that grant the state the same right of appeal as the accused.[12] At the other end of the spectrum are state statutes that allow appeals by the state government only in very limited circumstances.[13] The Virginia Constitution grants to the Commonwealth the right of appeal only in criminal proceedings relating to state revenue.[14]

Hampshire has no general right to appeal an unfavorable ruling in criminal proceedings. State v. Nocella, 124 N.H. 163,____, 467 A.2d 575, 576 (1983). The Supreme Court of New Hampshire, however, has general superintendence over all courts in the State and may correct all errors of the lower courts. N.H. REV. STAT. ANN. § 490:4 (Supp. 1983). Thus, the State may request the New Hampshire Supreme Court to hear an appeal in a criminal case under the Court's general superintending power. State v. Nocella, 124 N.H. at ___, 467 A.2d at 576.

11. *Compare* W. VA. CODE § 58-5-30 (1966) (State may appeal dismissal of indictment in criminal proceedings) *with* CONN. GEN. STAT. ANN. § 54-96 (West 1984) (with permission of court, State shall have right of appeal in same manner and to same effect as accused); *see infra* notes 12 & 13 and accompanying text (limits of government appeal in criminal proceedings vary from state to state).

12. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-96 (West 1984) (with permission of presiding judge, State has same right of appeal as accused upon all questions of law); NEB. REV. STAT. §§ 29-2316, 29-2319 (1979) (State may appeal any order or ruling in criminal proceeding and appellate decisions have prospective effect if defendant placed in jeopardy); N.M. STAT. ANN. § 39-3-3 (1978) (State may appeal in criminal proceedings within limits of double jeopardy clause and interlocutory appeal is discretionary with appellate court).

13. *See* R.I. GEN. LAWS § 9-24-32 (1985) (State may appeal any decision in criminal proceedings before defendant placed in jeopardy); W. VA. CODE § 58-5-30 (1966) (State may appeal dismissal of indictment in criminal proceedings).

14. VA. CONST. art. VI, § 1. Article VI, § 1 of the Virginia Constitution provides in pertinent part:

> No appeal shall be allowed to the Commonwealth in any case involving the life or liberty of a person, except that an appeal by the Commonwealth may be allowed in any case involving the violation of a law relating to the state revenue.

Id. Until 1902, the Virginia Constitution did not include a provision denying to the Commonwealth the right to appeal cases involving the "life or liberty" of a defendant. Commonwealth v. Perrow, 124 Va. 805, 809, 97 S.E. 820, 821 (1919) (no express or implied constitutional prohibition of Commonwealth's right of appeal in criminal proceedings until 1902). While the language of the Commonwealth's constitutional provision does not prohibit explicitly government appeals only in criminal cases, the Virginia Supreme Court of Appeals has found that such was the intent of the constitutional provision. *See* Smyth v. Godwin, 188 Va. 753, 760-61, 51 S.E.2d 230, 233 (case involving "life or liberty" of accused connotes criminal proceedings), *cert. denied*, 337 U.S. 946 (1949). A proceeding involving the "life or liberty" of an accused refers to a criminal proceeding in which the accused risks a punishment of death or imprisonment. *Id.* at 760-61; 51 S.E.2d at 233. Therefore, under Article VI, § 1 of the Virginia Constitution, the Commonwealth may appeal adversary judgments in habeas corpus proceedings, as the proceedings test the validity of the judgment restraining the liberty of a prisoner and do not deprive the prisoner of his life. *Id.* at 761; 51 S.E.2d at 233. In criminal cases in which the prescribed punishment merely is a fine, the Commonwealth also may appeal. *Perrow*, 124 Va. at 810-11; 97 S.E. at 822. Furthermore, the Commonwealth may appeal in any case involving potential violations of State revenue laws, regardless of the prescribed punishment. *See* VA. CONST. art. VI, § 1 (providing for Commonwealth appeals in any case involving violation of State revenue laws); *Perrow*, 124 Va. at 810; 97 S.E. at 822. The Virginia legislature enacted the narrow constitutional provision providing for Government appeals in cases involving State revenue laws to protect the Commonwealth's interest in securing income for the State's support and maintenance. *Id.* at 816; 97 S.E. at 823-24.

During its 1985 session, however, the Virginia General Assembly passed an act granting to the Commonwealth a limited right of appeal in felony cases.[15] The Commonwealth Right of Appeal Act will take effect December 1, 1986, provided that the 1986 session of the General Assembly approves an amendment to the Virginia Constitution relating to the judicial power of the Commonwealth, and the voters of Virginia subsequently ratify the constitutional amendment during a referendum to be held in November 1986.[16] The

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15. *See* VA. CODE § 19.2-398 (Supp. 1985). Section 19.2-398 of the Virginia Code provides that:

> An appeal may be taken by the Commonwealth only in felony cases, before a jury is impaneled and sworn in a jury trial, or before the court begins to hear or receive evidence or the first witness is sworn, whichever occurs first, in a nonjury trial. The appeal may be taken from:
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> 1. An order of a circuit court dismissing a warrant, information or indictment, or any count or charge thereof on the ground that a statute upon which it was based is unconstitutional; or
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> 2. An order of a circuit court prescribing the use of certain evidence at trial on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth or Sixth Amendments to the Constitution of the United States or Article I, Sections 8, 10 or 11 of the Constitution of Virginia prescribing illegal searches and seizures and protecting rights against self-incrimination, provided the Commonwealth certifies the evidence is essential to the prosecution.
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> Nothing in this chapter shall affect the Commonwealth's right to appeal in cases involving a violation of law relating to the state revenue.

Id. Since the Virginia Constitution currently provides for Government appeals only in cases involving State revenue laws, only an amendment to the Virginia Constitution will allow Government appeals in nonrevenue proceedings. *See infra* note 16 (procedure to amend Virginia Constitution).

16. 1985 Va. Acts 510. Implementation of § 19.2-398 of the Virginia Code is contingent on the outcome of a referendum regarding a proposed amendment to article VI, § 1 of the Virginia Constitution. *Id.; see supra* note 14 (text of current State constitutional provision). The proposed amendment to the Virginia Constitution provides:

> The General Assembly may also allow the Commonwealth a right of appeal in felony cases, before a jury is impaneled and sworn if tried by jury or, in cases tried without a jury, before the court begins to hear or receive evidence or the first witness is sworn, whichever occurs first, from (1) an order of a circuit court dismissing a warrant, information or indictment or any count or charge thereof on the ground that a statute upon which it was based is unconstitutional and (2) an order of a circuit court proscribing the use of certain evidence at trial on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth or Sixth Amendments to the Constitution of the United States or Article I, §§ 8, 10 or 11 of this Constitution proscribing illegal searches and seizures and protecting rights against self-incrimination, provided the Commonwealth certifies the evidence is essential to the prosecution.

VA. CONST. art. VI, § 1 (proposed amendment). The wording of the proposed amendment essentially is identical to that of § 19.2-398 of the Virginia Code. *Compare* VA. CONST. art. VI, § 1 (proposed amendment) *with* VA. CODE § 19.2-398, *supra* note 15. Section 19.2-398 provides for Government appeal from the order of a circuit court "prescribing" the use of certain evidence at trial. VA. CODE § 19.2-398, *supra* note 15. The General Assembly should amend § 19.2-398 to change the word "prescribing" to "proscribing," as is found in the proposed constitutional amendment. VA. CONST. art. VI, § 1 (proposed amendment).

proposed constitutional amendment provides for a limited right of government appeal in felony cases.[17]

In extending to the Commonwealth the right to appeal in felony cases, the primary limitation upon the Virginia General Assembly is the double jeopardy clause of the fifth amendment to the United States Constitution.[18] The fifth amendment's double jeopardy clause provides that the federal government may not try a person more than once for the same offense.[19]

Article XII of the Virginia Constitution provides that the joint action of two successive General Assemblies must approve a proposed amendment to the State constitution prior to submission to the people of the Commonwealth for approval. VA. CONST. art. XII, § 1; *see* 1985 Va. Acts 240 (providing for Statewide referendum in November 1986 to approve or reject proposed constitutional amendment to allow Commonwealth right of appeal in criminal proceedings). Until the three part process is complete, the proposed constitutional amendment remains in the process of enactment. *See* Scott v. James, 114 Va. 297, 303, 76 S.E. 283, 285 (1912) (three part process required to amend Virginia Constitution).

17. *See supra* note 16 (proposed constitutional amendment provides for Commonwealth appeals in felony cases).

