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Criminal Law—Appeal by State—Double Jeopardy

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Criminal Law—Appeal by State—Double Jeopardy*

The United States Constitution assures to the people the safeguard against double jeopardy: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[1] The New Mexico Constitution contains a similar provision: "nor shall any person be twice put in jeopardy for the same offense . . . ."[2]

The doctrine of double jeopardy has been gradually developed and refined by the courts since it was first placed in the United States Constitution, as well as most state constitutions.[3] The typical common law rationale for the doctrine is:

> The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . . Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.[4]

As this language is generally understood, the state or federal government has no right to an appeal unless expressly conferred by a statute.[5] In New Mexico the State Criminal Code allows the prosecution only a limited right to appeal in certain criminal cases: "The state shall only be allowed an appeal or writ of error in criminal cases where an indictment, complaint or information is quashed, or adjudged insufficient upon an interlocutory motion, or judgment is arrested."[6] The statute lacks, however, any provision allowing the state an appeal upon a question of law reserved at the trial. It is the purpose of this Comment to suggest that such

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* N.M. Const. art. 2, § 15; N.M. Stat. Ann. § 41-15-3 (Repl. 1964).

1. U.S. Const. amend. V. § 1.

2. N.M. Const. art. 2, § 15. "The words 'same offense' mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation." State v. Rose, 89 Ohio St. 383, 106 N.E. 50, 51 (1914). Quoted with approval by New Mexico Supreme Court in State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

3. U.S. Const. amend. V, § 1; N.M. Const. art. 2, § 15; Okla. Const. art. 2, § 21; Tex. Const. art. 1, § 14; Wash. Const. art. 1, § 9; Wis. Const. art. 1, § 8; 21 Am. Jur. 2d *Criminal Law* § 166 n. 7 (1965).

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

5. United States v. Rosenwasser, 145 F.2d 1015 (9th Cir. 1944); People v. White, 364 Ill. 574, 5 N.E.2d 472 (1936); City of Clovis v. Curry, 33 N.M. 222, 264 Pac. 956 (1928); People v. Moon, 257 App. Div. 1019, 12 N.Y.S.2d 861 (1939).

6. N.M. Stat. Ann. § 41-15-3 (Repl. 1964).

a provision would be a valuable and desirable addition to the State Criminal Code. The New Mexico Constitution would not necessarily prohibit a statute allowing the state to appeal. Although the overwhelming authority is that in the absence of statute no appeal lies to the state for error, states having constitutional provisions similar to that of New Mexico[7] have held that a statute allowing the state to appeal in a criminal case does not violate such a provision.[8]

Nor would the United States Constitution prohibit a state appeals statute. This question was answered by Mr. Justice Cardozo in *Palko v. Connecticut*.[9] The issue before the court was whether the Connecticut statute allowing state appeals[10] denied the defendant due process of law as required by the fourteenth amendment. In upholding the Connecticut legislation the opinion held that the state can have rights of appeal equal to those of the defendant without violating due process. Mr. Justice Cardozo concluded by saying: "The edifice of justice stands, its symmetry, to many, greater than before."[11] Although the opinion stated that the fifth amendment prohibition against double jeopardy was not applicable to the states through the fourteenth amendment, more recent cases that have broadened the concept of due process indicate that the provision may very well apply to the states.[12] It is the position of this Comment, however, that the allowance of an appeal to the state after acquittal does not create a situation of true double

7. See text accompanying note 2 *supra*.

8. For example, in State v. Witte, 243 Wis. 423, 10 N.W.2d 117 (1943), the court sustained the constitutionality of Wis. Stat. Ann. § 358.12(8) (1941), which provides that "a writ of error may be taken by and on behalf of the state in criminal cases . . . from rulings and decisions adverse to the state upon all questions of law arising on the trial . . . in the same manner and to the same effect as if taken by the defendant." The court expressly held that Wis. Const. art. 1, § 8, which states that "no person for the same offense shall be put twice in jeopardy of punishment," was not violated by the statute. Also, in State v. Brunn, 22 Wash. 2d 120, 154 P.2d 826 (1945), the court held a state appeal statute to be a valid enactment and not in violation of the state constitution providing that no person shall be twice put in jeopardy for the same offense. The court reasoned that a new trial, on application of the defendant or the state, is not a subsequent prosecution for the same offense, but is a continuation of the original prosecution.

