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# APPEAL DE NOVO IN VIRGINIA: AN EXAMINATION OF ITS PRESENT UTILITY

J. R. ZEPKIN\*

How do we justify "a system which tries a murderer once and a parking violator twice"?<sup>1</sup>

## I. SCOPE & PURPOSE

Appeal de novo<sup>2</sup> from the lowest level of trial courts in Virginia to courts of general trial jurisdiction has been a right of defendants in criminal cases and parties in civil actions from the inception of the state court system.<sup>3</sup> With the major changes over the last ten years in the district courts, involving the transition to all full-time judges, increased judicial salaries and increased jurisdictional limits in civil cases, the time has come to examine whether the right of appeal de novo should be modified or eliminated. Issues of efficiency, cost and fairness need to be discussed.

Chief Justice Harry L. Carrico, in his *1983 State of the Judiciary Report*, wrote: "The time has come to consider the elimination of the provision for trial de novo in appeals from both the general district courts and juvenile and domestic relations courts." The National Center for State Courts in a *1979 Virginia Court Organization Study*, called for changes in the right of trial de novo on appeal.<sup>4</sup> Figures from that report demonstrate that appeals from the general district courts constitute a respectable percentage of the workload of the circuit courts. In 1977, 37.1% of the criminal cases filed in the State's circuit courts were appeals from the district courts.<sup>5</sup> The percentages ranged from a high of 47% to a low of 9% among the different circuit courts.<sup>6</sup> Civil appeals were only 3.4% of the civil cases filed in the circuit

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1. McHugh, *Fair and Swift Justice*, 28 B.B.J. 13, 13 (1984) (quoting the Honorable Wilfred Bolster, 1938).

2. Appeal de novo is defined as: "Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered." BLACK'S LAW DICTIONARY 392 (5th ed. 1979).

3. VA. CONST. art. I, §§ 8, 11; VA. CODE §§16.1-106, 16.1-107, 16.1-113, 16.1-132, 16.1-136 (1982 & Supp. 1984).

4. NATIONAL CENTER FOR STATE COURTS, VIRGINIA COURT ORGANIZATION STUDY, Pt. 11, *Appeal of Minor Cases* (June 1979).

5. *Id.* at 297.

6. *Id.* at 290.

courts for 1977.<sup>7</sup> The percentage of circuit court criminal cases that were appeals from district courts dropped in 1984 to 29%, while the percentage of civil cases remained about the same.<sup>8</sup>

Among the agenda items of the Comprehensive Judicial Plan approved by the Judicial Council of Virginia is the evaluation of the trial de novo on appeal.<sup>9</sup> In addition, the Judicial Council recently adopted *Standards Relating to Juror Use and Management in Virginia*.<sup>10</sup> In this document, two of the stated goals are the improved overall efficiency of jury operations and the reduction of costs of jury trials.<sup>11</sup>

This article is intended to assist in the debate on the future of trial de novo on appeal in Virginia. Since the recently completed study, *The Adjudication of Family Law Matters in Virginia's Courts*,<sup>12</sup> considers appeals de novo from the juvenile and domestic relations district courts to the circuit courts, the topic is not addressed in this article. The purpose of this paper is to provide an aid for the discussion of options that might be available to modify appeal de novo from the general district courts to the circuit courts in Virginia.

After a review of the existing court framework in Virginia, attention will focus on the constitutional issues, federal and state, that affect appeal de novo. This is followed by a summary of the arguments, pro and con, of appeal and trial de novo. The concluding section offers some alternatives for Virginia that should comport with state and federal constitutional requirements. The appendix provides an overview of how appeals are taken from lower courts in other states.

## II. PRESENT COURT STRUCTURE IN VIRGINIA

A civil litigant may appeal of right "from any order or judgment. . ." rendered in a court not of record in a civil case "in which the matter in controversy is of greater value than fifty dollars."<sup>13</sup> It is noteworthy that this statute does not seem to require the order or judgment to be a final one. In criminal cases, an appeal of right exists from any conviction order or order forfeiting a recognizance or revoking any suspension of sentence.<sup>14</sup> The same is true for traffic infractions.<sup>15</sup>

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7. *Id.* at 297.

8. The Supreme Court of Virginia, Office of the Executive Secretary.

9. Judicial Council of Virginia, Comprehensive Judicial Plan (1985).

10. Judicial Council of Virginia, Standards Relating to Juror Use and Management in Virginia (1985).

11. *Id.* at 1.

12. Judicial Council of Virginia, *The Adjudication of Family Law Matters in Virginia's Courts* (1985).

13. VA. CODE § 16.1-106 (1982). The statute permitting appeals of right in civil cases permits appeals without a dollar threshold if the case involves the constitutionality of a state statute or a local ordinance. *Id.*

14. *Id.* § 16.1-132 (1982).

15. *Id.* § 19.2-258.1 (1983).

In appeals of all criminal convictions and traffic infraction convictions, the accused has a right to trial by jury in the circuit court.<sup>16</sup> In civil appeals, when the amount in controversy exceeds fifty dollars, either party has a right to trial by jury.<sup>17</sup> A party who pleads guilty to a traffic infraction or misdemeanor offense in the general district court may, as a matter of right, appeal the conviction and have a trial by jury in the circuit court.<sup>18</sup>

All appeals are strictly de novo: the order of the general district court is always automatically vacated when an appeal is taken.<sup>19</sup> Neither the plea of a defendant, nor the finding of the general district court, is admissible in the circuit court proceeding.<sup>20</sup> A statement or testimony offered by a litigant in the general district court, however, is admissible in the circuit court trial against the litigant.<sup>21</sup> The jurisdiction of the circuit court in appeal cases is derivative.<sup>22</sup> Therefore, the plaintiff in a civil case cannot expand his claim nor can the defendant counter claim for amounts in excess of the dollar jurisdictional limits of the general district court.<sup>23</sup>

Other provisions in the *Code of Virginia* permit the removal of a civil case from the general district court to the circuit court, prior to the trial, when the amount in controversy is more than \$1000 and certain other requirements are met.<sup>24</sup> On removal, the case is treated as if it had been filed initially in the circuit court. The scope of the claims may exceed the dollar jurisdictional limits of the general district court.<sup>25</sup>

In a civil case, a plaintiff whose claim is for \$1000 or less must first file in the general district court.<sup>26</sup> If the amount in controversy is more than \$1000, but does not exceed \$7000, the case may be filed in either the general district court or the circuit court.<sup>27</sup> If the claim is for more than \$7000, it must be filed in the circuit court.<sup>28</sup>

Traffic infractions and misdemeanor offenses are returnable to the general district court for trial.<sup>29</sup> The Commonwealth is entitled to bypass the

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16. *Id.* §§ 19.2-258.1 (1983), 16.1-136 (1982).

17. *Id.* § 16.1-113 (198 ) (right to trial by jury in civil appeals where amount in controversy exceeds \$50). *But see id.* § 8.01-336B (referring to a \$100 threshold for right to trial by jury).

18. *Id.* § 16.1-136 (1982).

19. Harbaugh v. Commonwealth, 209 Va. 695, 698-99, 167 S.E.2d 329, 332 (1969).

20. *Id.* at 698-99, 167 S.E.2d at 332.

21. *Id.* at 699, 167 S.E.2d at 332-33.

22. Hoffman v. Stuart, 188 Va. 785, 794, 51 S.E.2d 239, 244 (1949); Stacy v. Mullins, 185 Va. 837, 844, 40 S.E.2d 265, 268 (1946).

23. Hoffman, 188 Va. at 795, 51 S.E.2d at 244; Stacy, 185 Va. at 844, 40 S.E.2d at 268 (1946).

24. VA. CODE § 16.1-92 (1982 & Supp. 1985).

25. Hoffman v. Stuart, 188 Va. at 795, 51 S.E.2d at 244.

26. VA. CODE § 16.1-77 (1982 & Supp. 1985).

27. *Id.*

28. *Id.*

29. *Id.* § 16.1-123.1 (1982 & Supp. 1985).

general district court and present a misdemeanor charge directly to a grand jury of the circuit court,<sup>30</sup> but this rarely happens.

### III. FEDERAL LIMITATIONS—CRIMINAL CASES

#### A. *A Right to Trial by Jury*

It has been long recognized that the sixth amendment right to trial by jury "in all criminal prosecutions does not extend to every criminal proceeding."<sup>31</sup> At the time the federal constitution was adopted, there were numerous offenses, referred to as petty crimes, which historically were tried summarily without juries, by justices of the peace in England and by police magistrates or other judicial officials in the colonies.<sup>32</sup> The present day scope of the sixth amendment right to a trial by jury is governed by the "standard which prevailed at the time of the adoption of the Constitution."<sup>33</sup>

In *District of Columbia v. Clawans*,<sup>34</sup> the defendant was convicted in a federal police court of engaging in business without a license and sentenced to pay a fine of \$300, or serve 60 days in jail.<sup>35</sup> The maximum jail sentence which the court could have imposed for the offense was 90 days.<sup>36</sup> The United States Supreme Court, in affirming the conviction, held that the defendant had no sixth amendment right to a jury trial for this offense.<sup>37</sup> In its decision, the Court suggested some criteria to use to determine whether an offense is petty: (1) was it an offense indictable at common law; (2) how offensive is its moral quality?; and (3) how severe is the penalty?<sup>38</sup> In considering the penalty, the Court looked at the maximum possible penalty, not the sentence actually imposed.<sup>39</sup>

In *Cheff v. Schnackenberg*,<sup>40</sup> the defendant was convicted of criminal contempt and sentenced to six months in jail.<sup>41</sup> The United States Supreme Court held that Cheff had no constitutional right to a jury.<sup>42</sup> Using a federal statute as a guide, the Court concluded that since Cheff's sentence was six months, it was a petty offense and no right to trial by jury attached.<sup>43</sup> The

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30. *Id.* § 17-123 (1982).

31. *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937); see *United States v. Barnett*, 376 U.S. 681 (1964); *Callan v. Wilson*, 127 U.S. 540 (1888).

32. *Clawans*, 300 U.S. at 624.

33. *Id.* at 625.

34. 300 U.S. 617 (1937).

35. *Id.* at 623.

36. *Id.*

37. *Id.* at 624-25.

38. *Id.* at 625-30.

39. *Id.*

40. 384 U.S. 373 (1966).

41. *Id.* at 375.

42. *Id.*

43. *Id.* at 379-80. The Supreme Court used 18 U.S.C. § 1 as a guide to determine whether

Court ruled that “sentences exceeding six months for criminal contempt may not be imposed by Federal Courts, absent a jury trial or waiver thereof.”<sup>44</sup> Justice Douglas’ dissenting opinion correctly pointed out that the Court was focusing on the sentence actually imposed, not the authorized penalty. Douglas argued that the potential punishment was a better indicator of whether an offense was sufficiently serious to afford a right to a trial by jury.<sup>45</sup> Justice Douglas’ position was consistent with *Clawans*.