18. *See* Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences,* 63 VA. L. REV. 325, 342-43 (1977) (constitutional limitations of double jeopardy clause are only constraint on government appeals).

19. U.S. CONST. amend. V. The fifth amendment to the United States Constitution provides that no "person be subject for the same offense to be twice put in jeopardy of life or limb." *Id.* The double jeopardy clause protects persons charged with misdemeanor offenses as well as persons charged with felony offenses. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 172-73 (1873). Double jeopardy protection applies to both jury and bench trials. United States v. Jenkins, 420 U.S. 358, 365 (1975) *rev'd on other grounds,* 437 U.S. 82 (1978). The wording of the double jeopardy clause parallels Blackstone's explanation of the principles of *autrefois acquit* (prior acquittal), *autrefois convict* (prior conviction) and pardon. United States v. Wilson, 420 U.S. 332, 340 (1975); 4 W. BLACKSTONE, COMMENTARIES *335-37. At common law, the defendant could raise the pleas of *autrefois acquit, autrefois convict,* and pardon to bar a second trial for the same offense, if the defendant could prove that a jury previously had convicted him of the same crime. United States v. Wilson, 420 U.S. 332, 340 (1975). Blackstone wrote that the principle "that no man is to be brought into jeopardy more than once for the same offense" is at the heart of the pleas of *autrefois acquit* and *autrefois convict.* 4 W. BLACKSTONE, COMMENTARIES *335-36.

In addition to the fifth amendment to the federal constitution, the Virginia Constitution also provides that the Government shall not place a criminal defendant in double jeopardy. *See* VA. CONST. art. I, § 8 (in criminal prosecutions the Government shall not put a man in jeopardy twice for same offense). The Virginia Code, however, recognizes a more limited prohibition against double jeopardy. VA. CODE § 19.2-294 (1983). The Virginia Code provides that when the same act violates two or more statutes, conviction under one statute bars a second prosecution under the other statutes. *Id.* The prohibition against a second prosecution for the same act applies only when two or more statutory offenses are involved. *See* Blythe v. Commonwealth, 222 Va. 722, 727, 284 S.E.2d 796, 799 (1981) (defendant convicted of common law offense of voluntary manslaughter and statutory offense of unlawful wounding). The Virginia Code also provides that when the same act violates both a State and federal statute, a proceeding under the federal statute bars a second prosecution under the State statute. VA. CODE § 19.2-294 (Supp. 1985). The Virginia double jeopardy provision provides a defendant with more protection than the double jeopardy clause of the federal constitution. *Id.* Under federal law, if an act violates both a federal and state law, both the federal and state governments may punish the criminal offender. *See* Moore v. Illinois, 55 U.S. (14 How.) 6, 11 (1852) (defendant owes allegiance to both federal and state governments and both sovereigns may punish defendant if

The double jeopardy clause applies to state governments through the fourteenth amendment.[20] The policy behind the double jeopardy clause is that the government, with its virtually unlimited financial resources, should not attempt repeatedly to convict a defendant for the same offense, ultimately draining the defendant's savings and spirit and increasing the chance that, even though innocent, the finder of fact may find the defendant guilty.[21] The impact of the double jeopardy clause on the validity of government appeals in criminal proceedings is not entirely clear.[22] Until Congress passed the 1971 amendments to the Criminal Appeals Act, the Supreme Court never had occasion to explore the limitations that double jeopardy concepts place upon the federal government's right of appeal. The government appeals that the pre-1971 versions of the Criminal Appeals Act provided were more narrow than federal government appeals permitted by the Constitution. Prior to 1971, Supreme Court decisions regarding government appeals examined questions of statutory construction.[23]

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offense violates laws of both governments); BACIGAL, VA. CRIM. PROC., § 14-13 (1983) (discussing Virginia double jeopardy provisions).

20. *See* Benton v. Maryland, 395 U.S. 784, 793-96 (1969) (double jeopardy clause of fifth amendment applies to states through fourteenth amendment); U.S. CONST. amend. XIV (no state shall deprive any person of life, liberty, or property without due process of law). In *Benton v. Maryland,* the Supreme Court overruled *Palko v. Connecticut,* in which the Supreme Court had held that fifth amendment double jeopardy protection applied only to defendants in federal prosecutions. Benton v. Maryland, 395 U.S. at 795-96; *see* Palko v. Connecticut, 302 U.S. 319, 322 (1937) (upholding conviction for first degree murder following state appeal from second degree murder conviction). In *Benton,* the Supreme Court held that protection against double jeopardy is fundamental to the American scheme of justice and, therefore, applicable to both the federal and state governments. Benton, 395 U.S. at 795-96; *see* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (federal bill of rights guarantees are fundamental to American scheme of justice and are applicable to states).

21. Green v. United States, 355 U.S. 184, 187-88 (1957) (state must not make repeated attempts to convict defendant for same offense). The Supreme Court, in *North Carolina v. Pearce,* noted that the double jeopardy clause protects a defendant against a second prosecution for the same offense after acquittal or conviction and protects the defendant against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The double jeopardy principle protects three interests of a defendant, all of which are related to the idea of ending litigation. Westen & Drubel, *Toward a General Theory of Double Jeopardy,* 1978 SUP. CT. REV. 81, 84. The defendant has an interest in the finality of a proceeding, an interest in avoiding double punishment, and an interest in allowing the finder of fact to acquit against the evidence. *Id.*

22. *See* Burks v. United States, 437 U.S. 1, 15 (1978) (acknowledging conceptual confusion existing in double jeopardy analysis). In *Burks v. United States,* the Supreme Court admitted that it could not characterize recent Supreme Court decisions regarding double jeopardy issues as models of consistency and clarity. *Id.* at 9.

23. United States v. Scott, 437 U.S. 82, 85 (1978). In *United States v. Scott,* the Supreme Court noted that the 1971 amendment to the Criminal Appeals Act shifted the Court's focus regarding government appeals from issues of statutory construction to issues of double jeopardy concepts. *Id.* The 1971 amendment to the Criminal Appeals Act removed all prior restrictions on government appeals and provided for government appeal in all situations when Government appeal would not violate the double jeopardy clause of the fifth amendment. *See* Criminal Appeals Act, Pub. L. No. 91-644, 84 Stat. 1890 (codified at 18 U.S.C. § 3731 (Supp. 1985)) (no Government appeal shall lie when double jeopardy clause prohibits further prosecution).

In addressing the issue of whether a government appeal under the 1971 amendment to the Criminal Appeals Act violates the double jeopardy clause, the Supreme Court, in *Crist v. Bretz*,[24] characterized the time at which jeopardy attaches in criminal proceedings as the "lynchpin for all double jeopardy jurisprudence."[25] The time at which jeopardy attaches is important because a defendant may not claim potential protection against double jeopardy until jeopardy attaches.[26] Theoretically, the rules of attachment establish that jeopardy attaches when the state first exposes a defendant to a substantial risk of conviction.[27] The general rule is that the government first exposes a defendant to a substantial risk of conviction when the court impanels and swears in a jury.[28] To postpone the moment jeopardy attaches would increase the potential for governmental harassment of an accused and enable the government to avoid a jury the government believes to be unfavorable.[29] On the other hand, to permit jeopardy to attach any earlier

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The 1970 amendments to the Criminal Appeals Act reflect Congress' desire to rely upon the courts to define the constitutional limitations of the Government's right of appeal, rather than to risk imposing a narrower right to appeal than is constitutionally permissible. United States v. Wilson, 420 U.S. at 338-39.

24. 437 U.S. 28 (1978).

25. *Id.* at 38.

26. Crist v. Bretz, 437 U.S. at 32 (defendant potentially protected against subsequent prosecution only if jeopardy attached in first proceeding). In *Serfass v. United States,* the Supreme Court noted that the Court consistently had adhered to the view that jeopardy does not attach until the defendant appears before the finder of facts. Serfass v. United States, 420 U.S. 377, 388 (1974). Furthermore, the *Serfass* Court explained that a criminal defendant is not potentially protected against a subsequent prosecution for the same offense until jeopardy attaches in the first proceeding. *Id.*

27. Serfass v. United States, 420 U.S. at 388-89. Jeopardy attaches when a defendant goes before a finder of fact and risks a determination of guilt. *Id.* Double jeopardy purposes and policies become important at the moment jeopardy attaches. *Id.; see supra* note 21 and accompanying text (explaining policies and interests promoted by double jeopardy clause). A criminal defendant potentially is protected, but not absolutely protected, from a second proceeding for the same offense at the moment jeopardy attaches. *Serfass,* 420 U.S. at 388; *see infra* note 38 (mere attachment of jeopardy not enough to automatically bar retrial for same offense). In *Illinois v. Somerville,* the Supreme Court observed that the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the double jeopardy clause bars retrial. Illinois v. Somerville, 410 U.S. 458, 467 (1973).