There is, however, a difference of opinion in some other jurisdictions. See, *e.g.*, State v. Gates, 63 Ohio 137, 25 N.E.2d 471 (1939).

9. 302 U.S. 319 (1937).

10. Conn. Gen. Stat. Ann. § 54-96 (Supp. 1965). See text accompanying note 29 *infra*.

11. Palko v. Connecticut, 302 U.S. 319, 328 (1937).

12. Pointer v. Texas, 380 U.S. 400 (1965); United States v. Tateo, 377 U.S. 463 (1964); Malloy v. Hogan, 378 U.S. 1 (1964).

jeopardy[13] which may in fact be prohibited to the states in light of the Supreme Court's conception of the fourteenth amendment.

The discussion will be limited to the situation in which the same offense is reprosecuted within a single jurisdiction. No attempt will be made to analyze the problems of the split offense,[14] premature termination,[15] conviction of a lesser included offense,[16] multiple prosecution by overlapping jurisdictions,[17] or multiple indictments based on different legal theories for a single criminal act.[18]

Early English law furnishes a valuable background for considering the American concept of double jeopardy. Some courts have said it is impossible to find the origin of the doctrine; in the opinion of one court, it has "simply always existed."[19]

Whether double jeopardy has always existed or not, the phrase "jeopardy of life or limb" had a very literal meaning in early English law. Death or mutilation awaited those accused of almost any crime from petty larceny[20] to homicide.[21] Moreover, defendants were at a great disadvantage in criminal courts; they were not allowed counsel, witnesses, nor the right to testify on their own behalf.[22] Eventually, however, the unreasonable severity of criminal laws, and the oppression suffered by accused persons generally, led

13. See note 8 *supra* and accompanying text.

14. Hoag v. New Jersey, 356 U.S. 464 (1958) (one act may be directed at several persons, the question is whether each person injured is a separate criminal act).

15. Kepner v. United States, 195 U.S. 100 (1904) (a trial is stopped short of its final termination); United States v. Whitlow, 110 F. Supp. 871 (D.D.C. 1953).

16. State v. Welch, 37 N.M. 549, 25 P.2d 211 (1933) (a situation in which the defendant appeals a conviction and is later convicted of a greater offense, or is convicted on other counts not contained in the original indictment).

17. United States v. Lanza, 260 U.S. 377 (1922). See also Grant, *Penal Ordinances and the Guarantee Against Double Jeopardy*, 25 Geo. L.J. 293 (1937). (Overlapping jurisdictional boundaries may cause the same action to be tried again as an offense of a different kind, or against a different sovereign. *E.g.*, civil-criminal, federal-state, civilian-military, or foreign-domestic.)

18. State v. Quintana, 69 N.M. 51, 364 P.2d 120 (1961); Gore v. United States, 357 U.S. 386 (1958). See also Horack, *The Multiple Consequences of a Single Criminal Act*, 21 Minn. L. Rev. 805 (1937) (defendant is tried once and later tried again for offenses "arising out of the same transaction," although the new charges are technically different from the original charges).

19. Stout v. State, 36 Okla. 744, 130 Pac. 553, 558 (1913).

20. 2 Pollock & Maitland, History of English Law 497 (2d ed. 1959).

21. *Id.* at 452.

22. 1 Wigmore, Evidence 994 (2d ed. 1923). The year 1702 was the earliest an accused was allowed to have witnesses in his own behalf. Not until 1837 were felons allowed counsel, and they could not testify in their own behalf until 1898. Plucknett, Concise History of the Common Law 423 (4th ed. 1948).

to the development of rules designed to alleviate the hardships placed upon the defendant.[23]

Denial of a state right to appeal is usually based upon this argument of hardship to the defendant.[24] It is true that the delay involved in an appeal and perhaps a new trial would subject an accused to both economic and psychological hardships. This argument seems persuasive, particularly if the defendant is innocent and indigent. Society does not seem to mind, however, if an unwilling and blameless defendant is harrassed by his adversary in a civil case. He can be taken to any court in which his opponent can show that he has a claim.[25]

This objection can be easily overcome in several ways: criminal appeals could be advanced on the court docket;[26] special criminal divisions could be established; the time to bring an appeal could be shortened; and, the defendant could be released on his own recognizance.[27] The defendant's expenses could also be borne by the state, just as it does now in the case of an indigent defendant.