In *Duncan v. Louisiana*,<sup>46</sup> the United States Supreme Court held that the fourteenth amendment gave defendants in state courts a right to trial by jury in all criminal cases which would come within the Sixth Amendment’s guarantee if tried in a federal court.<sup>47</sup> In *Duncan*, the defendant was convicted of simple battery in Louisiana.<sup>48</sup> The district court sentenced the defendant to 60 days in jail and a \$150 fine.<sup>49</sup> The maximum punishment authorized was two years imprisonment and a \$300 fine.<sup>50</sup>

Stating in *Duncan* that “the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment,” the United States Supreme Court concluded that the defendant had been wrongfully denied a jury trial.<sup>51</sup> The Court reserved for a later case the resolution of “the exact location of the line between petty offenses and serious crimes.”<sup>52</sup>

In conjunction with *Duncan*, and on the same day, the United States Supreme Court decided *Bloom v. Illinois*.<sup>53</sup> In *Bloom*, the Court held that the rights to trial by jury set forth in *Duncan* apply to serious contempts.<sup>54</sup> Criminal contempt should be treated as a petty offense unless the actual punishment meted out makes it a serious one,<sup>55</sup> or the legislature expresses a judgment as to its seriousness by fixing a maximum penalty, in which

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the offense in *Cheff* was a petty offense. *Id.*; 18 U.S.C. § 1 (1982). The statute provides, “Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months” is a “petty offense.” 18 U.S.C. § 1 (1982).

44. *Cheff*, 384 U.S. at 380.

45. *Id.* at 387 (Douglas, J., dissenting).

46. 391 U.S. 145 (1968).

47. *Id.* at 149.

48. *Id.* at 146.

49. *Id.*

50. *Id.*

51. *Id.* at 161. In *Duncan*, the Court commented that the emphasis in *Cheff v. Schnackenberg* was the penalty imposed, but noted that the criminal contempt statute under which *Cheff* was prosecuted had no maximum punishment. *Id.* at 162 n.35. Thus, in *Cheff*, the Court simply used the actual sentence as the best evidence of the seriousness of the offense for which the defendant was on trial. *Duncan*, 391 U.S. at 162 n.35.

52. *Id.*

53. 391 U.S. 194 (1968).

54. *Bloom v. Illinois*, 391 U.S. 194 (1968).

55. *Id.* at 198.

event the authorized punishment would be examined.<sup>56</sup> Bloom had been sentenced to twenty-four months imprisonment, and the Court ruled he had wrongfully been denied a jury trial.<sup>57</sup>

In the last of this series of cases, the Supreme Court finally adopted a bright line rule. In a 5-3 decision, *Baldwin v. New York*<sup>58</sup> held that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."<sup>59</sup> The Court expressly rejected the division between misdemeanors and felonies as the criterion for distinguishing between petty and serious offenses.<sup>60</sup> The Court did not exclude the possibility that an offense for which the maximum imprisonment is six months or less could be classified as a serious offense based on its history and nature.<sup>61</sup> Two of the dissenters, Chief Justice Burger and Justice Harlan, would have permitted the states to decide where the line between petty and serious offenses should rest.<sup>62</sup> Justice Stewart, in his dissent, disagreed with the "incorporation theory" that has been used to make the sixth amendment obligatory on the states.<sup>63</sup>

### B. Minimum Size Requirements for Juries

The required size of the trial jury was one of the constitutional issues posed in *Williams v. Florida*.<sup>64</sup> The defendant had been convicted of robbery by a six person jury.<sup>65</sup> The State had refused to impanel a larger jury and Williams argued that this had violated his sixth amendment right to a jury trial as applied to the states through the fourteenth amendment in *Duncan*.<sup>66</sup>

Without setting a minimum number for a jury in a criminal case, the United States Supreme Court held that a twelve person jury was not necessary to protect the defendant's sixth amendment rights, but that a six person jury was sufficient.<sup>67</sup> The Court referred to the twelve person jury as a "historical accident."<sup>68</sup> In a footnote, the Court pointed out that *Williams* did not require the Court to determine the minimum number that constituted a jury under the sixth amendment.<sup>69</sup>

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56. *Id.* at 211.

57. *Id.*

58. 399 U.S. 66 (1970).

59. *Id.* at 69 (1970).

60. *Id.* at 70.

61. *Id.* at 69, n.6; see also *Williams v. Florida*, 399 U.S. 78, 121 (1970) (Harlan, J., dissenting to companion cases *Baldwin* and *Williams*).

62. *Baldwin*, 399 U.S. at 76 (Burger, J., dissenting); *Williams*, 399 U.S. at 117 (Harlan, J., dissenting to *Baldwin* and *Williams*).

63. *Williams*, 399 U.S. at 143 (Stewart, J., dissenting to *Baldwin* and *Williams*).

64. 399 U.S. 78 (1970).

65. *Id.* at 80.

66. *Id.* at 80, 86.

67. *Id.* at 86.

68. *Id.* at 89.

69. *Id.* at 91 n.25.

Seven years later, the Court decided the minimum number of jurors that is constitutionally necessary. In *Ballew v. Georgia*,<sup>70</sup> a five person jury convicted the defendant of a misdemeanor offense involving distribution of obscene materials.<sup>71</sup> Ballew argued that he was entitled to no less than a six person jury.<sup>72</sup> In an opinion that was unanimous as to result and varied as to reasoning, the Court ruled that a jury of less than six in state court proceedings deprived a criminal defendant of his sixth amendment right to trial by jury, as guaranteed by the fourteenth amendment.<sup>73</sup>

### C. Unanimity of the Verdict

In two cases decided the same day, *Johnson v. Louisiana*<sup>74</sup> and *Apodaca v. Oregon*,<sup>75</sup> the Court plunged into the morass of unanimous verdicts in criminal cases. Both cases dealt with the same question, but the constitutional issues were framed differently because Johnson was tried before the Supreme Court decided *Duncan*.<sup>76</sup> The *Johnson* parties agreed that *Duncan* was not retroactive.<sup>77</sup> Johnson was convicted of robbery by a 9-3 verdict, as authorized under Louisiana law.<sup>78</sup> The defendant argued that a less than unanimous verdict violated the reasonable doubt standard, which the due process clause of the fourteenth amendment required the state to satisfy in criminal cases.<sup>79</sup>

In *Apodaca*, the defendant had been convicted of several felonies by 11-1 verdicts.<sup>80</sup> Since the defendant's trial was post-*Duncan*, he argued that the less than unanimous verdict violated his right to a jury trial according to the Supreme Court's interpretation of that right in *Duncan*.<sup>81</sup> In both *Johnson* and *Apodaca*, the United States Supreme Court affirmed the convictions, ruling that neither due process nor the sixth amendment required a unanimous verdict.<sup>82</sup>

Both *Johnson* and *Apodaca* were 5-4 decisions, with Justice Powell casting the swing vote.<sup>83</sup> Justice Powell's rationale for voting to affirm both convictions was his belief that, while the sixth amendment does require

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70. 435 U.S. 223 (1978).

71. *Id.* at 227.

72. *Id.* at 226.

73. *Id.* at 228.

74. 406 U.S. 356 (1972).

75. 406 U.S. 404 (1972).

76. *Johnson v. Louisiana*, 406 U.S. 356, 358 (1972); *Duncan*, 391 U.S. at 145; *see supra* note 51 and text accompanying notes 46-52 (discussing *Duncan*).

77. *Johnson*, 406 U.S. at 358.

78. *Id.*

79. *Id.* at 359.

80. *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972). Oregon permitted a conviction on a 10-2 vote. *Id.*

81. *Id.*; *Duncan*, 391 U.S. at 145; *see supra* note 51 and text accompanying notes 46-52 (discussing *Duncan*).

82. *Johnson*, 406 U.S. at 363; *Apodaca*, 406 U.S. at 411.

83. *See Johnson*, 406 U.S. at 356; *Apodaca*, 406 U.S. at 404.



unanimous verdicts in federal cases, the fourteenth amendment does not obligate the states to incorporate all the elements of a jury trial in the federal system, in particular the federal requirement of unanimity.<sup>84</sup> Four of the Justices in *Apodaca* in addition to Justice Powell believed the sixth amendment required unanimous verdicts.<sup>85</sup>

*Burch v. Louisiana*<sup>86</sup> next called upon the Supreme Court to set the bottom limits of "non-unanimity."<sup>87</sup> The defendant had been convicted of a misdemeanor obscenity offense for which the maximum punishment was \$1000 and/or imprisonment for one year.<sup>88</sup> A 5-1 vote of the jury convicted the defendant.<sup>89</sup>

The Supreme Court decided that conviction by a non-unanimous six-member jury in a state criminal trial for a non-petty offense deprived an accused of his constitutional right to trial by jury.<sup>90</sup> Justice Rehnquist, writing on the unanimity issue, noted that the Court rendered no decision as to the "constitutionality of non-unanimous verdicts rendered by juries comprised of more than six members."<sup>91</sup> Thus, while less than unanimous verdicts of six-person juries are not permissible and a 9-3 verdict of a twelve-person jury is permissible, there are possibilities in between, such as a 7-5 verdict, whose validity remain undecided.

#### D. Permitted State Court Structures—Appeal De Novo

In 1888, the United States Supreme Court in *Callan v. Wilson*<sup>92</sup> considered whether a defendant could be denied a jury trial before a police court or a limited jurisdiction court, if the defendant had a de novo appeal of right with a jury in the second instance.<sup>93</sup> In *Callan*, the defendant faced a federal charge of conspiracy in the police court of the District of Columbia.<sup>94</sup> The Supreme Court first decided that the offense of conspiracy was not a petty offense.<sup>95</sup> The Supreme Court gave little credence to the government's contention that citizens of the District did not enjoy the protection of article

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84. *Johnson*, 406 U.S. at 369 (Powell, J., concurring with majority in *Johnson* and *Apodaca*).

85. *Apodaca*, 406 U.S. at 414. Justices Stewart, Brennan, Marshall, Douglas and Powell all agreed in *Apodaca* that the sixth amendment required unanimous verdicts, although Justice Powell believed that this sixth amendment requirement did not apply to state courts. *Id.*; *Johnson*, 406 U.S. at 369 (Powell, J., concurring).

86. 441 U.S. 130 (1979).

87. *Id.* at 131-32.

88. *Id.* at 132.

89. *Id.*

90. *Id.* at 134.

91. *Id.* at 138 n.11.

92. 127 U.S. 540 (1888).

93. *Id.* at 547, 551.

94. *Id.* at 540.

95. *Id.* at 555. The United States Supreme Court conceded in *Callan* that no right to trial by jury attached to certain types of petty offenses. *Id.*

III and the sixth amendment of the United States Constitution.<sup>96</sup> The Court further held that the court structure in question violated the Constitution, in particular the sixth amendment and article III.<sup>97</sup> These provisions embodied and guaranteed a right to trial by jury “in the court of original jurisdiction.”<sup>98</sup> In contrast to subsequent cases concerning the constitutionality of particular courts systems, *Callan* involved solely a question of the federal courts. The process of applying the Bill of Rights to the states had not yet begun at the time the Court decided *Callan*.