28. *See Downum,* 372 U.S. at 737-38 (jeopardy attaches when court impanels and swears in jury, even if court discharges jury before trial); United States v. Fleming, 667 F.2d 440, 441 (4th Cir. 1981) (second prosecution for same offense does not violate double jeopardy clause when jury in first proceeding impaneled but discharged before sworn), *cert. denied,* 455 U.S. 959 (1982).

29. Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals,* 52 TEX. L. REV. 303, 337 (1974). Postponement of the moment jeopardy attaches would increase the potential for governmental harassment of the defendant and would help the government avoid unfavorable jury verdicts. *Id.* For example, in *Downum v. United States,* the federal government charged Downum with stealing mail and forging checks. Downum v. United States, 372 U.S 734, 734 (1963). *See* 18 U.S.C. § 371 (1966) (conspiracy to commit offense or to defraud United States); 18 U.S.C. § 493 (1966) (against federal law to forge bonds and

than when the court impanels a jury would obstruct the government's interest in bringing an accused to trial.[30] For example, if jeopardy attached at the time of indictment, the government would have no right to amend an indictment that the trial court rules to be insufficient.[31] In *Bretz,* the Supreme Court held that the rule that jeopardy attaches when a court impanels a jury is an essential element of the fifth amendment's double jeopardy protection, and, therefore, applicable to the states through the fourteenth amendment.[32] The *Bretz* Court explained that the rule of attachment protects a defendant's right to have his trial completed before a particular jury—a right that has become an integral part of the constitutional prohibition against double jeopardy.[33] In bench trials, jeopardy attaches when the court sends in the first witness or begins to hear evidence.[34] The obvious implication of *Bretz* is that the rule of attachment in bench trials also is part of the constitutional

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obligations of lending agencies); 18 U.S.C. § 1708 (1966) (theft or receipt of stolen mail). After the court impaneled the jury, the trial judge granted the Government's request to dismiss the jury, over defendant's objection, because an important Government witness failed to appear. *Id.* at 735. A second jury, impaneled two days later, convicted the defendant. *Id.* The Supreme Court reversed the conviction, holding that the double jeopardy clause barred the second trial. *Id.* at 737-38. Both the majority and dissenting opinions acknowledged the possibility that the Government may harass a defendant by successive prosecutions or declarations of mistrials so as to give the Government a more favorable opportunity to convict. *Id.* at 736, 742. Neither the majority nor the dissenting opinions suggested that the Government deliberately caused the witness to fail to appear; however, the possibility for deliberate government misconduct does exist. *Id.* at 736, 742. Consequently, jeopardy attaches at the moment the court impanels or swears in the jury to prevent the possibility of the government benefitting from its own misconduct. *Id.* at 736.

30. Comment, *supra* note 29, at 337. If jeopardy attached at a point prior to the impaneling of the jury, the government's interest in bringing a defendant to trial would suffer. *Id.; see infra* note 31 and accompanying text (government's interests suffer if defendant not required to go before finder of fact).

31. Comment, *supra* note 29 at 337. If jeopardy attached at the time of indictment, a trial court ruling finding the indictment insufficient would result in the release of the defendant, with no possibility for the subsequent re-indictment of the defendant. Note, *Double Jeopardy: The Reprosecution Problem,* 77 HARV. L. REV. 1272, 1275 (1964). The defendant would never go before a finder of fact for a determination of guilt or innocence. *Id.*

32. *Bretz,* 437 U.S. at 37-38; *see supra* note 21 (double jeopardy clause applicable to states through fourteenth amendment).

33. *Bretz,* 437 U.S. at 38.

34. Serfass v. United States, 420 U.S. 377, 388 (1975). Although the general rule is that jeopardy attaches in bench trials when the first witness is sworn in or the court begins to hear evidence, the Fourth Circuit, in *Webb v. Hutto,* held that no violation of the double jeopardy clause occurs when the judge begins to hear evidence and subsequently grants the government a continuance to obtain additional evidence. Webb v. Hutto, 720 F.2d 375, 380 (4th Cir. 1983), *cert. denied,* 104 S. Ct. 1444 (1984). In addition, jeopardy attaches in neither jury trials nor bench trials if the trial court lacks jurisdiction, regardless of the stage to which the trial has progressed. *See* Serfass v. United States, 420 U.S. 377, 391 (1975) (court must have jurisdiction to try defendant before double jeopardy issue becomes significant); Schlang v. Heard, 691 F.2d 796, 798 (5th Cir. 1982) (per curium) (jeopardy does not attach when trial court lacks jurisdiction); *cf.* Wade v. Hunter, 336 U.S. 684, 688 (1949) (retrial barred when court with jurisdiction determines guilt or innocence of defendant).

guarantee against double jeopardy and applicable to the states through the fourteenth amendment.[35]

While the rules concerning when jeopardy attaches are easy to understand and to apply, in *Illinois v. Somerville,*[36] the Supreme Court acknowledged that the use of mechanical formulas to decide double jeopardy issues creates the possibility of abuse of double jeopardy protections.[37] In determining whether the government has twice put a defendant in jeopardy, the *Somerville* Court stated that the issue is whether the government's interest in retrying a defendant outweighs the defendant's interest in ending litigation.[38] Subsequently, in *United States v. Wilson,*[39] the Supreme Court also emphasized that a court must analyze the substantive reasons for dismissal rather than focusing exclusively on the timing of the dismissal.[40] In *Wilson,* the Supreme Court moved away from the hard and fast procedural rules of attachment of jeopardy and emphasized that double jeopardy protection bars government

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35. *See supra* notes 32-33 and accompanying text (rule of attachment of jeopardy in jury trials is essential element of double jeopardy protection and therefore applicable to states through fourteenth amendment); *cf.* PROSECUTION AND ADJUDICATION 782 (F. Miller, R. Dawson, G. Dix, R. Parnes. ed. 1982) (suggesting that rule on attachment of jeopardy in bench trials is binding on states).

36. 410 U.S. 458 (1973).

37. *See* Illinois v. Somerville, 410 U.S. at 461-62. In *Illinois v. Somerville,* the Supreme Court criticized the application of mechanical formulas during the course of criminal trials because of the varying and often unique situations that arise during each trial. *Id.* at 462.

38. *See id.* at 463. In *Illinois v. Somerville,* the Supreme Court noted that application of double jeopardy concepts does not ignore the public's interest in seeing that a criminal proceeding ends with a verdict of acquittal or conviction. *Id.* In *Somerville,* after the court impaneled and swore in the jury, the State of Illinois discovered a jurisdictional defect in the indictment that the State could not correct by amendment or waiver. *Id.* at 459-60. The grand jury indicted the defendant for theft, but the indictment failed to allege that the defendant intended permanently to deprive the owner of the owner's property. *Id.* at 459. The defect in the indictment was so significant that, if the trial continued and the jury convicted the defendant, the defendant could assert the jurisdictional deficiency and ultimately overturn the conviction. *Id.* at 460. The State moved for a mistrial, and the trial court granted the State's motion. *Id.* The grand jury handed down a second indictment for the same offense against the defendant and the court arraigned the defendant. *Id.* The trial court overruled the defendant's claim of double jeopardy and the jury returned a verdict of guilty. *Id.* The defendant appealed the conviction on double jeopardy grounds to the Illinois Supreme Court. *Id.* The Illinois Supreme Court upheld the conviction. *Id.* The defendant then sought federal habeas corpus relief on the ground that his conviction constituted double jeopardy. *Id.* The Court of Appeals for the Seventh Circuit granted the defendant's habeas corpus petition and ruled that the double jeopardy clause barred retrial. *Id.* The Government appealed to the United States Supreme Court. *Id.* The Supreme Court rejected the defendant's argument that the double jeopardy clause of the fifth amendment barred retrial. *Id.* at 461. The Supreme Court held that, even though the State was responsible for the jurisdictional defect, the defendant's interest in finality did not outweigh the public's interest in seeing the proceeding terminate with a verdict of guilty or not guilty. *Id.* at 462-63.

39. 420 U.S. 332 (1975).