Admitting that a defendant should not be twice put in jeopardy, the question arises whether a defendant is ever placed in jeopardy when there is reversible error in the proceedings. Whether there was substantial error at the trial can only be determined by an appeal. If the appellate court finds that substantial error exists, a new trial is in order. The second trial would not be another trial for the same offense; it would be a continuation of the same trial, the first trial not being complete until it is tried correctly.[28]

23. Sigler, *A History of Double Jeopardy*, 7 Am. J. Legal Hist. 283 (1963).

24. *E.g.*, Green v. United States, 355 U.S. 184 (1957). See text accompanying note 4 *supra*.

25. See Fed. R. Civ. P. 59(a).

26. This is already done in some jurisdictions. See, *e.g.*, Morse v. United States, 168 Fed. 49 (2d Cir. 1909), where the defendant's case was placed ahead of other litigants and argued before the trial court record and briefs were printed.

27. Miller, *Appeals by the State in Criminal Cases*, 36 Yale L.J., 486, 501 (1927). The author points out that the defendant, if released on his own recognizance pending appeal by the state, would be no freer than he is now following complete discharge. If the judgment were reversed, he could be rearrested.

28. 10 ALI Proceedings 130, 131 (1932):

> [W]hen the state appeals, and the Supreme Court sees error was made in the trial of the case to the prejudice of the state, the judge ruling erroneously on questions of law or evidence, the case has never been tried according to rules of law and is not finally settled until it is so tried. They send it back to be tried in accordance with the principles of law, and this second trial is not another trial of the defendant for the same offense. It is a part of the same trial of the defendant for the same offense, the first trial not being a final and complete trial until it has been tried correctly.

Connecticut has taken this position by enacting a statute which allows the state as broad a right of appeal as that of the defendant. The state may appeal an acquittal just as the defendant may appeal a conviction:

> Appeals from the rulings and decisions of the superior court, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court, in the same manner and to the same effect as if made by the accused.[29]

In holding the statute valid, the Connecticut court said:

> The end is not reached, the cause is not finished, until both the facts, and the law applicable to the facts, are finally determined. . . . A final settlement is not more vital than a right settlement.
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> The same underlying principle of justice which demands a retrial because a juror is legally disqualified calls for a retrial when illegal evidence has been admitted or legal evidence excluded. In either case the trial is tainted, and should not support a final judgment.[30]

The same reasoning is relied upon in the dissenting opinion of Mr. Justice Holmes in *Kepner v. United States*[31] in which he made the argument that an appeal by the state to procure a new trial would be continuing jeopardy beginning and ending in the same case. He said that "logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause."

The desirability of the Connecticut rule and the unfortunate result of the majority rule is apparent when one realizes what the majority rule actually stands for: when the trial favors the accused, the proceeding is conclusive; when it favors the state, it is not conclusive. "Stated thus baldly, the proposition is an amazing one."[32]

In addition to the necessity of one fair, complete trial for the accused, there is also the need for state appeals in order to properly develop the state criminal law. Denial of state appeals forces a one-sided development because the state is never heard at the

29. Conn. Gen. State. Ann. § 54-96 (Supp. 1965). The present statute is substantially the same as the original act enacted in 1886. Conn. Pub. Acts 1886, at 560.

30. State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894).

31. 195 U.S. 128, 134 (1904) (dissenting opinion).

32. Miller, *supra* note 27, at 496.

appellate level. In New Mexico and other states in which appeal by the state is not allowed, no record is ever made in the appellate court upon trial court errors prejudicial to the prosecution. Since the state does not have the right of appeal, questions of law which are decided against the people cannot be reviewed by the appellate court.[33] The trial court therefore becomes the final arbiter for questions of law concerning the prosecution. Development of the criminal law will necessarily be irregular and one-sided as long as the state is denied an equal right to appeal.