In *Colten v. Kentucky*,<sup>99</sup> the Quarterly Court of Fayette County convicted the defendant of disorderly conduct under a Kentucky statute that authorized a maximum punishment of a \$500 fine and six months in jail.<sup>100</sup> Kentucky’s court structure was very similar to Virginia’s and the defendant was tried in the equivalent of a Virginia General District Court.<sup>101</sup> The court found the defendant guilty.<sup>102</sup> The defendant then exercised his absolute right of appeal to Kentucky’s court of general trial jurisdiction.<sup>103</sup> The only major difference between the current Virginia court system and the Kentucky system was that the defendant in *Colten* could have had a six person jury at his first trial.<sup>104</sup> The defendant waived the jury at the first trial.<sup>105</sup> Since this was an offense carrying a maximum punishment not in excess of six months, access to a jury was not an issue on appeal.<sup>106</sup> Appeals from the lower or Kentucky Quarterly Court went to the circuit court; trials on appeal were de novo.<sup>107</sup>

Upon appeal from his conviction in circuit court, the defendant’s assertions embraced two issues. First, the defendant argued that forcing an accused to go through a second trial de novo exposed him to the possibility of increased punishment in the second trial, in violation of the due process clause and the holding in *North Carolina v. Pearce*.<sup>108</sup> Second, the defendant asserted that in the de novo trial, the fifth amendment’s double jeopardy

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96. *Id.* at 548-49.

97. *Id.* at 556.

98. *Id.* at 557.

99. 407 U.S. 104 (1972).

100. *Id.* at 107-08; KY. REV. STAT. § 437.016(1)(f) (Supp. 1968).

101. *See id.* at 108, 112 n.4.

102. *Id.* at 108.

103. *Id.*

104. *See id.* at 113.

105. *Id.*

106. *See supra* text accompanying note 100.

107. *Colten v. Kentucky*, 407 U.S. 104, 112-13 (1972).

108. *See id.* at 114, *citing* *North Carolina v. Pearce*, 395 U.S. 711 (1969). *Pearce* held that a more severe penalty after reconviction, when the first conviction was reversed, if imposed as punishment for having successfully appealed, would violate due process. 395 U.S. at 723-24. Because of the high frequency of such occurrences, the Supreme Court adopted a prophylactic rule, putting the burden on the government to show that appropriate and lawful reasons for the enhanced punishment in trial number two existed. *Id.* at 726.

clause prevented the second court from imposing a greater punishment than that meted out following conviction in the first trial.<sup>109</sup>

The Court held that *Pearce* was not violated since there was nothing in the record or briefs to show that the procedure penalized a defendant for seeking a trial de novo, or to show that the procedure deterred a defendant from exercising the right to trial de novo.<sup>110</sup> Colten also lost on the double jeopardy issue, with the Court noting that a defendant could effectively bypass the lower court by simply pleading guilty and immediately appealing.<sup>111</sup>

In 1976, the United States Supreme Court examined the Massachusetts' two-tier court system in *Ludwig v. Massachusetts*.<sup>112</sup> The Massachusetts system was similar to Virginia's with several exceptions: (1) the lower court had some felony trial jurisdiction; (2) if a defendant pled guilty in the lower court, he lost his right on appeal to a full de novo trial in the court of general trial jurisdiction and was limited to only a sentence review; and (3) even though the lower court conviction was appealed and the defendant was entitled to a de novo trial on appeal, with a jury if requested, the lower court conviction could still carry certain collateral consequences, such as loss of a driver's license and revocation of parole.<sup>113</sup>

The Supreme Court considered two issues in this case. First, the Court considered whether the constitutional guarantee of trial by jury, as decided in *Duncan*, required that a defendant be afforded a jury trial in the first instance, in the lowest level of courts.<sup>114</sup> Next, the Court looked at whether the Massachusetts' court structure resulted in a violation of the fifth amendment's double jeopardy protection as it applied to the states.<sup>115</sup>

The Supreme Court answered both inquiries in the negative.<sup>116</sup> The court structure or procedure did not violate the fourteenth amendment by placing an unconstitutional burden on the exercise of the defendant's right to a jury merely because the defendant had to endure the first trial before reaching the second trial, where an opportunity for a jury existed.<sup>117</sup> Nor did the possibility of harsher punishment at the trial de novo on appeal offend the prohibition of *North Carolina v. Pearce*.<sup>118</sup>

The Court further reasoned that the fifth amendment protection against double jeopardy was not violated in that the appeal de novo by a defendant put him in no different position with regard to retrial than a defendant who

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109. Colten, 407 U.S. at 119.

110. *Id.* at 116.

111. *Id.* at 119.

112. 427 U.S. 618 (1976).

113. *Id.* at 621-622.

114. *Id.* at 620.

115. *Id.*.

116. *Id.* at 630, 631-32.

117. *Id.* at 630.

118. *Id.* at 627; see *supra* note 108 (discussing *Pearce*); see also Colten, 407 U.S. at 114 (citing *Pearce*).

appeals on the record and whose conviction is reversed.<sup>119</sup> In the latter instance the state in many circumstances can retry the defendant.<sup>120</sup>

The Court distinguished from *Ludwig* the holding in *Callan v. Wilson* that the denial of an initial jury trial in a court system which permitted appeal de novo with a jury was unconstitutional.<sup>121</sup> The Court distinguished *Callan* from *Ludwig* because *Callan* involved article III of the Constitution, which is not applicable to the states.<sup>122</sup> In *Callan* the court structure required the defendant to be “fully tried” before he obtained the right to a jury trial, whereas this was not true in Massachusetts.<sup>123</sup>

On first reflection, Virginia’s system would pass constitutional muster under *Ludwig* since Virginia permits a defendant to plead guilty in the general district court, to waive presentation of the evidence and then to appeal the conviction, and since Virginia law entitles the defendant on appeal to a trial de novo with a jury.<sup>124</sup> On close examination, however, it must be kept in mind that *Ludwig* was a 5-4 decision.<sup>125</sup> The four dissenters, Justices Stevens, Brennan, Stewart and Marshall would apply the rule of *Callan* and require state proceedings to afford each defendant a jury trial in the first instance.<sup>126</sup> Justice Stevens wrote in the dissenting opinion, “all of the legitimate benefits of the two-tier system could be obtained by giving the defendant the right to waive the first tier trial completely.”<sup>127</sup>

The swing vote in *Ludwig* was that of Justice Powell, who concurred in the result because it was consistent with his view that the “right to a jury trial afforded by the fourteenth amendment is not identical to that guaranteed by the sixth amendment.”<sup>128</sup> This should not be construed as an expression of support for the two-tier system as found in Virginia.

119. *Ludwig v. Massachusetts*, 427 U.S. 618, 631 (1976).

120. *Id.* at 632. *Ludwig* predated *Burks v. United States*, which prohibited retrial where a conviction is reversed on appeal due to insufficient evidence in the trial court to support a conviction. See *Burks v. United States*, 437 U.S. 1 (1978).

121. *Ludwig*, 427 U.S. at 629-30; *Callan v. Wilson*, 127 U.S. 540 (1888); see *supra* text accompanying notes 92-98 (discussing *Callan*).

122. *Ludwig*, 427 U.S. at 629-30.

123. *Id.* at 630; *Callan*, 127 U.S. at 557. Counsel for *Ludwig* advised the Court at oral argument that under an informal non-statutory procedure, a defendant could submit to informal admissions of facts. The defendant would not challenge the government’s presentation of the evidence in an abbreviated form. The Court would then convict the defendant and he in turn would note an appeal. This accelerated the trial and avoided a guilty plea (which forfeits any right to a full trial de novo on appeal). *Ludwig*, 427 U.S. at 620-22, 636 n.2. The United States Supreme Court reasoned that this was less than the being “fully tried” that the defendant in *Callan* had had to endure. *Id.* at 630; *Callan*, 127 U.S. at 557.

124. VA. CODE § 16.1-132 (1982).

125. See *Ludwig*, 427 U.S. at 619, 632.

126. *Id.* at 638 (Stevens, J., dissenting).

127. *Id.* at 634 (Stevens, J., dissenting).

128. *Id.* at 632. Justice Powell’s position in *Ludwig* was articulated in *Apodaca v. Oregon*, in Justice Powell’s concurring opinion. See *id.* at 632; *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Powell, J., concurring in both *Apodaca* and *Johnson*); *supra* text accompanying notes 74-85 (discussing *Apodaca* and *Johnson*).

With the question of whether a two-tiered system like Virginia's resulted in an unconstitutional impact on a defendant's right to a jury trial laid to rest for the moment, the next attack came from another direction. The stage was set by the United States Supreme Court's decision in *Burks v. United States*.<sup>129</sup>

In *Burks*, the Court held that the state cannot retry a defendant wrongfully convicted on insufficient evidence.<sup>130</sup> The double jeopardy clause of the fifth amendment prohibits retrial, even if the defendant seeks the reversal and asks by way of relief for a new trial.<sup>131</sup> The Court's reasoning was simple. The appellate court's ruling in reversing a conviction for insufficiency of the evidence was tantamount to a ruling that the trial court should have directed an acquittal. Since the defendant could not be retried if the trial court had directed an acquittal, the defendant should be in no worse position for having to appeal his case in order to get the correct ruling as to the sufficiency of the evidence.<sup>132</sup>

By analogy, it is an easy leap from *Burks* to the two-tier trial system. If, in Virginia, a general district court were to acquit a defendant because of insufficient evidence, the protection against double jeopardy would bar retrial. If the court wrongfully convicted the defendant on insufficient evidence and the defendant appealed, however, he would be tried again de novo. Since the defendant has no opportunity to appeal the question of insufficient evidence in trial number one in a two-tier system, this type of court structure arguably violates double jeopardy and the rule of *Burks*.

This was the issue posed in *Justices of Boston Municipal Court v. Lydon*.<sup>133</sup> Massachusetts had modified its court structure after *Ludwig* so that a defendant could elect to: (1) have a first tier bench trial with a right of appeal to a superior court and a jury trial de novo; or (2) elect to go straight to the second tier trial court with a bench trial.<sup>134</sup> This elective feature was commented on several times in the various opinions in *Lydon*, but it is not possible to determine if it was a persuasive factor in the opinions of any of the members of the Court.

The Justices of the Supreme Court filed five opinions.<sup>135</sup> Justice White wrote the opinion for the Court, finding that the Massachusetts' system as changed in 1978 did not violate the holding in *Burks*.<sup>136</sup> Using a concept of "continuing jeopardy,"<sup>137</sup> Justice White reasoned that double jeopardy cannot prohibit the second trial de novo unless the first trial ended with an

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129. 437 U.S. 1 (1978).

130. *Id.* at 18.

131. *Id.*

132. *See id.* at 16.

133. \_\_\_ U.S. \_\_\_, 104 S. Ct. 1805 (1984).

134. *Id.* at \_\_\_, 104 S. Ct. at 1816 n.9.

135. *Id.* at \_\_\_, 104 S. Ct. at 1805.

136. *Id.* at \_\_\_, 104 S. Ct. at 1812, 1814.