40. *See* United States v. Wilson, 420 U.S. at 345. A defendant has no valid argument that he should benefit from an error of law when the court may remedy that error without subjecting the defendant to a second trial before a second finder of fact. *Id.*

appeals only when a defendant is in danger of facing a second trial for the same offense.[41]

The current law of double jeopardy, as established by the Supreme Court in *Wilson,* may best be understood when analyzed in terms of the three stages during which a criminal proceeding may end. A criminal proceeding may end during the pretrial, trial, and post verdict phases of the proceeding. Since the double jeopardy clause generally does not prohibit government appeals except when reversal would subject a defendant to a second trial, the government may appeal pretrial dismissals.[42] Neither government appeal of a discharge, nor renewed prosecution for the same offense should an appeal be successful, violates the double jeopardy clause.[43] Pretrial dismissals pose no barrier to appeal and reprosecution for the same offense because the state never has placed the defendant in jeopardy of conviction.[44] The defendant did not risk a determination of guilt because the defendant was

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41. *See id.* at 345-46 (courts properly focus on prohibition against multiple trials as controlling double jeopardy principle). In *United States v. Wilson,* the trial court granted a motion to dismiss after the jury had found the defendant guilty of converting union funds to the defendant's own use. *Id.* at 333; *see* FED. R. CRIM. P. 29(c) (district court may set aside jury verdict of guilty and enter judgment of acquittal). The Government sought to appeal the post-verdict dismissal, but the United States Court of Appeals for the Third Circuit ruled that the double jeopardy clause barred review of the trial court's dismissal. *Id.* The Supreme Court reversed and held that the double jeopardy clause bars government appeals only when the defendant is in danger of facing a second trial for the same offense. *Id.* at 345. Since reversal on appeal in *Wilson* would result only in reinstatement of the jury verdict of guilty, the Supreme Court found that a reversal would not offend the double jeopardy policy prohibiting multiple prosecutions. *Id.* at 344-45; *see supra* note 21 and accompanying text (policies of double jeopardy clause).

42. *See supra* note 41 (double jeopardy clause bars government appeals when defendant faces second trial for same offense).

43. *See Serfass,* 420 U.S. at 394 (government appeal of dismissal of indictment before defendant goes before finder of fact does not violate double jeopardy clause). In *Serfass v. United States,* the trial court dismissed an indictment against the defendant after the judge examined an affidavit and records setting forth evidence the Government planned to introduce at trial. *Id.* at 379. Since the defendant had demanded a jury trial and the court had not impaneled and sworn in the jury before the court dismissed the indictment, the Supreme Court held that the double jeopardy clause did not bar Government appeal. *Id.* at 394. The Supreme Court in *Serfass* stated that an appeal of a pretrial dismissal based on the factual issue of guilt or innocence does not violate the double jeopardy clause because a first jeopardy does not attach until the defendant faces the risk of conviction. *Id.* at 392.

44. *See supra* notes 28 & 34 and accompanying text (discussing rules concerning attachment of jeopardy in jury trials and bench trials). The risks associated with government harassment of the defendant by repeated vague indictments is insufficient to advance attachment of jeopardy to the time of indictment. *See* Note, *Double Jeopardy: The Reprosecution Problem,* 77 HARV. L. REV. 1272, 1275 (1964) (discussing minimal risk of government harassment of defendant at time of indictment). The victim of repeated vague indictments may obtain relief through injunctive proceedings. *Id. But see* United States v. Lattimore, 112 F. Supp. 507, 507-11 (D.D.C. 1953) (illustrating extreme possibility of government harassment of accused through repeated indictments); *rev'd in part and aff'd in part,* 215 F.2d 847 (D.C. Cir. 1954); Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee,* 65 YALE L.J. 339, 358 n.88 (1956) (discussing *Lattimore* proceeding).

not yet before a finder of fact with jurisdiction to determine the guilt or innocence of the defendant.[45] Government appeals of pretrial discharges, therefore, do not violate the Supreme Court's observation in *Wilson* that the primary purpose of the double jeopardy clause is to prevent multiple prosecutions of a defendant for the same offense.[46]

At the trial stage of a criminal proceeding, a defendant is not in jeopardy of conviction until he is before a finder of fact.[47] The Supreme Court, in *Wade v .Hunter,*[48] stated that a trial not culminating in a finding of guilt or innocence by the finder of fact may place a defendant in jeopardy.[49] If a trial court dismisses a case subsequent to the attachment of jeopardy, but prior to a verdict by the finder of fact, the government's right of appeal is dependent upon which party requested the dismissal and the grounds upon which the party requested the dismissal.[50] Double jeopardy policies permit government appeals only if a defendant seeks the dismissal on a basis unrelated to factual guilt or innocence.[51] If a defendant seeks a dismissal on grounds unrelated to factual guilt or innocence, the court deems the defendant to have waived his right to have his trial conducted before a particular

45. *See Serfass,* 420 U.S. at 391 (double jeopardy clause not applicable until defendant goes before finder of fact).

46. *Serfass,* 420 U.S. at 391-92; *see supra* note 41 (discussing Supreme Court holding in *United States v. Wilson).*

47. *See supra* note 45 and accompanying text (defendant does not risk determination of guilt until defendant is before finder of fact).

48. 336 U.S. 684 (1949).

49. *See* Wade v. Hunter, 336 U.S. 684, 688 (1949). In *Wade v. Hunter,* the Supreme Court noted that a defendant who appears before a judge or jury may have double jeopardy protection against a second trial for the same offense even though his first trial ends without a verdict. *Id.* The Supreme Court, however, cautioned that a defendant may not go free in all instances when the trial fails to end in a final judgment. *Id.* In some circumstances, a defendant's right to have his trial completed by a particular finder of fact may be less important than the public's interest in a fair trial ending in a final judgment. *See id.* at 689 (judge must discharge jury and direct retrial when judge discovers that member of jury might be biased against one party).

50. United States v. Dinitz, 424 U.S. 600, 607-08 (1976). In *United States v. Dinitz,* the Supreme Court distinguished between the double jeopardy consequences of a mistrial declared without the defendant's consent, and a mistrial declared on the defendant's motion. *Id.* The government may appeal only a mistrial granted at the defendant's request because the defendant voluntarily has waived his right to have his trial completed before the original finder of fact. *Id.*

51. *Compare* United States v. Scott, 437 U.S. 82, 99-100 (1978) (government may appeal from dismissal sought by defendant based on prejudicial delay) *with* United States v. Dahlstrum, 655 F.2d 971, 975-76 (9th Cir. 1981) (trial court's sua sponte dismissal for prosecutorial misconduct prohibits retrial because defendant did not seek dismissal), *cert. denied,* 455 U.S. 928 (1982). When a trial court declares a mistrial absent a motion by the defendant, the double jeopardy clause prohibits retrial unless "manifest necessity" required the mistrial declaration. United States v. Perez, 22 U.S. (9 Wheat.) 194, 194-95 (1824). The concept of manifest necessity permits retrial after the trial court declares a mistrial when the jury is deadlocked or when the jury may be prejudiced. *See* Richardson v. United States, 104 S. Ct. 3081, 3086 (1984) (double jeopardy clause does not prohibit retrial following mistrial for deadlocked jury); Arizona v. Washington, 434 U.S. 497, 512-13 (1978) (double jeopardy clause does not prohibit retrial following mistrial for defense counsel's prejudicial remarks).

finder of fact.[52] When a defendant seeks a preverdict dismissal on legal grounds, rather than on factual grounds, the defendant deprives the government of the right to one complete opportunity to convict, and the government therefore may seek reversal of such a mid-trial dismissal.[53]

In post-verdict situations, the rule that the government may not appeal a jury determination of not guilty or an acquittal directed by a trial judge during a jury trial is firmly established.[54] In addition, the government may not appeal an acquittal by a trial judge in a bench trial.[55] The courts prohibit government appeals of jury and bench determinations of not guilty whether the government questions the legal or factual basis for the acquittal.[56] The government may not appeal an acquittal, no matter how egregiously erroneous the acquittal, because reversal of an acquittal requires a defendant to