Moreover, although the present rule denying the state an appeal purports to prevent undue harrassment of the individual, it may in practice do just the opposite. The multitude of statutory offenses which can be ascribed to a single criminal transaction may be an indication of the states' desire to be assured of convictions. If a defendant is acquitted of one offense, the state may secure a future conviction under another statutory provision.[34] For example, if several persons are robbed at the same time, the accused may be tried separately for the robbery of each. In *Abbate v. United States*,[35] Mr. Justice Brennan in a separate opinion said:

> Obviously separate prosecutions of the same criminal conduct can be far more effectively used by a prosecutor to harass an accused than can the imposition of consecutive sentences . . . . [It is] solely within

33. The fact that trial courts make errors adverse to the state is demonstrated by the cases in jurisdictions which permit state appeals. Such jurisdictions generally provide that an appeal shall be used only for determination of questions of law and not affect the judgment or bring the defendant back for a new trial. People v. Burke, 47 Cal. 2d 45, 301 P.2d 241 (1956) (trial court order striking charge of prior conviction was an appealable order). People v. Gilbert, 25 Cal. 2d 422, 154 P.2d 657 (1944) (an order of the trial court modifying its previous judgment was an order "affecting substantial rights of the people" and is appealable; State v. Stout, 90 Okla. 35, 210 P.2d 199 (1949); State v. Moyers, 86 Okla. 101, 189 P.2d 952 (1948). (If the question reserved is decided in favor of the state, the appeal settles that question of law but does not affect the verdict of acquittal.)

While it is objectively important that the law be determined for future cases, a substantial objection to settling the question of law without affecting the acquittal is that the criminal law is determined by what amounts to an *ex parte* procedure. If the accused does not participate in the appeal, all of the advantages of an adversary proceeding are lost. Without an opposing faction, an appeal by the state is not likely to be pursued with any great diligence by the prosecutor. Thus, an appeal which will only determine the law for future cases may well confuse the law or even result in an erroneous holding. See Moreland, Modern Criminal Procedure 275 (1959).

34. Horack, *supra* note 18; State v. Hoag, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, 356 U.S. 464 (1958) (four persons were robbed in a bar; defendant was acquitted on earlier indictments charging armed robbery of three persons, but was later convicted of armed robbery of the fourth person).

35. 359 U.S. 187, 199 (1959) (separate opinion).

> the prosecutor's discretion to bring successive prosecutions based on the same acts, thereby requiring the accused to defend himself more than once.[36]

If state appeal of error were allowed in such cases, the state might feel safe in presenting all its claims at one trial. The prosecutor would not be forced to preserve the state's right to prosecute for each offense.

The state prosecutor is not the only person at the trial affected by the rule prohibiting state appeals; the trial judge and defense counsel are also affected. Trial judges are under pressure to decide close questions of law in favor of the defendant.[37] This condition is reinforced by the knowledge of the judge that he is safe from reversal and reprimand by the appellate court if he decides all close questions of law and doubtful instructions in favor of the defendant. If the trial results in an acquittal, the record of the trial is of little or no consequence; if it results in a conviction, the trial judge is reasonably sure of being affirmed.

If the trial judge makes an error that leads to an acquittal, the prosecutor has no power to protect the interests of the state. Objection by the prosecutor to a comment by the judge that is prejudicial or an instruction that is erroneous will be to no avail for he cannot appeal.

The prosecutor is also inhibited in his speech and manner of conducting the trial. The prosecutor's every word is subject to careful scrutiny by the appellate court as possible reasons for reversal.[38] The prosecutor is thus confined within limits set by the appellate court as to how far he may go in presenting the state's case to the jury. The defense counsel, however, may violate all the rules of practice and ethics without the fear of having his conduct form the basis of a reversal by the appellate court.[39] Thus, the

36. *Id.* at 199.

37. Recent United States Supreme Court decisions are almost exclusively oriented toward the rights of the individual without equal consideration being given to the rights of the public. These decisions have covered all areas of the criminal law. *E.g.*, Escobedo v. Illinois, 378 U.S. 478 (1963) (defendant's privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (defendant's right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (suppression of evidence taken during an unlawful search).