137. *Id.* at \_\_\_, 104 S. Ct. at 1813.

acquittal.<sup>138</sup> Lydon had not been acquitted, he simply argued that he should have been.<sup>139</sup> The Supreme Court further held that Lydon had no constitutional right to a judicial determination of the sufficiency of the evidence at the first tier bench trial,<sup>140</sup> and that the decision in *Ludwig* was dispositive of the double jeopardy issue posed by *Lydon*.<sup>141</sup>

In a concurring opinion, Justice Brennan, joined by Justice Marshall, agreed with Justice White that jeopardy would have had to terminate in the first trial in order for double jeopardy to come into issue.<sup>142</sup> The term "continuing jeopardy" without more, however, was a "conceptual abstraction," according to Justice Brennan.<sup>143</sup> Justice Brennan argued that common sense leads one to conclude that the proceedings against Lydon terminated upon a conviction in the first trial.<sup>144</sup> A guilty verdict at the first tier, however, is not attended by the type of circumstances that could be said to "terminate" trial proceedings against Lydon for purposes of the double jeopardy clause.<sup>145</sup> The verdict had "substantially less significance for the defendant than it would have in a traditional one tier system."<sup>146</sup>

In a second concurring opinion, Justice Stevens urged that the defendant should have completed the second tier trial and then, on appeal, asked for review of the sufficiency of the evidence in the first tier trial.<sup>147</sup> If at that point the court determined that the evidence in the first trial was insufficient, the defendant's conviction at trial number two should be reversed and the defendant should be discharged, even if the evidence at trial number two was sufficient.<sup>148</sup> Justice Stevens was the only member of the Court to agree with Lydon's position that he was entitled to appellate review of the sufficiency of the evidence in the first trial and to acquittal if it was found to be insufficient.<sup>149</sup> Lydon had brought a habeas corpus proceeding after the first trial and before trial number two.<sup>150</sup> Justice Stevens thought he was premature.<sup>151</sup> The Stevens opinion does take note of the election option a

138. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1813. A conviction that was neither vacated by the defendant appealing with a trial de novo, nor reversed on appeal, would also bar retrial on the same charge.

139. *Id.*

140. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1811.

141. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1812.

142. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1819 (Brennan, J., concurring in part).

143. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1817.

144. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1817.

145. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1822.

146. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1822.

147. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1826 (Stevens, J., concurring).

148. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1825 (Stevens, J., concurring).

149. *See id.* at \_\_\_\_\_, 104 S. Ct. at 1824 (Stevens, J., concurring).

150. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1809.

151. *Id.* at \_\_\_\_\_, 104 S. Ct. at 1824-25 (Stevens, J., concurring); *see Berry v. Commonwealth*, 383 Mass. 793, 473 N.E.2d 1115 (1985). Basing its decision on common law protection from double jeopardy, the Supreme Judicial Court of Massachusetts held that a defendant whose first trial ended with a hung jury is entitled to a appellate review of the sufficiency of

defendant has under the Massachusetts' system.<sup>152</sup>

Correlation of the opinions in *Lydon* is difficult. Justices White, Blackmun, Rehnquist, Brennan, Marshall, Powell and Burger all appear to agree that the failure to provide Lydon with appellate review of the sufficiency of the evidence at the first trial did not and would not violate double jeopardy rights, even if that evidence was in fact insufficient to support the conviction.<sup>153</sup> In the opinions representing five of the Justices, however, sufficient discussion of the "election" feature exists to raise the question of how the Court would treat the issue in a non-elective system.

In examining the appeal and trial de novo system in Virginia, and any modification of it, the unknown weight given to the "election" features in *Lydon* may be significant. A statement exists in the White opinion, from which Justices Blackmun and Rehnquist did not offer differing views, that *Ludwig v. Massachusetts*<sup>154</sup> was dispositive of the double jeopardy issue, even though the court system in that case required a defendant to participate in the first tier trial.<sup>155</sup> Virginia's argument in favor of the existing system is that a defendant can simply plead guilty in the general district court, permit the court to pass judgment, and then immediately appeal without any adverse material consequences from the guilty plea.<sup>156</sup>

#### IV. FEDERAL LIMITATIONS IN CIVIL CASES<sup>157</sup>

The seventh amendment to the United States Constitution, which provides a right to trial by jury in suits at common law where the amount in controversy exceeds twenty dollars, has never been held applicable to the states. At least one commentator has argued that the states could abolish civil juries entirely without offending the United States Constitution.<sup>158</sup> The United States Supreme Court affirmed, without oral argument or opinion, a decision of a three judge court of the United States District Court for the Eastern District of Louisiana in *Melancon v. McKeithen*<sup>159</sup> which had held that the seventh amendment was not binding on the states through the

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the evidence at trial number one before the state can try him a second time. 473 N.E.2d at 1119.

152. *Justices of Boston Municipal Court v. Lydon*, \_\_\_U.S.\_\_\_\_, 104 S. Ct. 1805, 1825 n.2 (1984). Justice O'Connor's views on the sufficiency issue in *Lydon* are not given. In a separate opinion, she never reached the evidentiary question, but urged instead that the Court did not have jurisdiction in the habeas corpus proceeding because the defendant was not in custody. *Id.* at \_\_\_\_, 104 S. Ct. at 1830 (O'Connor, J., concurring in the judgment).

153. *Id.* at \_\_\_\_, 104 S. Ct. at 1814, 1815, 1819.

154. *See supra* notes 112-128 (discussing *Ludwig*).

155. *Lydon*, 104 S. Ct. at 1812 (1982).

156. VA. CODE § 16.1-132 (198 ).

157. *See generally* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) (detailed history of right to civil jury trial embodied in seventh amendment to U.S. constitution).

158. Karlen, *Can a State Abolish the Civil Jury?*, 1965 WIS. L. REV. 103, 104 n.4 (1965).

159. 409 U.S. 943 (1972).

fourteenth amendment.<sup>160</sup> The district court had opined that, absent a “total incorporation” making the entire Bill of Rights binding on the states, “a civil jury trial is not so implicit in the concept of ordered liberty in a cooperative federalism as to be required of the states by due process.”<sup>161</sup> The district court did recognize a tendency of the United States Supreme Court to “apply the principles of the Seventh Amendment to state civil cases in suits involving federally created rights.”<sup>162</sup> The court admitted that the same arguments used to require a jury in state civil trials involving litigation of federal statutory rights could be used in favor of applying the seventh amendment to all state civil trials.<sup>163</sup>

#### V. FEDERAL REQUIREMENTS THAT A LITIGANT IN A STATE COURT BE AFFORDED SOME RIGHT OF APPELLATE REVIEW

In considering the options that are available for altering Virginia’s court structure, a necessary inquiry is what, if any, constitutional duty a state has to provide the right to appeal. This is separate and distinct from the question of entitlement to a jury trial. The United States Supreme Court addressed the issue of the state’s duty to provide for appeals as early as 1894, in *McKane v. Durston*.<sup>164</sup> The Court held that due process did not require a state to provide any appellate review of a final judgment in a criminal case.<sup>165</sup> The holding in *McKane* remains undisturbed today and has been frequently cited.<sup>166</sup> If a state does elect to provide a right of appellate review, then it must be done in a non-discriminatory manner that satisfies the due process and equal protection clauses of the United States Constitution.<sup>167</sup>

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160. *Melancon v. McKeithen*, 345 F. Supp. 1025, 1045 (E.D. La., *aff’d without opinion*, 409 U.S. 943, *aff’d*, 409 U.S. 1098 (1972). *See also* *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1876) (affirming that not all trials in state courts require juries).

161. *Melancon*, 345 F. Supp. at 1045; *accord*, *Bringe v. Collins*, 274 Md. 338, 343, 335 A.2d 670 (Ct. App. 1975); *W. S. Forbes & Co. v. Southern Cotton Oil Co.*, 130 Va. 245, 256, 108 S.E. 15, 18 (1921). *See* *Fisher, The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507 (1973) (concerning required size of federal juries); *see also* *Henderson, The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966-67) (arguing that seventh amendment was not intended to codify rigid form of jury).

162. *Melancon*, 345 F. Supp. at 1044. *Contra* *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 214 (1916); *Chesapeake & Ohio Ry. Co. v. Carnahan*, 118 Va. 46, 50, 86 S.E. 863, 865-67 (1915), *aff’d*, 241 U.S. 241 (1916).

163. *Melancon*, 345 F. Supp. at 1044.

164. 153 U.S. 684 (1894).

165. *Id.* at 687.

166. *Evitts v. Lucey*, \_\_\_ U.S. \_\_\_, 105 S. Ct. 830, 834 (1985); *Griffin v. Illinois*, 351 U.S. 12, 18 (1955); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937). *See also* *Dix, Appellate Review of Decision to Impose Death*, 68 GEO. L. J. 97, 106 n.77 (1979-80) (citing *McKane* to support assertion that appellate review of capital cases is not a constitutional matter).

167. *Evitts v. Lucey*, \_\_\_ U.S. \_\_\_, 105 S. Ct. 830, 834 (1985); *Jones v. Barnes*, 463 U.S. 745 (1983); *Blackledge v. Perry*, 417 U.S. 21 (1974); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12, 18 (1955).



In *Ohio v. Akron Metropolitan Park Dist.*,<sup>168</sup> the ruling in *McKane* was applied to a civil case.<sup>169</sup> In 1974, the Virginia Supreme Court cited *McKane* with approval in the case of *Saunders v. Reynolds*.<sup>170</sup>

## VI. STATE CONSTITUTIONAL LIMITATIONS IN CRIMINAL CASES

According to Article I, Section 8 of the Virginia Constitution, a defendant in a criminal prosecution has the right to a jury trial, except that a defendant accused of an offense not felonious may be tried initially without a jury in a court not of record, so long as he is afforded the right of appeal and a jury in a court of general trial jurisdiction.<sup>171</sup> The question is whether the provision in the Virginia Constitution will permit the same classification between serious and petty offenses as was recognized in *Duncan v. State of Louisiana*.<sup>172</sup> If not, absent a change of major significance in the state constitution, the options available to eliminate or modify appeal de novo in Virginia are severely limited.

In *Ragsdale v. Danville*,<sup>173</sup> the Virginia Supreme Court recognized that the term "criminal offense" as used in article I, section 8 did not include all offenses.<sup>174</sup> There are some acts or omissions that "are not regarded essentially as crimes and misdemeanors within the purview of the constitutional guarantees referred to."<sup>175</sup> In this case, the Court held that a summary conviction under a local ordinance in a mayor's court where the fine was \$10.00 or less could be made final by the Danville City Charter without violating the state constitution.<sup>176</sup>

A predecessor offense to our present "Blue Laws"<sup>177</sup> was the subject of *Ex Parte Marx*.<sup>178</sup> The defendant was charged and convicted of violating the

168. 281 U.S. 74 (1930).

169. *Id.* See Scott, *Models of the Civil Process*, 27 STAN. L. REV. 927, 934 n.18 (1975) (right of appeal is never constitutionally guaranteed in civil or criminal cases).

170. 214 Va. 697, 204 S.E.2d 421 (1974).

171. VA. CONST. art. I, § 8. Article I, Section 8 of the Virginia Constitution reads, in part: In criminal prosecutions a man . . . shall enjoy the right to a speedy and public trial, by an impartial jury. . . . Laws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction.

*Id.* This provision as to the right to trial by jury in criminal prosecutions has remained basically unchanged since 1776. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968).

172. 391 U.S. 145 (1968). See *supra* notes 46-52 (discussing *Duncan*).

173. 116 Va. 484, 82 S.E. 77 (1914).

174. *Id.* at 486-88, 82 S.E. at 77-78.

175. *Id.* at 486, 82 S.E. at 78. See also J. DILLON, MUNICIPAL CORPORATIONS § 439 (4th ed. 1890).

176. *Ragsdale v. Danville*, 116 Va. 484, 489, 82 S.E. 77, 78 (1914).