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52. *See* United States v. Dinitz, 424 U.S. 600, 608 (1976) (in absence of manifest necessity for dismissal, defendant has right to submit case to first jury); *supra* note 51 (discussing concept of manifest necessity); Western and Drubel, *supra* note 21, at 89-90 (discussing nature of defendant's right to have trial completed by particular tribunal). Although the Supreme Court has acknowledged that a defendant has a valued right to have his trial completed by a particular tribunal, the Supreme Court never has explored the nature of the right. *Id.* at 89; *see Wade v. Hunter,* 336 U.S. at 689 (noting defendant's right to have trial completed by particular tribunal); United States v. Jorn, 400 U.S. 470, 484-85 (1971) (same). The defendant's valued right to continue before a particular tribunal is most likely a part of the defendant's interest in finality. Western and Drubel, *supra* note 21, at 89. Once a trial begins, the defendant has an interest in concluding the trial. *Id.* Consequently, the defendant has an interest in retaining a particular jury because changing juries means interrupting the trial and extending the time the defendant must wait for a final verdict. *Id.*

53. *See Scott,* 437 U.S. at 100. When a defendant seeks a dismissal on grounds unrelated to the sufficiency of the evidence before the judge or jury delivers a verdict, the defendant deprives the public of the right to one complete opportunity to convict. *Id.* The government, therefore, may appeal the dismissal. *Id.*

54. *See* Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam) (prohibiting retrial after trial judge directed jury to acquit and entered judgment); United States v. Ball, 163 U.S. 662, 662 (1896) (prohibiting retrial after acquittal by jury). The Supreme Court, in *United States v. Martin Linen Supply Co.,* defined an acquittal as a judicial ruling representing a resolution in the defendant's favor of some or all factual elements of the offense charged. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). The double jeopardy clause bars retrial after acquittal even if the acquittal results from an erroneous resolution of factual elements of the charge. *See* Sanabria v. United States, 437 U.S. 54, 57 (1978) (prohibiting retrial after judge granted acquittal on insufficiency of evidence even though ruling resulted from erroneous exclusion of evidence). The double jeopardy clause also protects the defendant against a second prosecution for the same offense after conviction. *See In re* Nielson, 131 U.S. 176, 188 (1889) (double jeopardy clause prohibits prosecuting defendant for adultery subsequent to defendant's conviction for unlawful cohabitation).

55. *See* United States v. Jenkins, 420 U.S. 358, 365 (1975) (double jeopardy clause applies in same manner to bench and jury trials) *rev'd on other grounds,* 437 U.S. 82 (1978).

56. *See Fong Foo,* 369 U.S. at 143 (retrial barred after judge improperly directed jury to acquit and entered judgment). In *Fong Foo v. United States,* the Government brought defendants to trial under a valid indictment in a federal district court, which had proper personal and subject matter jurisdiction. *Id.* at 141-42. Before the Government completed its case, the trial judge directed the jury to return verdicts of acquittal and entered a formal judgment of acquittal based on both the supposed improper conduct of the Assistant United States Attorney General prosecuting the case and on the supposed lack of credibility of prosecution witnesses. *Id.* at

undergo a second trial for the same offense.[57] Balancing the interests of society and of the defendant is unnecessary once the jury or the trial court acquits a defendant. Balancing of interests is unnecessary because the double jeopardy clause has declared a constitutional policy that is not open to judicial scrutiny.[58] The government, however, may appeal a trial court's post-verdict dismissal, if the jury returned a verdict of guilty, because a successful government appeal merely reinstates the original guilty verdict and does not force a defendant to undergo a second trial.[59] Therefore, an appeal by the government does not offend the double jeopardy clause.

In applying the Supreme Court's double jeopardy analysis to the proposed amendment to the Virginia Constitution and the implementing legislation, the Virginia provisions clearly do not violate the double jeopardy clause. Under the proposed constitutional amendment to the Virginia Constitution and the provisions of § 19.2-398 of the Virginia Code, the Commonwealth may appeal in a criminal case only if jeopardy has not yet attached, that is, only if the court has not impaneled and sworn in a jury in

142. The Government petitioned the United States Court of Appeals for the First Circuit for a writ of mandamus, praying that the court vacate the acquittal and order a retrial of the case. *Id.* The Court of Appeals granted the petition, holding that the trial court was without power to direct the judgment of acquittal under the circumstances. *Id.* The Supreme Court reversed the judgment of the First Circuit. *Id.* at 143. The Supreme Court held that, under the double jeopardy clause, entry of a judgment of acquittal is final and not subject to review even if the trial court improperly granted the acquittal. *Id.* The trial court had the power to direct the jury to enter the judgment of acquittal, but only at the close of either side's evidence. *See* FED. R. CRIM. P. 29(a) (district court shall order entry of judgment of acquittal at close of either side's evidence when district court determines evidence insufficient).

57. Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam). In *Fong Foo v. United States,* the Supreme Court held that an appeal based on an egregiously erroneous foundation is a final verdict and the government may not appeal that verdict without putting the defendant twice in jeopardy. *Id.*

58. *See* Burks v. United States, 437 U.S. 1, 11 n.6 (1978) (when double jeopardy clause applies, balancing of equities is unnecessary).

59. *See Wilson,* 420 U.S. at 353. The Government may appeal when a jury returns a verdict of guilty and the trial judge subsequently grants the defendant's motion to acquit. *Id.* The fact that a judge, rather than a jury, made the original finding of guilt has no effect on the government's ability to appeal a subsequent order setting aside the guilty verdict. United States v. Ceccolini, 435 U.S. 268, 270-71 (1978). In *United States v. Ceccolini,* a grand jury indicted the defendant for perjury. *Id.* at 272. The district court considered the defendant's motion to suppress physical evidence and testimony simultaneously with the trial on the merits. *Id.* The trial court found the defendant guilty of perjury. *Id.* Immediately after the trial court's finding of guilt, the trial court granted the defendant's motion to suppress the testimony of an essential Government witness. *Id.* at 272-73. The trial court set aside the verdict of guilt because the court determined that without the testimony of the Government witness, the evidence was insufficient to establish the defendant's guilt. *Id.* at 273. The Supreme Court affirmed the Court of Appeals' determination that the Government properly could appeal both the order granting the motion to suppress and the order granting the motion to set aside the verdict of guilty. *Id.* at 270. The Supreme Court held that government appeal from the orders granting the defendant's motion did not offend the double jeopardy clause because reversal of the orders merely would reinstate a finding of guilt. *Id.* at 270-71; *see supra* note 41 and accompanying text (government appeals barred only when defendant faces second trial for same offense); FED. R. CRIM. P. 29(c) (district court may set aside jury verdict of guilty and enter judgment of acquittal).

a jury trial or the court has not sworn in the first witness or received evidence in a bench trial.[60] The proposed constitutional amendment and implementing legislation do not provide for mid-trial or post-verdict government appeals.[61] The proposed amendment to the Virginia Constitution and the enabling legislation provide that the Commonwealth may appeal only from pretrial orders, and, even then, only from pretrial orders expressly specified in the proposed amendment and legislation.[62] The Virginia provisions specify that the Commonwealth only may appeal from pretrial suppression orders, from pretrial rulings requiring the return of seized evidence, and from pretrial orders dismissing a warrant, information, or indictment based on the unconstitutionality of the underlying statute.[63] Furthermore, under the Virginia provisions, the Commonwealth may appeal only in felony cases, rather than in all criminal proceedings.[64] Since the proposed amendment to the Virginia Constitution and the implementing legislation only provide for government appeals of certain trial court rulings that occur prior to the attachment of jeopardy, the provisions provide a criminal defendant greater protection against government appeals than the fifth amendment to the federal constitution requires.[65]

The proposed amendment to the Virginia Constitution and the implementing legislation not only comply with the double jeopardy clause of the federal constitution, but public policy also supports a statutory provision providing for government appeals prior to the time jeopardy attaches. As with appeals by a defendant, appeals by the government allow for the

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60. *See* VA. CONST. art. VI, § 1 (proposed amendment); *supra* note 16 (text of proposed amendment to Virginia Constitution granting to Commonwealth limited right of appeal in criminal proceedings); VA. CODE § 19.2-398 (Supp. 1985); *supra* note 15 (text of § 19.2-398 of Virginia Code providing procedural guidelines for implementation of proposed constitutional amendment).

61. *See supra* note 16.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See supra* text accompanying note 60 (Commonwealth may appeal only before jeopardy attaches under provisions of proposed amendment to Virginia Constitution and implementing legislation); *supra* notes 31 & 34 (rules of attachment of jeopardy in jury trials and bench trials); Letter from Donald C.J. Gehring, Deputy Attorney General, Commonwealth of Virginia to John G. Dicks, III, Member, House of Delegates, Commonwealth of Virginia (February 27, 1984) (discussing ramifications of Commonwealth right of appeal in criminal cases).