38. State v. Miller, 76 N.M. 62, 412 P.2d 240, 246 (1966) (Comment by prosecutor which called attention to defendant's failure to testify violated defendant's rights against self incrimination).

39. While the trial judge and the prosecutor must strive to keep the record free from error prejudicial to the defendant, "the defense attorney, on the other hand, can play Texas rules (two below the belt and one above)." Brandenburg, *The Right to Appeal by the State in Criminal Cases*, 6 Albuquerque B.J. 10, 12 (June 1966).

orderly administration of a criminal trial depends in large part upon the acquiescence of defense counsel.

The benefit of the state appeal is not that the state will take a large number of appeals,[40] but rather in the care and orderly procedure that it will impose upon the trial. All parties involved would know that any action on their part would be subject to appellate review. The quality of practice before the state's criminal courts would improve.[41]

Once it is agreed that there are strong reasons why a state should provide for appeals by the prosecution, there remains the problem of how this provision can best be made, staying within the constitution[42] and preventing the possibility of abuse. Of course, any statute would be invalid if it gave the state an appeal after a jury verdict which was supported by the evidence; this would clearly be double jeopardy.[43] A good statement of how a state statute might read appears in the Connecticut statute.[44] The statute provides for appeals only on questions of law outside the jury's determination. Thus, the state supreme court could not reverse a verdict of the jury. The appeal can only test the rulings of the trial court on matters such as admissibility of evidence, or erroneous instructions. Moreover, since the permission of the trial judge is required, the right is discretionary rather than absolute.

Despite the benefits to be gained by allowing the state an appeal equal to that given the accused, New Mexico would still gain much if an appeal were allowed the state solely to determine the question of law involved.[45] In such an appeal the acquittal is not affected; the appeal presents a pure question of law for determination. This would allow the people at least a limited right of appeal. It would also seem to have the least objection since the appeal would not

40. Miller, *supra* note 27, at 500. Since Connecticut permits appeals by the state, Miller examined volumes 82-98 of the Connecticut reports and found the following results: of 7 appeals by the state, 5 were affirmed and 2 were reversed; of 82 appeals by defendants, 56 were affirmed, 24 were reversed, 1 judgment for the defendant, and 1 appeal dismissed.

41. Horack, *Prosecution Appeals in West Virginia,* 41 W. Va. L.Q. 50, 56 (1934). In response to a questionaire sent to the prosecuting attorneys in the state of Virginia, the replies overwhelmingly expressed the opinion that the granting of the right of appeal by the state in criminal cases would improve the quality of criminal procedure and practice in the state. When asked if the state appeal would "restrain unfair tactics of defense counsel," all but one prosecutor replied affirmatively.

42. See note 8 and accompanying text *supra.*

43. 28 Jour. of Crim. Law 919, 923 (1938).

44. Conn. Gen. Stat. Ann. § 54-96 (Supp. 1965). See text accompanying note 29 *supra.*

45. See note 33 *supra.*

injure the accused once he was acquitted. The fact that the appeal would be essentially *ex parte* would not render the question entirely moot. In spite of the fact that the appellate court would be deciding the case on the basis of a less than adequate presentation because of the *ex parte* nature of the appeal, such an appeal is desirable since there is a social need for a determination of the law for the future.

While the advantages in procedure which have been increased for the accused over the years should not be abolished, there should be an examination to see if the balance is relatively even. A criminal trial should not be considered final if substantial errors prejudicial to the prosecution remain uncorrected.

Finality with error is not true finality. The state should have the opportunity of one correctly judged trial of the defendant for the offense charged. Correction of material errors, whether prejudicial to the defendant or the state, is necessary to assure a fair and impartial trial. Finality is essential, but not at the expense of justice.

Although the common law practice of not allowing the state an appeal in criminal cases is firmly established in New Mexico,[46] it is recommended that the legislature modernize the state criminal code by allowing the state an appeal to correct errors in the lower court proceedings.

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46. The following cases held that the state has no right of appeal in a criminal case unless it is conferred by a statute: State v. Ashcroft, 32 N.M. 209, 252 Pac. 1001 (1927); State v. Dallas, 22 N.M. 392, 163 Pac. 252 (1917); *Ex parte* Carrillo, 22 N.M. 149, 158 Pac. 800 (1916).