177. VA. CODE §§ 18.2-341 - 18.2-343 (Supp. 1984).

178. 86 Va. 40, 9 S.E. 475 (1889); see *Wells v. Commonwealth*, 107 Va. 834, 57 S.E. 588 (1907).

Sabbath.<sup>179</sup> The Court determined that the proceeding was in fact a civil suit to collect a forfeiture for the offense.<sup>180</sup> In dicta, the Court observed that the reference to criminal prosecutions in the Virginia Bill of Rights should be construed as prosecutions involving “the right of trial by jury as it existed at the time the constitution was adopted. It is the right as known and enjoyed by the people of the State at that time that is preserved and guaranteed by the Constitution.”<sup>181</sup> Offenses such as disorderly conduct, swearing, drunkenness, and vagrancy were handled in a summary fashion at common law, with no right to trial by jury.<sup>182</sup> The Court further noted that Pomeroy, in his work on statutory construction and constitutional law, supports the rule that a “constitution speaks from the time of its adoption.”<sup>183</sup>

This analysis, looking at the right of trial by jury at common law, is the same approach the United States Supreme Court took in *Duncan v. Louisiana*.<sup>184</sup> *Duncan*, and the cases that followed, ultimately ruled that any offense for which the authorized punishment exceeded six months carried with it the sixth amendment right to a jury trial.<sup>185</sup> While the case law has acknowledged that some offenses punishable by less than six months in jail might be classified as non-petty crimes, generally the maximum authorized punishment has been the “bright line” test.<sup>186</sup>

Identifying cases that would not carry a state constitutional right to a jury trial in Virginia would depend on whether the Virginia Supreme Court accepts the conclusion of the United States Supreme Court as to what rights to trial by jury existed at common law in criminal cases. The sixth amendment to the United States Constitution does not contain the language “offenses not felonious,” but does employ the same term “in all criminal prosecutions.”<sup>187</sup>

In a very early case, *Miller v. Commonwealth*,<sup>188</sup> the Virginia Supreme Court noted the similarity of language in the Virginia Constitution and the constitution of the United States guaranteeing the right to trial by jury in all

179. *Ex Parte Marx*, 86 Va. 40, 40-41, 9 S.E. 475, 476 (1889).

180. *Id.* at 43, 9 S.E. at 476.

181. *Id.* at 48, 9 S.E. at 478; *accord Fogg v. Commonwealth*, 192 Va. 819, 823, 66 S.E.2d 841, 843 (1951); *Trigally v. Mayor of Memphis*, 46 Tenn. (6 Cold.) 382, 385 (1869); *Byers and Davis v. Commonwealth*, 42 Pa. 89, 94 (1862).

182. *Marx*, 86 Va. at 48, 9 S.E. at 478.

183. *Id.* at 49, 9 S.E. at 478; T. SEDGWICK & J. POMEROY, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 487 (2d ed. 1874).

184. *Duncan*, 391 U.S. at 160.

185. *See supra* notes 46-63 and accompanying text (discussing *Duncan*, *Bloom*, and *Baldwin*).

186. *See supra* note 39 and accompanying text.

187. U.S. CONST. amend. VI; *cf.* VA. CONST. art. I, § 8. The phrase “criminal prosecutions” was used as early as George Mason’s *First Draft of the Virginia Declaration of Rights* in 1776. THE PAPERS OF GEORGE MASON, Vol. I, 276 (R. Rutland ed. 1970).

188. 88 Va. 618, 14 S.E. 161 (1892).

criminal prosecutions.<sup>189</sup> The Court described the language in the two constitutions as "substantially the same."<sup>190</sup> The court also acknowledged the existence of a group of charges that it labeled "petit offenses" which were tried at common law without a jury.<sup>191</sup> Professor A. E. Dick Howard, in his book *Commentaries on the Constitution in Virginia*,<sup>192</sup> confirms that Virginia courts have recognized a class of petty cases below misdemeanors to which the constitutional provision guaranteeing a jury trial does not apply.<sup>193</sup>

Perhaps the major potential impact of the issue lies in the area of traffic infractions. Minor traffic offenses have been "decriminalized" in Virginia and are treated as something less than a misdemeanor.<sup>194</sup> This type of offense represents a large portion of the general district court caseload and of the appeals noted from general district court convictions. In 1984, it is estimated that 71% of the appeals from general district courts, other than civil appeals, were traffic infraction convictions.<sup>195</sup> If a traffic infraction is a "petty" offense, and one for which article I, section 8 of the Virginia Constitution does not guarantee a jury trial, then the decision of the general district court could be final, or provisions for appeal could be amended to offer an appeal on the record. Such statutory modifications are possible without constitutional amendment.

The other area of offenses that could be excluded from those for which a conviction carries the right to appeal de novo are Class IV and Class III Misdemeanors, offenses which do not carry any jail time as potential punishment.<sup>196</sup> Again, depending on how the Virginia Supreme Court defines offenses that are criminal prosecutions, Class II Misdemeanors, which are punishable by no more than six months in jail, might also be classified as "petty."

In 1972 the Virginia Supreme Court had an opportunity to review the de novo system of appeals in criminal cases in Virginia. The court held that de novo appeal was constitutional,<sup>197</sup> and that the decision in *Callan v. Wilson*<sup>198</sup> was inapplicable to the States.<sup>199</sup>

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189. *Id.* at 622, 14 S.E. at 163.

190. *Id.* at 623, 14 S.E. at 163.

191. *Id.* at 620-21, 14 S.E. at 162.

192. A.E.D. HOWARD, COMMENTARIES ON THE CONSTITUTION IN VIRGINIA (1974). Professor Howard served as Executive Director of the Virginia Commission on Constitutional Revision.

193. *Id.* at 145.

194. VA. CODE §§ 18.2-8, 19.2-258.1 (1982).

195. Virginia Supreme Court, Office of the Executive Secretary.

196. VA. CODE §18.2-11(c)-(d) (1982).

197. *Manns v. Commonwealth*, 213 Va. 322, 324, 191 S.E.2d 810, 812 (1972).

198. *See supra* notes 92-98 (discussing *Callan*).

199. *Manns*, 213 Va. at 324, 191 S.E.2d at 811; *accord* *Whitmarsh v. Commonwealth*, 366 Mass. 212, 316 N.E.2d 610, 616 (1974); *Walker v. Dillard*, 363 F. Supp. 921 (D.C. W.D. Va. 1973); *contra* *State v. Holliday*, 109 R.I. 93 280 A.2d 333, 338 (1971).

## VII. STATE CONSTITUTIONAL LIMITATIONS IN CIVIL CASES

In the federal system, the language "in suits at common law" found in the seventh amendment was long thought to be a reference to the scope of the right to a trial by jury in civil cases, as of 1791.<sup>200</sup> The United States Supreme Court instituted a trend toward use of a more flexible approach in *Beacon Theatres, Inc. v. Westover*.<sup>201</sup> During the colonial period a strong preference for the use of juries existed in the colonies, even to the extent of permitting juries to make findings of law as well as fact.<sup>202</sup>

The lack of uniformity among the original colonies with respect to the right to jury trials in civil cases creates a problem in attempting to use the custom or practice of that era to determine the constitutional scope of this right. Beyond general agreement on the desirability of juries in civil cases no consensus existed.<sup>203</sup> Therefore references to the right of trial by jury as found at common law requires one to look to the English practice of the time,<sup>204</sup> or to the rights of litigants in a particular state or colony in the 1700's. As one court succinctly stated, "It is paradoxical and anachronistic to assert that the civil jury of 1791 is necessary to assure fair trials in suits at common law in this country when civil juries have been all but done away with in England, the source of the common law."<sup>205</sup>

The Virginia Supreme Court has consistently defined the scope of the right to a jury in civil cases by reference to the right as it was known at the time the Virginia Constitution was adopted in 1776.<sup>206</sup> In determining whether a litigant has a present day right to a jury trial in a civil case, a court must decide if a right to a jury existed or would have existed for the cause of

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200. See *Bowman v. Va. State Entomologist*, 128 Va. 351, 372, 105 S.E. 141, 148 (1920) ("It has long been well settled that neither the State nor the Federal Constitution guarantees or preserves the right of trial by jury except in those cases where it existed when these Constitutions were adopted.")

201. 359 U.S. 500 (1959); see Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979).

202. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Litigation*, 128 U. PA. L. REV. 829, 834-35 (1980); L. MOORE, *THE JURY—TOOL OF KINGS—PALLADIUM OF LIBERTY*, 107 (1973).

203. Henderson, *supra* note 163, at 299.

204. See C. JOINER, *CIVIL JUSTICE AND THE JURY*, 39 (1962); HOWARD, *supra* note 192, at 244. While earlier legal historians credited the Magna Carta as the source of the English right to trial by jury, it is now believed to have its origin in the period after the Norman conquest. C. JOINER, *CIVIL JUSTICE AND THE JURY* 39 (1962); HOWARD, *supra* note 192, at 244.

205. *Melancon v. McKeithen*, 345 F. Supp. 1025, 1035 (E.D. La.), *aff'd without opinion*, 409 U.S. 943, *aff'd*, 409 U.S. 1098 (1972). Juries in civil cases in England have been all but eliminated. *Id.* at 1034.

206. *Standardsville Volunteer Fire Co. v. Berry*, 1 VLR 1483, 1488 dec. June 14, 1985; *Alexander v. Commonwealth*, 212 Va. 554, 555, 186 S.E.2d 43, 44 (1972), *reh. den.* 414 U.S. 881, *vac.* 413 U.S. 836 (1973); *W. S. Forbes & Co. v. Southern Cotton Oil Co.*, 130 Va. 245, 262-63, 108 S.E. 15, 21 (1921); *Pillow v. Southwest Va. Imp. Co.*, 92 Va. 144, 149, 23 S.E. 32, 33 (1895).

action in question at the time the Virginia Constitution first became effective.<sup>207</sup> In 1920, for example, the Virginia Supreme Court held that Virginia's Cedar Rust law was constitutional even absent any provision for trial by jury prior to the taking and destruction of property, because no right to trial by jury existed at common law in this type of summary proceeding and none had been specifically provided for by statute.<sup>208</sup>

Virginia has provided the guarantee of a jury in civil cases since the first constitution was adopted in 1776.<sup>209</sup> Few changes have occurred from the original language to that of the present constitution.<sup>210</sup> In fact, the first Charter of Virginia in 1606 provided that all subjects in the colonies would have the same rights as those born in or residing in England.<sup>211</sup>

The scope of the present article I section 11 of the Virginia Constitution which provides that "in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred" will determine the extent to which the General Assembly can limit rights of appeal from the general district court in civil cases. Modifications of the right to appeal would affect access to a jury. Article I, section 11 controls whether a dollar threshold could be imposed as a condition of access to a jury. Presently, in order to appeal from a general district court decision in a civil case, the amount in controversy must exceed \$50.<sup>212</sup> Consequently, when the amount in dispute is less than \$50, the parties are even now denied an opportunity for a jury trial. Apparently no case law exists regarding the constitutionality of this limitation, yet this restriction has been in the Virginia Code for many years.

In looking at the court structure in Virginia in the seventeenth century, one finds inferior courts in which trials were held in summary fashion, without juries.<sup>213</sup> Rights of appeal to courts of general trial jurisdiction existed, however, with a jury available there.