When compared to the federal Criminal Appeals Act, the proposed amendment to the Virginia Constitution and the enacting legislation of § 19.2-398 are extremely narrow in scope. *Compare* Criminal Appeals Act,, 18 U.S.C. § 3731 (Supp. 1985) (providing for appeals by federal government in criminal proceedings) *with* VA. CONST. art. VI, § 1 (proposed amendment) *and* VA. CODE § 19.2-398 (Supp. 1985). Unlike the Virginia statute, the Government may appeal in many criminal proceedings after jeopardy attaches under the federal act. *See supra* note 8 (discussing scope of government appeals permitted under federal Criminal Appeals Act). For example, under the Criminal Appeals Act, the federal government may appeal dismissals or acquittals entered after a factual finding of guilt. Criminal Appeals Act, 18 U.S.C. § 3731 (Supp. 1985).

correction of error or oversight at the trial court level.[66] Appellate review of trial court rulings concerning the constitutionality of a criminal statute is crucial to the effectiveness of the criminal justice system. When a trial judge determines that a criminal statute is unconstitutional, the judge's ruling establishes precedent.[67] Without a government right of appeal, the trial judge's ruling of unconstitutionality essentially insures the abrogation of the statute.[68] Allowing the government to appeal the trial court's determination permits a second and final ruling on the constitutionality of a criminal statute—a statute that received the support of the legislative and executive branches of the government.[69]

In addition to providing for correction of judicial error regarding the constitutionality of criminal statutes, government appeals regarding suppression of certain evidence at trial may promote more effective law enforcement by providing uniformity in judicial interpretation of procedural criminal law.[70] For example, if the law requires police officers to follow what the officers feel is an erroneous trial court ruling regarding methods of obtaining evidence, officers have two choices. The officers could abandon current practices that, in fact, may be legal. Alternatively, officers could continue their practice, gambling that a future trial court will rule that the practice is

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66. *Cf.* L. ORFIELD, *supra* note 2, at 32-33 (discussing function of appeal by defendant). The obvious function of extending to the criminal defendant the right of appeal is to ensure that the defendant receives justice. *Id.* The right of appeal, for both the state and the defendant, is not a requirement of due process. McKane v. Durston, 153 U.S. 684, 687 (1894). The notion that a defendant who did not receive a fair trial should have a second trial, however, is the generally accepted view. L. ORFIELD, *supra* note 2, at 33. A "fair" trial is a trial in which all parties observe the procedural safeguards established to protect the interests of the defendant. *Id.* The procedural safeguards include a preliminary investigation by the prosecution to insure the prosecution has a case, notice to the defendant of the offenses charged, and opportunity for the defendant to prepare for trial, the impanelling of an impartial jury, and proper rulings by the trial court. *Id.* at 32.

67. *See* 1903 ATT'Y GEN. ANN. REP. vi (without a government right of appeal, trial court rulings establish precedent).

68. *See id.* (without a government right of appeal, trial court rulings regarding unconstitutionality of statutes result in abrogation of statute).

69. *See* Kurland, *The Mersky Case and the Criminal Appeals Act: A Suggestion for Amendment of the Statute,* 28 U. CHI. L. REV. 419, 447-48 (1961) (supporters of Criminal Appeals Act emphasized importance of uniform construction of the United States Constitution and federal statutes). In 1903, United States Attorney General Knox indicated his support for the proposed federal Criminal Appeals Act. *Id.* at 447. In the 1903 annual report of the Attorney General, Knox indicated that, when a trial court dismisses an indictment based upon the unconstitutionality of a statute, the trial court ruling establishes a precedent that results in the abrogation of the statute which supports the indictment. 1903 ATT'Y GEN. ANN. REP. vi. In 1906, Attorney General Moody echoed Knox's argument and added that it is a "monstrous" situation when the opinion of a single man whose opinion is not subject to review may nullify a law that received the support of Congress and of the President. 1906 ATT'Y GEN. ANN. REP. 4. *See generally* Kurland, *supra,* at 445-55 (legislative history of Criminal Appeals Act).

70. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 140 (1967) (recommending that Congress and states enact statutes giving prosecution right to appeal from grant of pretrial motions to suppress evidence or confessions).

legal.[71] Government appeals, however, would permit a uniform, final ruling as to proper procedures for obtaining evidence.[72] Furthermore, government prosecutors have an interest in the development of uniform rules regarding the admissibility of evidence.[73] Although pretrial orders excluding evidence usually do not foreclose prosecution, a suppression order may impede seriously the prosecution's case.[74] Uniform rules regarding the admissibility of evidence would eliminate the dilemma of the prosecutor in choosing to follow what he believes to be an erroneous limitation on the use of evidence, or to defy prior rulings regarding the admissibility of evidence in the hopes that he can convince the trial court that the prior ruling was in error.[75]

While the proposed amendment to the Virginia Constitution provides for Government appeals of suppression orders and dismissals of indictments on the grounds of the unconstitutionality of the underlying statute, the proposed amendment fails to provide for Government appeals of orders dismissing an indictment based on the construction of the underlying State statute.[76] A question of statutory construction arises when the trial court

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71. *Id.*

72. *See supra* notes 70 & 71 and accompanying text (government appeals of pretrial rulings promote uniformity of procedural criminal law).

73. *See infra* notes 74 & 75 and accompanying text (government prosecutors have interest in uniform procedural criminal law).

74. *See* Friedenthal, *Government Appeals in Federal Criminal Cases,* 12 STAN. L. REV. 71, 90 (1959). Orders suppressing evidence do not necessarily result in the dismissal of the indictment because the prosecution still may proceed with the case on the basis of other evidence. *Id.* Suppression orders, however, often make prosecution impossible. *Id.*

75. *See* United States v. Greely, 413 F.2d 1103, 1104 (D.C. Cir. 1969). The 1968 amendments to the Criminal Appeals Act provided for government appeals from orders sustaining motions to suppress evidence. Criminal Appeals Act, 82 Stat. 237 (1968). The primary purpose of the amendment was to remedy the harmful effects on the practice and development of the law of suppression of evidence resulting from the inability of the government to appeal orders sustaining motions to suppress evidence. *Greely,* 413 F.2d at 1104. Absence of government appeals of suppression orders resulted in inconsistent rulings at the trial level and development of a rapidly changing area without the benefit of appellate review. *Id.* Absence of government appeals also resulted in the dilemma of the prosecutor in choosing to follow what the prosecutor feels is an erroneous ruling regarding suppression or to ignore the prior ruling in the hope of persuading the judge that the prior ruling is erroneous. *Id.* The second purpose of providing for government appeals of suppression orders is to allow the government to successfully prosecute the defendant when the trial court erroneously has suppressed evidence. *Id.* In many cases, a trial court ruling to sustain a motion to suppress evidence forecloses prosecution, particularly in cases charging that possession of the suppressed evidence is illegal. *See* United States v. Cox, 475 F.2d 837, 841 (9th Cir. 1973). In *United States v. Cox,* police officers were unlawfully on defendants' premises when the officers discovered and seized a large quantity of narcotics. *Id.* at 839. The Government charged defendants with possession of narcotics with the intent to distribute. *Id.* at 838. The trial court ruled that, since the officers were on the defendants' premises illegally, and the illegality was not so attenuated by an unrelated series of events as to purge the taint, the narcotics seized as evidence were not admissible. *Id.* at 841. The trial court subsequently dismissed the indictment. *Id.* On appeal, the court of appeals affirmed the dismissal. *Id.*

76. *See* VA. CONST. art. VI, § 1 (proposed amendment).

dismisses an indictment for failing to state an offense under the applicable statute.[77] Government appeals of trial court dismissals of indictments based upon the construction of a statute would enhance uniformity of State law, ensuring that the same law applies in the same manner to all persons before the State courts.[78] If trial courts in different districts in the State interpret the same statute in a different manner, a Government appeal would permit an authoritative, final rule for the entire State.[79]

In spite of the fact that the proposed amendment benefits society's interests in correcting trial court error and increasing law enforcement officers' effectiveness, the General Assembly should not approve the amendment during the 1986 session unless the implementing legislation protects the interests of the defendant. A criminal defendant has no legitimate double jeopardy objections to government appeals of pretrial orders.[80] Appellate review of pretrial orders, however, places additional hardship upon a defendant.[81] Unfortunately, the Virginia statute implementing the proposed constitutional amendment bestows many benefits upon society without providing corresponding safeguards to a defendant. The implementing statute contains no provisions to protect a defendant's interest in a speedy trial,[82] or

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77. *See* Friedenthal, *supra* note 74, at 74 (explaining meaning of term "statutory construction").