In the early 1600's, the Virginia Colony had a court in Jamestown composed of the Governor and his Council. Commissioners (usually three) held monthly courts in the outlying areas. The proceedings were summary in nature with no juries. A right of appeal to the Governor at Jamestown existed, however, where there was also a right to trial by jury.

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207. *See Pillow*, 92 Va. at 149, 23 S.E. at 33.

208. *Bowman v. Va. State Entomologist*, 128 Va. 351, 372, 105 S.E. 141, 148 (1920).

209. 1 HENNING'S STATUTES 49 (1619-1660) (citing Declaration of Rights adopted at General Convention in Williamsburg, May 6, 1776 and agreed to June 12, 1776).

210. HOWARD, *supra* note 192, at 244; *Problems*, *supra* note 173, at 171.

211. MOORE, *supra* note 202, at 97.

212. VA. CODE §§ 16.1-106, 16.1-113 (1982). *But see id.* § 8.01-336B (1982) (suggesting that a case involving over \$50 can be appealed, but unless amount in dispute is \$100 or more, no right to trial by jury in circuit court exists).

213. David T. Konig, Ph.d., Research Fellow at The Colonial Williamsburg Foundation, furnished the information that follows. *See also* 1 HENNING'S STATUTES, 132-133 & 435 (1629); T. SEDGWICK & J. POMEROY, *supra* note 185.

By the 1630's counties had been created and there was a county court in each one. The right to trial by jury in civil cases in these county courts was well established by 1642.

In 1658, a statute provided for a right of appeal to the county court from decisions of justices of the peace, who tried small matters without a jury and in a summary fashion. The appeal was de novo. From the records of these proceedings, appeals apparently were seldom taken when the amount in dispute was less than an amount roughly equivalent to two months gross earnings of a tobacco farmer.

It is important to note that, as early as the mid 1600's, a right of appeal de novo existed in civil cases to courts of general trial jurisdiction where a jury was available. No statutory dollar threshold existed, although in practice, only cases involving substantial amounts of money were in fact appealed.

In inquiring as to the rights and customs either at common law, or in Virginia at the time the state constitution was first adopted, it appears that the Virginia Supreme Court might take either of two positions. First, the court might follow a literal reading of the statutes and the state's common law in the 1600's and 1700's. These statutes guaranteed access to a jury in any civil case for damages, regardless of how trifling the sum in controversy. Therefore, a reasonable conclusion is that this right exists today, and consequently, conditioning the right to a jury on a given amount in controversy is unconstitutional. In the alternative, the court might look to the actual practice or custom which resulted in jury trials only when substantial sums of money were involved. Therefore, the General Assembly can define a dollar threshold as a prerequisite to a litigant's entitlement to a jury.

#### VIII. ADVANTAGES AND DISADVANTAGES OF THE DE NOVO SYSTEM<sup>214</sup>

Vigorous proponents and opponents of the de novo structure exist. Some of the arguments are based on objective analysis, others on a particular perspective of the system. Following is a summary of the principal issues most frequently raised.

A. *Congestion.* Proponents suggest the de novo system permits the rapid and efficient disposition of a large number of minor cases, while still protecting the right of a defendant to trial by jury. The low percentage of appeals supports the position that defendants are mostly satisfied with the results in the lower court.

Opponents argue that the de novo appeal creates extra caseload at the general trial court level, and that it would be less burdensome on the system as a whole to provide a jury trial at the first instance if a defendant desires

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214. See generally Robertson and Walker, *Trial De Novo in the Superior Court - Should It Be Abolished?*, 56 MASS. L. Q. 347 (1971); NATIONAL CENTER FOR STATE COURTS, VIRGINIA COURT ORGANIZATION STUDY (June 1979).

trial by jury. The response to this argument is that permitting a jury trial at the entry level would substantially increase the number of jury trials, causing congestion, not reducing it. Proponents of de novo appeal also argue that appeals with a jury do not take as long as felony jury trials. Opponents urge that experience has shown that in systems with only one trial level available, few defendants ask for jury trials.

B. *Fairness.* Several arguments exist regarding the fairness of the de novo system. Proponents contend that the de novo procedure safeguards the rights of the innocent, disposes of weak government cases and helps convince the guilty defendant that there are no advantages to appealing.

Opponents suggest it permits a minor offender two trials or chances to be acquitted, but a felony defendant only one. Further it permits a defendant to use the first level trial for discovery, since he can simply hear the government's case and offer no evidence. This improves a defendant's chances for acquittal at the next level. It is also said that the extra burden of the second trial chills a defendant's desire for a jury as does the risk of greater punishment.

Opponents also urge that the de novo system favors the wealthy who can afford the expense, time off from work and other burdens of going through two trials. The poor cannot afford this luxury. For example, the criminal defendant without resources for bond might have to remain in jail for long periods before getting the second trial, and his first opportunity for a jury.

In response, the counter argument notes that indigents are entitled to a court appointed attorney in the more serious cases. Further, while counsel fees and other costs of the proceeding are assessed against the convicted defendant, generally only a willful refusal to pay these costs, as opposed to an economic inability to pay, results in any sanctions. Lastly, it is argued that in civil cases, the wealthy litigant is always able to appeal an adverse ruling while the indigent civil litigant is not. The civil litigant that is poor is thereby left in an unequal bargaining position, and is also effectively denied access to a jury because he cannot post the bond that is required in order to appeal.

C. *Quality of Justice.* Opponents contend the de novo system results in "rough justice." A judge may be inclined to make a disposition that he feels will not result in an appeal. In the alternative, the judge may impose an unduly harsh sentence in a case that has popular interest and then let the next level of court take any criticism for a more appropriate disposition.

Commentators have also suggested that the de novo system tends to diminish the first court's effort to reach a correct result, because no matter how careful the judge, whatever the result, the defendant in a criminal case and all litigants in a civil case can appeal. Simply noting the appeal wipes out all of the thought and effort of the first court. The de novo system discourages pride in one's work and leads to an attitude of "Let the next court get it straight." The lower court judge gets "neither recognition for

doing well nor direct correction for doing poorly.” The system likewise affects the confidence of the public and the Bar, in findings made by the lower level of courts.

Opponents further argue that the de novo system deprives lower court judges of the benefit of appellate court review, including guidelines as to the law and its interpretation. Without direct review insufficient accountability exists for decisions, mistakes are repeated, and a lack of uniformity results.

Respondents counter that a one-trial system would so overload the court structure with requests for jury trials that quality would in turn suffer. The public would not stand for increases in the number of judges and courtrooms, and thus the process would slow down. Plea bargaining would increase and judges would feel pressured to make quick decisions. On the other hand, many believe that when an appeal is noted, removal of all of the vestiges of the lower court conviction is impossible. Prejudice to the defendant may still result from media reports about the conviction.

*D. Impact on the Public.* The burden placed on the witnesses, victims and other members of the public that are involved in the trial provides another argument against a de novo court system. When a lower court conviction is appealed de novo all of these people have to be in court a second time. This encourages the belief that it is better never to get involved. Participants do not understand why a second trial is necessary, and often feel in a criminal case that their punishment is worse than that imposed on the defendant.

## IX. ALTERNATIVES FOR VIRGINIA

Some alternatives for Virginia that would appear to comport with both federal and state constitutional requirements are discussed below.

### *A. Criminal Cases*

1. Legislatively define petty offense to include traffic infractions and local ordinance violations that carry modest fines, such as parking violations, Class IV and Class III misdemeanors. For these cases, the decision of the General District court would be final, subject to appeal in the true appellate sense, either to the circuit court or to the court of appeals. No record of the testimony would be made unless a defendant took the necessary steps to have it recorded, in the same manner now followed in misdemeanor appeals from the circuit court. A tape recording of the trial in the general district court could be used for the record; the appellate court would simply listen to the tape. There would be no right to trial by jury in these petty offense cases.

2. Require a defendant to make an election prior to trial time as to whether he wishes a jury trial or not. If so, the case would go directly to the circuit court. If not, the case would be tried in the general district court, with a right of appeal on the record to either the circuit court or court of



appeals. This option arguably would not be permitted under the present wording of article I, section 8 of the Virginia Constitution. The language "preserving the right of the accused to an appeal to and trial by a jury in some court of record. . . ." requires the state to provide a defendant with a trial in the lower court and a right of appeal. Whether the initial election by the defendant would satisfy this requirement is subject to debate.

3. Create a unified system with only one level of trial court, but with specialized divisions in that court. Cases involving traffic, misdemeanors, felony trials and so on, would be tried in the appropriate division. Since there would be no courts not of record, there should be no problem with the language in article I, section 8 of the Constitution. The right to a trial by jury could be provided in all cases, or only for "non-petty" offenses. For cases in which a right to trial by jury exists, the defendant would make a decision upon entry into the system whether to seek trial by jury or to waive that right. Appeals would be taken to the Court of Appeals and the Virginia Supreme Court, as presently permitted. The chief judge would assign judges to the various divisions as needed.

### *B. Civil Cases*

1. Create a unified court system with only one level of trial court and specialized divisions, including a small claims section. A dollar threshold could possibly be used to determine which cases would entitle the parties to a jury if requested. Appeals would go to the Supreme Court, as at present, or there could be an allocation of civil appeals between the Virginia Supreme Court and the Court of Appeals, based on the dollar amount involved.

2. Retain the present system, but enact a dollar threshold so that cases under a certain amount would be finally tried in the general district court with appeals on the record to either the circuit court, Court of Appeals or Virginia Supreme Court. Cases over the threshold could be appealed to the circuit court with a jury trial available. A tape recording could be used to supply the record of the proceedings in the general district court for cases appealed on the record. This alternative has the drawback discussed earlier, concerning whether the General Assembly can constitutionally impose a dollar threshold.<sup>215</sup>

3. Allow trial by jury in all civil cases, but require the parties to make an initial election. If either party were to request a jury trial, the case would go directly to the circuit court. Dollar thresholds could be used to deny the right to a jury for disputes under a certain amount, subject to the General Assembly's constitutional ability to impose a dollar threshold.

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215. See *supra* text accompanying note 212 (discussing constitutionality of imposition of dollar threshold on right of appeal).

## X. CONCLUSION

In considering both the federal and state constitutional imitations that have been discussed, it appears that a fair summary would permit the following conclusions:

*Criminal cases:* The State is not constitutionally required to offer a jury to persons charged with traffic infractions and local ordinance violations involving maximum punishment by small fines. Case law suggests that trials of present Class III and Class IV Misdemeanors need not carry a right to a jury; possibly Class II Misdemeanors may also be tried without injury.

*Civil cases:* Whether the General Assembly can require a minimum dollar amount in dispute as a prerequisite to trial by jury is a question which cannot be resolved here. The strongest argument that can be made in favor of the authority to impose a threshold is based on the custom and practice at the time the state constitution was adopted. As noted earlier, while the statutes did provide an opportunity for a jury trial in all civil cases when the constitution was adopted, juries were not demanded in practice unless substantial amounts of money were involved. Further, support for the General Assembly's authority to require a dollar threshold amount lies in the dollar minimum which has existed on the statute books for many years.

If it is determined that changes should be made in the present appeal de novo structure in Virginia, then serious consideration should be given to the unified trial court system. While this approach involves substantial questions of political and jurisdictional turf, it is arguably by far the most efficient way of structuring a state court system. A unified system has all of the advantages of the other alternatives, plus the additional advantage of greater flexibility in moving judicial personnel to fit the needs of the system.

This article hopefully will generate thoughtful discussion and consideration of the appeal de novo concept and will assist in ultimately making informed and reasoned decisions regarding the need, if any, for change.

## APPENDIX

*Introduction.* This appendix attempts a brief annotation describing the appeal process in the lower courts of each state. The variety among states, representing the possible options and combinations for state court organization, makes strict classification as one system or another difficult at best and misleading at worst. Some states have a unified trial court and no lower courts, while others have multiple lower courts of limited jurisdiction. A few states have adopted a unified trial court system, yet have retained a type of limited jurisdiction court by creating specialized divisions within the court of general jurisdiction, and allowing appeals from the associate judges and magistrates in the divisions to the general court. In a number of states, appeals are taken on the record in some kinds of cases or from some lower courts, but tried de novo, while in another instance the appellant can demand an appeal on the record instead of the de novo trial he otherwise has a right to. A few states' statutes and Rules of Court give the appellate bench discretion to hear the appeal on the record or de novo.

The report, *State Court Organization (1980)*, prepared by the Conference of State Court Administrators and the National Center for State Courts, Williamsburg, Virginia, was consulted as the starting point for each state. Other documents, state constitutions, court rules and statutes are cited where appropriate in each section.

*Alabama*

Appeals from district and municipal courts of limited jurisdiction are taken de novo to the circuit court, although district court cases can be heard on the record by the court of appeals if there is a record and jury trial is waived, or if only questions of law are presented.

ALA. CODE §§ 12-4-1 (1975); §§ 12-11-30, 12-12-71, 12-12-72, 12-14-70(a) (1975 & Supp. 1985).

*Alaska*

Appeals from limited jurisdiction courts are taken to the court of general jurisdiction, on the record, although a trial de novo can be granted "in whole or part" by the superior court. If the defendant pleads guilty in lower court, he can only appeal his sentence. A criminal defendant waives further appeal to the court of appeals if he first takes his appeal to the court of general jurisdiction, although the court of appeals has discretion to review certain aspects of the superior court decision on an appeal from district court, including the sentence.

ALASKA STAT. §§ 22.07.020(d)-(e), 22.15.120, 22.15.240(b)-(c) (1982); § 22.10.020(a) (1982 Supp. & 1985).

*Arizona*

Trial by jury may be had in one of the two courts of limited jurisdiction, if allowed by law and demanded before trial. Appeals are taken from the courts of limited jurisdiction to the court of general jurisdiction (superior court). Criminal appeals from both lower courts are taken on the record if

the transcript is adequate; otherwise, they are tried de novo. Civil cases may be appealed to the superior court, but small claims carry no right to jury trial or appeal. With limited exceptions, there is no further appeal from the decision of the superior court.

ARIZ. REV. STAT. ANN. §§ 22-261, 22-425(A), 22-425(B) (1956); §§ 22-201, 22-220 (B), 22-301, 22-320, 22-371(A), 22-374, 22-375, 22-402 (1956 & Supp. 1984-85).

#### *Arkansas*

This state has six courts of limited jurisdiction and three of general jurisdiction, one of which (circuit) hears appeals de novo from the lower courts.

ARK. STAT. ANN. § 44-509 (1977 Repl. Vol. Supp. 1983).

#### *California*

Small claims and civil actions from courts of limited jurisdiction are heard de novo by the appellate division of the court of general jurisdiction; appeals are on the record in criminal cases.

CAL. CIV. & CRIM. CT. R. 121-144, 154-156, 184.

#### *Colorado*

Appeals from limited jurisdiction courts to the courts of general trial jurisdiction are on the record, but may be de novo at court's discretion or if the record is inadequate. Appeals from limited jurisdiction courts not of record are de novo.

COL. R. CRIM. PRO. 37; COL. REV. STAT. § 16-2-114(7) (1973); §§ 13-6-310, 13-10-116 (1973 & Supp. 1984).

#### *Connecticut*

Superior court is sole trial court in all matters except probate. Appeals are taken to intermediate appellate or state supreme court.

CONN. GEN. STAT. ANN. §§ 51-164s, 51-197A, 51-197b (West 1985).

#### *Delaware*

Superior courts receive appeals on the record from courts of common pleas, a lower court with limited civil and criminal jurisdiction. Accused before a justice of peace, alderman or mayor can elect to be tried instead in a court of common pleas. Appeals from the family court are either de novo or on the record; appeals from other courts of limited jurisdiction are de novo.

DEL. CODE ANN. tit. 10, § 960 (1974), tit. 11 § 5301(c) (1974); DEL.SUP. CT. R. CIV. P. 72(g); DEL. SUP. CT. R. CRIM. P. 37.1.

#### *Florida*

Appeals are taken from county court to court of general jurisdiction, unless appealable to the district court of appeals. Florida rules of court refer to an appeal on the record in supreme, district and circuit courts.

FLA. STAT. ANN. §§ 924.08 (West 1985); § 26.012 (West Supp. July, 1985); FLA. R. C. 9.140(f).

*Georgia*

Appeals from county magistrate courts are taken de novo to the state or superior court of the county. State courts of counties are also courts of limited jurisdiction and are courts of record. Appeals from state courts (as well as superior, city and other courts) are taken to the court of appeals and supreme court.

GA. CODE ANN. §§ 5-4-1, 5-6-33 (1982); §§ 5-3-29, 5-6-34 (1982 & Supp. 1985); §§ 15-7-1, 15-7-41, 15-7-43, 15-9-1.1, 15-10-1, 15-10-41, 15-10-120, 15-10-122 (1985).

*Hawaii*

Appeals from Hawaii courts are taken to the state supreme court and may be assigned to the intermediate court of appeals. District courts are courts of record, but try civil and criminal cases without a jury. If a jury is demanded, the amount in controversy is \$1,000 or more, and the "matter is triable of right" by jury, or if the accused has right to a jury trial "in the first instance," the case is transferred to circuit court. If no jury is demanded, the case is tried in district court "subject to the right of appeal as provided by law." While the law reserves appellate jurisdiction over lower courts to circuit court, statutes provide for appeals on the record, in both civil and criminal cases, from the district court to the supreme court.

HAWAII REV. STAT. §§ 603-21.8, 604-8, 604-9, 604-17, 641-2 (1976); §§ 602-4, 602-5, 602-6, 604-5(b), 641-12 (1976 & Supp. 1984).

*Idaho*

The District Court is a court of general and original jurisdiction. Magistrate courts, including small claims sections, are divisions of the district court. Appeals from magistrate courts are taken to a district judge who can review the case on the record, remand it for a new trial or hear it de novo.

IDAHO CODE §§ 1-204, 1-705(3), 1-2213 (1979); §§ 1-2312, 1-2406 (1979 & Supp. 1985).

*Illinois*

Circuit court is general trial court; there are no lower courts of limited jurisdiction. Appellate court "has original jurisdiction to complete determination of any case on review, when necessary," subject to such other rights as jury trial (instead of remand).

ILL. CONST. art. VI, § 6; ILL. ANN. STAT. ch. 37, § 32.1 (Smith-Hurd 1972 & Supp. 1985).

*Indiana*

Appeals from the limited jurisdiction courts to the courts of general trial jurisdiction are on the record (county courts) or de novo (city courts).

*Courts of Limited Jurisdiction: A National Survey* (1977); IND. CODE ANN. §§ 33-10.1-5-9(a); 33-10.5-1-4(a); 35-10.5-7-10 (Burns 1985).

*Iowa*

The District Court is a unified trial court, but has associate district judges and magistrates within this court hearing some civil cases, misde-

meanors, small claims, traffic and ordinance violations. Appeals are de novo as to matters equitable in nature; appeals in other cases are on the record. Appeals in misdemeanor cases tried before district and associate district judges and lawyer magistrates are on the record; misdemeanors tried before a non-lawyer magistrate are tried de novo on appeal unless the appellant demands an appeal on the record.

IOWA CODE § 813.3 (Supp. 1984-85); IOWA R. CRIM. P. 54(3)-(4); IOWA R. APP. P. 4.

### *Kansas*

This state has one court of limited jurisdiction (municipal court), and three units in its court of general jurisdiction (district judges, associate district judges, and magistrates). Appeals from municipal courts are taken de novo to district courts, except diversion agreements in lieu of criminal proceedings (alcohol related), which are heard on the record. District and associate district judges hear appeals from magistrates. Appeals taken from magistrates are heard de novo, except that convictions under diversion agreements are appealed on the record, and civil cases where a record has been made are taken to the court of appeals, unless law provides for review in district or supreme court.

KAN. STAT. ANN. §§ 12-4416(b), 12-4601 (1982); §§ 22-2909(c), 22-3609, 22-3610 (1981 & Supp. 1984); § 60-2103(o) (1983); § 60-2101 (1983 & Supp. 1984).

### *Kentucky*

Kentucky abolished four special limited jurisdiction courts and created a single district court system and abolished trial de novo appeal in 1978. Appeals from the district court to the circuit court are on the record.

KY. R. CIV. P. 72, 73, 75; KY. R. CRIM. P. 12.02-12.82; Nat'l Ctr. for State Courts, *Final Report: Virginia Court Organization Study*, submitted to Judicial Council of Virginia (1979), at 292-3.

### *Louisiana*

General jurisdiction court hears criminal appeals from city, parish and municipal courts, except cases triable by jury which are appealed to courts of appeals. "These appeals shall be on law alone." Electronic recording can be used when appeal is taken to district court. Criminal appeals from mayor and justice of peace court are heard de novo in district court. Appeals in civil cases where the amount in controversy is no more than \$100 are tried de novo without a jury.

LA. REV. STAT. ANN. §§ 13:1137, 13:1897, 13:2493, 13:2498 (West 1983); §§ 13:1896, 13:2501.1 (West 1983 & Supp. 1985); LA. CODE CRIM. PROC. ANN. article 912 (1984).

### *Maine*

Maine abolished appeal de novo and adopted a one trial system in 1982. In Class D and E criminal proceedings, a defendant can waive jury trial and elect to be tried in the limited jurisdiction district court with an appeal to

the superior court, having general jurisdiction, on questions of law only. Other appeals to superior court in criminal cases are on the record.

ME. REV. STAT. ANN. tit. 4, & 156 (1964); tit. 15, § 2114 (1964 & Supp. 1984-85); ME. R. CRIM. P. 93; Report of the Committee on Juries of Six, *Elimination of trial De Novo in Criminal Cases*, to Chief Justice of the District Ct. Dept. (MA) (1984), at 39-40; *Final Report* at 294.

### *Maryland*

Appeals are de novo from the courts of limited jurisdiction to the courts of general jurisdiction. In a civil case involving more than \$10,000 or in any case in which the parties so agree, appeal from the lower or district court to the circuit court is on the record. In all other cases, appeals from the district court to the circuit court are de novo.

MD. CTS. & JUD. PROC. CODE ANN. § 12-401 (1984 & Supp. 1985).