78. *See infra* note 79 and accompanying text (government appeals promote uniformity of interpretation and application of law).

79. *See Right of a State, supra* note 2, at 480-81. State appeals would promote uniformity of both procedural and substantive state criminal law. *Id.* at 480. When the state loses a case as a result of what the state feels is an erroneous trial court ruling regarding statutory construction, the state realistically may not expect the defendant to appeal. *Id.* at 481. In this situation, only an appeal by the state will help develop, unify, or clarify the statute in question. *Id.* Both the federal Criminal Appeals Act and the American Bar Association's approved draft of standards relating to criminal appeals provide for government appeals from judgments dismissing an indictment or information for failure of the charging instrument to state an offense under the statute. Criminal Appeals Act, 18 U.S.C. § 3731 (Supp. 1985); STANDARDS RELATING TO CRIMINAL APPEALS § 1.4(a)(i), at 8 (Approved Draft 1970).

80. *See supra* notes 60-65 and accompanying text (proposed amendment to Virginia Constitution satisfies double jeopardy requirements).

81. *See infra* notes 83-90 and accompanying text (state appeals place hardships upon defendant).

82. *See* VA. CODE § 19.2-398 (Supp. 1985). The sixth amendment to the United States Constitution provides that "[i]n all prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI. Article I, section 8 of the Virginia Constitution provides that the accused "shall enjoy the right to a speedy and public trial. . . ." VA. CONST. art. I, § 8. The right to a speedy trial guaranteed under the federal constitution is a fundamental right, and applies to the states through the fourteenth amendment to the federal constitution. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (speedy trial guarantee of sixth amendment applies to states through fourteenth amendment); U.S. CONST. amend. XIV (no state shall deprive any person of life, liberty, or property without due process of law). The right to a speedy trial attaches at the time the state officially accuses the defendant by arrest or indictment. *See* Miller v. Commonwealth, 217 Va. 929, 933, 234 S.E.2d 269, 272 (1977), *cert. denied,* 434 U.S. 1016 (1978). The trial court determines the speedy trial issue, however, when the case proceeds to trial. *See* United States v. Mitchell, 425 F.2d 1353, 1361 (8th Cir. 1970), *cert. denied,* 400 U.S. 853 (1970). *But see* United States v. Cox, 475 F.2d

to reduce bail,[83] or for the appointment of counsel for indigents while a government appeal is pending.[84] Whether the Commonwealth's appeal succeeds or fails, a defendant endures an additional delay in the final adjudication of the case and suffers increased legal fees to defend the appeal. Although some amount of delay resulting from government appeals is inevitable, it is possible to expedite the appellate procedure. An earlier version of the House of Delegates bill provided safeguards for a defend-

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837, 841 (9th Cir. 1973) (permitting dismissal of indictment pending government appeal of suppression order because of trial court's concern with aspects of speedy trial guarantee of sixth amendment). The United States Supreme Court never adopted a precise standard for determining when the government violates the defendant's right to a speedy trial. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972) (creating case-by-case balancing test for determining when government violates defendant's right to speedy trial). The Virginia Code, however, specifies the time periods within which the Commonwealth must bring the defendant to trial. VA. CODE § 19.2-243 (Supp. 1985). The time within which the Commonwealth must bring the accused to trial varies according to the status of the defendant and whether the defendant faced a pretrial proceeding. *Id.* The three purposes of the speedy trial guarantee are to prevent undue incarceration before trial, to minimize the anxiety of public accusation, and to limit the possibility that undue delay will jeopardize the defendant's case. United States v. Ewell, 383 U.S. 116, 120 (1966).

83. *See* U.S. CONST. amend. VIII (prohibiting imposition of excessive bail). The eighth amendment to the United States Constitution provides that a court shall not impose excessive bail conditions. *Id.* The federal constitution's prohibition against excessive bail is the foundation of the bail system. Sistrunk v. Lyons, 646 F.2d 64, 68 (3d Cir. 1981). The eighth amendment does not create an absolute right to be free on bail. *Id.* The system of conditioning release from prison on the offer of financial security reflects the attempt to balance the defendant's interest in pretrial liberty and society's interest in the defendant's presence at trial. *Id.* Bail is excessive when set at an amount greater than necessary to insure the appearance of the defendant at trial. Stack v. Boyle, 342 U.S. 1, 5 (1951). Several circuit courts of appeals have concluded that the eighth amendment's excessive bail provision is an essential element of the concept of ordered liberty and, therefore, applicable to the states through the fourteenth amendment to the federal constitution. *See, e.g.*, Meechaicum v. Fountain, 696 F.2d 790, 791 (10th Cir. 1983); Hunt v. Roth, 648 F.2d 1148, 1156 (8th Cir. 1981), *vacated as moot*, 455 U.S. 478 (1982); Sistrunk v. Lyons, 646 F.2d 64, 71 (3d Cir. 1981); United States *ex rel.* Goodman v. Kehl, 456 F.2d 863, 868 (2d Cir. 1972); U.S. CONST. amend. XIV (no state shall deprive any person of life, liberty, or property without due process of law). The Supreme Court has not resolved directly whether the eighth amendment's excessive bail prohibition is applicable to the states through the fourteenth amendment. *Sistrunk*, 646 F.2d at 66. In *Schilb v. Kuebel*, however, the Supreme Court stated that "[b]ail . . . is basic to our system of law. . .and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the states through the Fourteenth Amendment." Schilb v. Kuebel, 404 U.S. 357, 365 (1971), *reh'g denied*, 405 U.S. 948 (1972). The Virginia Constitution also prohibits imposition of excessive bail. *See* VA. CONST. art. I, § 9 (court should not require excessive bail). The Virginia Code recognizes that the court may deny bail if the court has probable cause to believe that the defendant will not appear for trial or hearing and if the court has probable cause to believe that the defendant's liberty will create an unreasonable danger to the defendant or to the public. VA. CODE § 19.2-120 (1983).

84. *See* U.S. CONST. amend. VI. The sixth amendment to the federal constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defense." *Id.* The right to the assistance of counsel in felony cases is a fundamental right, and applies to the states through the fourteenth amendment. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (right to counsel is essential to fair trials); U.S. CONST. amend. XIV (no state shall deprive any person of life, liberty, or property without due process of law). Furthermore, the state may not imprison a criminal defendant for any

ant.[85] The provisions of the earlier bill required the Commonwealth to file a notice of appeal within seven days of the issuance of a trial court ruling that the Commonwealth wished to contest.[86] Furthermore, the bill required the Commonwealth to file an initial brief within fourteen days of the notice of appeal and to file a reply brief within seven days after the defendant filed a brief.[87] The bill also provided for acceleration of Commonwealth appeals on the Court of Appeals' docket, with a final order required within sixty days of receipt of a defendant's brief.[88]

The earlier version of the Virginia bill not only provided an expedited procedure for government appeals, but also provided for a reduction in bail or for the release of a defendant on his own recognizance pending resolution

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offense, petty, misdmeanor, or felony, unless the defendant had the assistance of counsel at trial. Argersinger v. Hamlin, 407 U.S 25, 37 (1972). The right to counsel extends to all phases of the prosecution in which absence of counsel would prejudice the defendant. United States v. Wade, 388 U.S. 218, 226 (1967). An indigent charged with a felony has a right to court-appointed counsel, unless the defendant knowingly and intelligently waives his right to counsel. Johnson v. Zerbst, 304 U.S. 458, 468 (1938). An indigent's right to counsel extends to misdemeanor cases when there is a risk of imprisonment if the court finds the defendant guilty. *Argersinger,* 407 U.S. at 40. The Virginia Code requires that, upon a claim of indigency by the defendant, the court shall determine by oral examination and other competent evidence whether the claim is true. VA. CODE § 19.2-159 (Supp. 1985).