### *Massachusetts*

Trial courts were consolidated into a single trial court of the Commonwealth consisting of seven courts or departments. District court and Boston municipal court hear appeals de novo taken up in their own departments. Defendants have a choice of a jury trial in the first instance, or a bench trial and de novo appeal.

MASS. GEN. LAWS ANN. ch. 218 § 1 (West 1958 & Supp. 1985); ch. 218, § 27A (West Supp. 1985); *Elimination of Trial de Novo*, at 20-21.

### *Michigan*

Appeals from the district court to the circuit court are on the record. Appeals from the municipal courts to the circuit courts are de novo. Appeals from traffic bureau and magistrates divisions within the district court are de novo to the district court. A party who tries a case in small claims division waives his right of appeal.

MICH. COMP. LAWS ANN. §§ 600.8341, 600.8342, 600.8391, 600.8412, 600.8515 (West 1968 & Supp. 1985); § 774.34 (West 1982); MICH. CT. R. 4.10(G).

### *Minnesota*

Conciliation courts try civil disputes up to \$1250 in value, with a "trial on the merits" in county court on appeal. Trial by jury of misdemeanors occurs in county courts. Trial by jury of gross misdemeanors and felonies occurs in district courts. Only offenses punishable by incarceration are triable by jury. The right to a jury trial can be asserted in civil cases. Until 1983, misdemeanor conviction in county court entitled a defendant to trial de novo or an appeal on the record in district court. Current rules take the appeal to the state court of appeals and omit reference to trial de novo.

MINN. STAT. ANN. §§ 487.23, 487.30, 487.39 (West Supp. 1985); MINN. R. CRIM. P. 26.01, 28.02.

### *Mississippi*

Appeals from justice courts are "tried anew" in county court, or in circuit court when there is no county court. Appeals from county court are heard on the record in circuit or chancery court, except when a new trial is

granted and tried de novo by the circuit or chancery court.

MISS. CODE ANN. §§ 11-51-79, 11-51-81, 11-51-91, 99-35-1 (1972); § 11-51-85 (1972 & Supp. 1984).

### *Missouri*

Circuit court now has no appellate jurisdiction except in civil cases tried before the associate circuit division without a jury. This is a de novo trial. Civil cases tried with a jury, misdemeanors and violations of county ordinances are appealed on the record to the "appropriate appellate court."

MO. ANN. STAT. §§ 478.070, 512.180, 512.190, 512.250, 512.270 (Vernon 1949 & Supp. 1985).

### *Montana*

Appeals from courts of limited jurisdiction to district courts are de novo. MONT. CONST. art. VII, § 4; 1984 MONT. CODE ANN. § 3-5-303 (1983).

### *Nebraska*

Small claims court appeals are de novo to the district court without any jury. Other appeals from the courts of limited jurisdiction to the district court, which is the court of general trial jurisdiction, are on the record.

NEB. REV. STAT. § 24-302 (1943); §§ 24-501, 29-613 (1943 & Supp. 1984); §§ 24-541.06, 24-541.07 (Supp. 1984).

### *Nevada*

Current law provides for an appeal on the record in criminal cases appealed from justice of the peace and municipal courts to district courts. With respect to civil proceedings taken up from justice and municipal courts to district courts, the law provides that a case appealed must not be tried anew.

NEV. REV. STAT. §§ 189.050, 266.595 (1979); JUSTICE COURT R. CIV. P. 77.

### *New Hampshire*

Misdemeanor appeals from limited jurisdiction courts heard de novo in court of general jurisdiction. A civil case is transferred from district to superior (general trial) court if jury trial is demanded.

N.H. REV. STAT. ANN. §§ 502:23, 502-A:12, 502-A:15 (1983); 599 (1974).

### *New Jersey*

Appeals from municipal courts are taken to the law division of the superior court. Other courts of limited jurisdiction (county, tax, juvenile) appeal to appellate division of the superior court. Criminal and civil appeals from municipal court can be heard de novo on the record, in which case they receive an independent determination of facts. Such appeals can instead be remanded for a new trial, or heard by plenary trial de novo without a jury. The appellate division can exercise original jurisdiction necessary for a complete determination of the matter on review.

1985 R. GOVERNING CT. N.J. 2:2-3, 2:10-5, 3:23-8(a), 4:74-3.



*New Mexico*

Appeals from courts of limited jurisdiction are taken to the district court. Metropolitan courts are courts of record in civil cases, but not criminal. A jury trial is available in civil cases unless waived, but in criminal cases a jury trial is available only when the penalty is more than 90 days in jail. Criminal appeals are heard de novo. Magistrate courts are not courts of record; appeals are tried de novo. Appeals from municipal courts are heard de novo in district court without a jury.

N.M. STAT. ANN. §§ 34-8A-5, 34-8A-6, 35-1-1, 35-15-10 (1978); §§ 34-8A-3, 35-13-2 (1978 & Supp. 1985).

*New York*

Appeals from limited jurisdiction courts are taken to county court or to an appellate term on the record. Generally there is no appeal in small claims cases.

See Un. Dist. Ct. Act §§ 1701-04, 1807, 2018-19 (1963 & Supp. 1984-85); N.Y. CIV. PROC. LAW § 5501 (Consol. 1978); N.Y. CRIM. PROC. LAW § 460.10 (McKinney 1983). D. Siegel, *New York Practice* (1978 Supp. 1981-82), §§ 8 et seq., 524, 536 et seq.

*North Carolina*

Small claims and criminal offenses tried by magistrates are heard de novo in district court. Criminal appeals from district court are tried de novo in superior (general jurisdiction) court. Civil appeals from district court are taken to the court of appeals.

N.C. GEN. STAT. §§ 7A-27(c), 7A-228(a), 7A-290 (1981).

*North Dakota*

North Dakota has two types of limited jurisdiction courts, county courts and municipal courts. Appeals from the municipal court are de novo. Appeals from the county court appear to be on the record.

N.D. CENT. CODE § 27-01-01 (1974); § 27-01-01 (1974 & Supp. 1983); §§ 27-07.1-01, 27-07.1-18 (Supp. 1983); § 27-07.1-17 (Supp. 1983 & Supp. 1985); N.D. R. CRIM. P. 37(g); N.D. R. APP. P. 1(a), 1(c).

*Ohio*

Appeals from the limited jurisdiction courts are de novo generally, with provisions for appeal on the record where only issues of law are involved. The court to which the appeal goes may rely on the record in part and may call for additional evidence on any part of the trial the court thinks necessary.

OHIO REV. CODE ANN. 1905.22; 1905.25, 1901.30; 1921.01, 1913.27, 1921.14, 2501.21; 2506.01 (Page Supp. 1984).

*Oklahoma*

All appeals from courts of limited jurisdiction to courts of general jurisdiction are de novo.

OKLA. STAT. tit. 11, § 27-129 (Supp. 1984-85).

*Oregon*

Appeals from three of the four courts of limited jurisdiction to the court

of general trial jurisdiction are de novo. Appeals from the fourth limited jurisdiction court are on the record but go to the Oregon Court of Appeals. Audio recordings are used for the record.

OR. REV. STAT. §§ 46.430(2); 46.430(4), 138.220, 53.090, 221.350, 5.120 (1983).

#### *Pennsylvania*

All appeals from the courts of limited jurisdiction to courts of general jurisdiction are de novo.

PA. MINOR CT. CIV. R. 1007; PA. R. CRIM. P. 64, 6006.

#### *Rhode Island*

Superior court of general jurisdiction hears appeals de novo from district and municipal courts of limited jurisdiction for any offense except violations, which are taken by certiorari to the state supreme court. Civil appeals from district court are heard in the supreme court.

R.I. GEN. LAWS §§ 8-8-3, 8-8-3.2 (Supp. 1984), §§ 12-3-1; 12-17-1, 12-22-1, 12-22-1.1, 12-22-9 (1981).

#### *South Carolina*

Appeals from magistrate courts are heard in county or circuit courts. County court appeals are taken to circuit court. Appeal is heard "on papers in the case," including testimony, although the court has discretion to examine a witness when a fact is at issue in the appeal. The appellate bench can affirm, reverse, modify or order new trial.

S.C. CODE ANN. § 14-9-120 (Law. Co-op. 1977); §§ 18-1-140, 18-7-10, 18-7-130, 18-7-170, 18-7-180, 18-7-420 (Law. Co-op. 1985).

#### *South Dakota*

South Dakota has a unified trial court with divisions. Generally, all appeals are to the state appellate court and on the record. A small claims appeal is heard de novo in circuit court when no record is kept. Magistrates can be law-trained or non-lawyer judges, in which case their courts are not of record.

S.D. COMP. LAWS ANN. §§ 16-6-10; 16-12A-26; 16-12A-27; 16-12A2.1 (1979).

#### *Tennessee*

All appeals from courts of limited jurisdiction to courts of general trial jurisdiction are de novo.

TENN. CODE ANN. §§ 27-4-108; 27-5-102; 27-5-108 (1980); 27-3-131 (Supp. 1985).

#### *Texas*

Two "levels" of limited jurisdiction courts exist in Texas, with the higher level hearing appeals de novo from the courts below. Appeals from this level of limited jurisdiction court bypass the general trial court and go to an appellate court on the record.

TEX. CONST. art. V, §§ 8, 16; TEX. CODE CRIM. P. art. 4.05, 4.08, 4.09, 44.17, 45.10.

*Utah*

Most appeals from the limited jurisdiction courts to the general trial jurisdiction courts are on the record; small civil claims and appeals from justice courts are heard de novo.

UTAH CONST. art. VIII, § 5; UTAH CODE ANN. 77-35-26 (1953 & Supp. 1983); § 78-4-11 (Supp. 1983).

*Vermont*

All appeals from the courts of limited jurisdiction are on the record to the court of last resort in the State.

VT. R. APP. P. 3.

*Virginia*

Each appeal from a court of limited jurisdiction is to a court of general trial jurisdiction and is de novo.

VA. CODE §§ 16.1-106, 16.1-132 (1982).

*Washington*

Appeals from court of limited jurisdiction are heard de novo in general trial court.

WASH. REV. CODE § 2.08.020 and ann. (West 1961, Supp. 1985).

*West Virginia*

A judicial reorganization amendment to the state constitution merged limited jurisdiction courts (except magistrates court) into the circuit court. Appeals from magistrates courts are heard de novo in circuit court, except there is generally no appeal from a plea of guilty if the defendant had counsel. Municipal courts are not part of the state court system. The mayor can hear, convict and sentence persons who have violated ordinances. An appeal can apparently be taken de novo to circuit court.

W. VA. CONST. art. VIII, §§ 5, 6; W. VA. CODE § 8-10-1 (1984); § 50-5-12 (1980); § 50-5-13 (1980 & Supp. 1985).

*Wisconsin*

Appeals from limited jurisdiction courts to courts of general trial jurisdiction may be de novo if requested by either party or by the court's own motion. Otherwise appeals are on the record.

WIS. CONST. art. 7 § 8; WIS. STAT. ANN. §§ 800.14(4) (West 1981); 800.14(5) (West 1981 & Supp. 1985).

*Wyoming*

All appeals from limited jurisdiction courts to general jurisdiction courts are on the record. Tape recorded transcripts are used to make the record and juries are available in the limited jurisdiction courts.

WYO. CT. R. 1.03 (1979 Rev. Ed.).

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