85. H.B. No. 1731 (Patron, Dicks) (subsequently amended and codified at VA. CODE § 19.2-398 (Supp. 1985)). The original version of House of Delegates Bill number 1731, as introduced by Delegate Dicks, provided for the Commonwealth to file a notice of appeal within seven days after entry of the order of the circuit court; for the Commonwealth to file an opening brief within fourteen days after the date of the notice of appeal; for acceleration of Commonwealth appeals on the docket of the Court of Appeals and for disposition of the appeal not more than sixty days following the court's receipt of the defendant's brief; for a hearing to determine the issue of bail not more than forty-eight hours after the Commonwealth files its notice of appeal; and for appointment of counsel to represent the defendant if the defendant is an indigent. *Id.*

86. *Id.* House Bill No. 1731, which the General Assembly subsequently amended and codified at § 19.2-398 of the Virginia Code, provided that Commonwealth appeals from Virginia circuit court rulings in criminal proceedings would lie as a matter of right to the newly created Court of Appeals of Virginia. *Id.; see* VA. CODE § 17-116.01 (Supp. 1985) (creating Court of Appeals of Virginia). House Bill No. 1731 specified that the decision of the Court of Appeals upon review of an appeal filed by the Commonwealth is final. H.B. No. 1731 (Patron, Dicks) (subsequently amended and codified at VA. CODE § 19.2-398 (Supp. 1985)).

87. H.B. No. 1731 (Patron, Dicks) (subsequently amended and codified at VA. CODE § 19.2-398 (Supp. 1985)).

88. *Id.* The Minnesota Rules of Criminal Procedure recognize the hardship that additional delays resulting from State appeals place on criminal defendants and provide for an expedited appellate procedure. *See* MINN. R. CRIM. P. 28.04 (providing for expedited procedure for appeals initiated by State). A Minnesota trial court must order a stay of proceedings within five days of oral notice that the State intends to appeal a pretrial order, and the State must file a notice of appeal within five days of the order staying the proceeding. *Id.* The State must file its brief within fifteen days of delivery of the transcripts. *Id.* Several other states also provide for an expedited procedure for appeals initiated by the state. *See, e.g.,* D.C. CODE ANN. § 23-104(e) (1981) (requiring expedited appellate proceeding when appeal taken by District of Columbia); ALA. R. CRIM. P. 17 (providing expedited procedure for appeals taken by State); OHIO R. CRIM. P. 12(J) (providing expedited procedure for State appeal of motion to return property and motion to suppress evidence); VT. STAT. ANN. tit. 13, § 7403 (requiring expedited

of the appeal.[89] The bill required a hearing to set bail pending resolution of the Commonwealth's appeal not later than forty-eight hours after the filing of a notice of appeal.[90] Appropriately, the bill placed the burden upon the Commonwealth to demonstrate that a court should not reduce bail or that a defendant should remain in custody.[91] Finally, the earlier version of the bill provided for appointment of counsel to indigent defendants.[92] Unlike the present statute, the earlier bill recognized the hardships government appeals place on a defendant and attempted to alleviate the hardships without compromising the interests of society. The bill that emerged from the House Committee for Courts of Justice, and that the General Assembly subsequently passed, however, lacked the safeguards for a speedy trial, for reduced bail, and for appointment of counsel to indigent defendants.[93] The only safeguard remaining from the earlier version of the bill is the requirement that the Commonwealth certify that the evidence excluded by order of the trial court judge is essential to the State's case before the Commonwealth may proceed

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appellate proceeding when appeal taken by State).

89. H.B. No. 1731 (Patron, Dicks) (subsequently amended and codified at VA. CODE § 19.2-398 (Supp. 1985)).

90. *Id.*

91. *Id.* The Minnesota Rules of Criminal Procedure provide for the possibility of the release of the criminal defendant upon appeal of a pretrial order by the State. *See* MINN. R. CRIM. P. 28.04 (court shall consider conditions for defendant's release pending appeal by State). Several other states provide that the court must consider conditions for reduced bail or for the release of the criminal defendant upon appeal by the state. *See, e.g.*, D.C. CODE ANN. § 23-104(f) (1981) (court shall consider release of defendant pending appeal by District of Columbia); ILL. ANN. STAT. ch. 110A, § 604(a)(3) (Smith-Hurd Supp. 1984) (defendant shall not be held in custody or to bail pending appeal by State absent compelling reasons); ME. R. CRIM. P. 37B(c) (court shall consider reduced bail for defendant pending appeal by State); KAN. STAT. ANN. § 22-3604 (1981) (State shall not hold defendant in jail or subject defendant to appearance bond pending State appeal); OHIO R. CRIM. P. 12(J) (State shall release defendant on his own recognizance pending appeal by State except in capital cases); TENN. R. APP. P. 8(b) (State shall not hold defendant in jail or to bail pending State appeal absent compelling reasons).

92. H.B. No. 1731 (Patron, Dicks) (subsequently amended and codified at VA. CODE § 19.2-398 (Supp. 1985)). The Minnesota Rules of Criminal Procedure provide for appointment of counsel to indigent defendants upon State appeal of a pretrial order. *See* MINN. R. CRIM. P. 28.04 (providing for appointment of counsel to indigent defendants upon State appeal). *See also* OHIO REV. CODE ANN. § 2945.67(B) (Page 1982) (court shall appoint counsel to indigent defendant upon appeal by State).

93. *See* VA. CODE § 19.2-398 (Supp. 1985); *supra*, note 15 (text of § 19.2-398 of Virginia Code). The implementing legislation of § 19.2-398 of the Virginia Code, detailing the procedure for Commonwealth appeals in felony cases, lacked the safeguards of House Bill No. 1731 because "[i]n the late days of the 1985 General Assembly, there was simply not sufficient time to address all of the detailed issues in the implementing legislation, when [the General Assembly] had just been able to work out a concrete understanding on the language of the Constitutional amendment." Letter from John G. Dicks, III, Member, House of Delegates, Commonwealth of Virginia to Deborah Titus (October 14, 1985). The General Assembly passed § 19.2-398 of the Virginia Code without safeguards to the defendant as "part of an overall understanding that [Delegate Dicks] reached with legislators opposing the Commonwealth's Right of Appeal, to in essence show good faith on the part of all the negotiators that the Constitutional Amendment would be passed in its identical form in 1986." *Id.; see supra* note 16 (describing procedure required to amend Virginia Constitution). Delegate Dicks contemplates that the

with its appeal.[94] One concession to the protection of a defendant's interests is inadequate because a defendant has many interests that the state must attempt to protect.[95]

The proposed amendment to the Virginia Constitution and the implementing legislation enabling the Commonwealth to appeal certain pretrial orders in felony proceedings are constitutional because the provisions provide for Government appeals only before jeopardy attaches.[96] Policy considerations support granting to the Commonwealth a limited right of appeal.[97] An equitable administration of criminal justice necessitates judicial review of erroneous decisions of law resulting in the dismissal of charges against a defendant and that the State courts apply the criminal law clearly and uniformly throughout the Commonwealth.[98] The General Assembly, however, must establish a Commonwealth right of appeal in a manner that considers and protects a criminal defendant against the dangers which generally accompany appeals by the State. The earlier version of the implementing legislation addressed the dangers of appeal and sought to protect a defendant's interests, as well as promote the interests of society.[99] The final version of the implementing legislation, however, has passed the General Assembly already and contains only one safeguard for a defendant.[100] When the General Assembly reassesses the implementing legislation during the 1986 session, the General Assembly should strike a more equitable balance between the interests of society and the interests of a defendant.[101] The General Assembly should amend § 19.2-398 of the Virginia Code to include safeguards for a defendant during Commonwealth appeals.[102]

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General Assembly will amend § 19.2-398 of the Virginia Code during the 1986 session after the General Assembly considers the "various procedural issues in detail." Letter from John G. Dicks, III, *supra*.

94. *See* VA. CODE § 19.2-398 (Supp. 1985); *supra* note 15 (text of § 19.2-398 of Virginia Code).

95. *See supra* notes 82-84 and accompanying text (discussing interests of defendant which the state must attempt to protect).

96. *See supra* notes 60-65 and accompanying text (proposed amendment to Virginia Constitution and implementing legislation do not violate double jeopardy clause of federal constitution).

97. *See supra* notes 66-79 and accompanying text (discussing policies supporting government appeals in criminal proceedings).

98. *Id.*

99. *See supra* notes 85-92 and accompanying text (discussing safeguards to defendant included in House Bill No. 1731).

100. *See* § 19.2-398 (Supp. 1985). Section 19.2-398 of the Virginia Code requires that, in government appeals of suppression orders, the Commonwealth certify that evidence the Commonwealth seeks to admit into evidence is essential to the prosecution. *Id.*

101. *See supra* notes 66-79 and accompanying text (societal interests furthered by government appeals); notes 80-82 and accompanying text (defendant's interests jeopardized by government appeals).

102. *See supra* notes 80-94 (discussing safeguards for defendant that General Assembly should include in amended Commonwealth Right of Appeal statute).