

S B

Q Q

BILL FILE LOG

BILL # SB 99

1/25 Original bill - Fiscal Note +
Transmittal letter

2/14 ~~2/14~~ 1st hearing - held over
Gayle Hovetski testified -
will send further backup

2/18 Back-up received from Hovetski

3/15 Per Roger - Gayle Hovetski will testify.

3/19 Bill passed out.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

Ph 99

January 25, 1985

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that will broaden the state's right to appeal in criminal cases. This right was severely restricted by a recent decision of the Alaska Supreme Court, and the Legislative Affairs Agency has recommended legislative action in response to the court decision.

AS 22.07.020 defines the jurisdiction of the state court of appeals; AS 22.10.020 defines the jurisdiction of the superior court. Both statutes provide that the state may appeal from a final decision in a criminal case only on two grounds: 1) to appeal a sentence on the ground that it is too lenient, or 2) to test the sufficiency of the indictment or information. Criminal defendants in the past have argued that to "test the sufficiency" of the indictment or information means to determine its efficacy as a charging document. I.e., does it state an offense, and was the evidence that was submitted to the grand jury adequate? See State v. Michel, 634 P.2d 383, 384 (Alaska App. 1981). Defendants have argued that the statutory language forecloses appeal by the state if the case was dismissed for any other reason, such as an erroneous ruling by the trial court on a point of law not related to the sufficiency of the indictment.

For several years, the state appellate courts refused to construe the statutory language so narrowly, and have allowed the state to appeal a trial court order that dismissed a criminal indictment for any reason, unless retrial would be barred by the double jeopardy provisions in the state and federal constitutions. See State v. Michel, 634 P.2d 383 (Alaska App. 1981), and State v. Shelton, 368 P.2d 817 (Alaska 1962).

This long-standing interpretation was most recently reaffirmed by the Alaska Court of Appeals in State v. Kott, 636 P.2d 622 (Alaska App. 1981). In that case, the trial judge dismissed criminal charges against Kott because Kott's co-defendant had been acquitted at an earlier trial. The court of appeals allowed the state to appeal the dismissal, and reversed the lower court ruling. The appellate court held that the doctrine of collateral estoppel did not prevent trial of Kott after his co-defendant had been acquitted.

The court of appeals decision in the Kott case was appealed to the state supreme court. In an apparent departure from earlier interpretations (see State v. Shelton, 368 P.2d 817 (Alaska 1962)), the supreme court reversed the court of appeals decision regarding the state's ability to appeal the trial court's ruling, although it agreed that the trial court's original order of dismissal had been wrong. Kott v. State, 678 P.2d 386 (Alaska 1984). The supreme court noted that the state might be able to obtain review through filing a "petition" with the appellate court. Acceptance of such a petition is discretionary; there is no "right" to obtain appellate review. Id. at 390-1.

Like all human institutions, our criminal justice system is not perfect. Judges, like the rest of us, sometimes make mistakes. If a mistake is made in favor of the state, the defendant can appeal. A conviction that was wrongfully obtained will be reversed on appeal. That is as it should be; basic justice requires no less. But, if a judge makes a mistake in favor of the defendant, the supreme court's holding in Kott may well prevent appellate review of the erroneous decision. Constitutional prohibitions against double jeopardy do not require that such an erroneous decision stand uncorrected, and our statutes should be changed to allow the state to appeal in these circumstances.

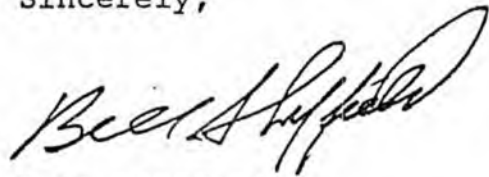
The Legislative Affairs Agency, during its statutorily required annual review of published court decisions, concluded that the supreme court's decision in the Kott case did not appear to conform with the legislative intent behind AS 22.07.020, and recommended legislative review of the statute. See Legislative Affairs Agency, A Report To The Thirteenth State Legislature (October 1984) at 54-5. The language of the proposed amendments in this bill is based upon a comparable provision in federal law:

18 U.S.C.A. sec. 3731. The bill would, in essence, return Alaska's law to the position it was in before the recent supreme court ruling in Kott.

Section 7 of the bill explicitly repeals Rule 202(c) of the Alaska Rules of Appellate Procedure. The language of Rule 202(c) merely tracks the language of the existing statutes. Since Rule 202(c) appears to merely recognize and repeat the language of the statute in existence when the rule was adopted, it may be argued that amendment of the underlying statute would be sufficient, and that a formal change in the court rule is not necessary. To avoid unnecessary litigation on this point, however, the better practice would be to specifically repeal Rule 202(c). This would, of course, require a two-thirds vote in each house.

In order to maintain a criminal justice system that allows for the fullest review of erroneous legal decisions, whether they favor the defendant or the state, I urge you to pass this bill.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill Sheffield".

Bill Sheffield
Governor

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 99
 Title: "An Act relating to the state's right to appeal in crim. cases."
 Sponsor: By Request of the Governor
 Requestor: Governor's Ofc./OMB
 Date of Request: 12/18/84

FISCAL DETAIL

Agency Affected: Department of Law
 Program Category Affected: Administration of Justice
 BRU, Program or Subprogram(s) Affected: Prosecution

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
----------------	--	--	--	--	--	--

REVENUE						
----------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

This bill amends Title 22 to broaden the state's right of appeal from a trial court's dismissal of a criminal prosecution. The amendment provided by that bill returns the law to how it was interpreted prior to the Alaska Supreme Court's recent decision in Kott v. State. Consequently, there will not be a fiscal impact.

Prepared By: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: 12/19/84
 Approved by Commissioner: Richard I. Pegues/Fox Date: 12/19/84
 Agency: Norman C. Gorsuch Department of Law

Distribution (by Agency preparing fiscal note):

Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

7/1/84

MEMORANDUM

State of Alaska

TO: Sen. Rodney
Chair, Senate
Judic. Comm.

DATE: Feb. 18, 1985

FILE NO:

TELEPHONE NO: X3428

FROM: Dwayne Hoetaki
Asst. Atty. Gen.

SUBJECT: State's Right to
Appeal in Crim. Cases
(SB 99)

you requested last Thursday at the
Judic. Comm. meeting on SB 99, I am
sending you copies of Alaska cases regarding
interpretation of statutes giving the state
the right to appeal from dismissals of criminal
cases. The cases show the consistent interpre-
tation given these provisions up to the
supreme court's decision in Kott v. State
in Jan. 1984.

I've also included a copy of the federal
statute we used as a model.

Please give me a call if you have any
questions.

STATE of Alaska, Appellant,
v.
Frank Matthew SHELTON, Appellee.
No. 59.

Supreme Court of Alaska.
Jan. 11, 1962.
Rehearing Denied Feb. 28, 1962.

Prosecution for second degree murder. At the close of the State's case, the defendant moved to dismiss the indictment on the ground that it was based on perjured testimony. The Superior Court, State of Alaska, Fourth Judicial District, James A. von der Heydt, J., granted the motion, and the State appealed. The Supreme Court, Dimond, J., held that statement should not have been dismissed as based on perjured testimony even though there was variance in grand jury testimony and trial testimony of decedent's widow as to position of decedent's body when the first two shots were fired, where four other witnesses had been examined by grand jury.

Order dismissing indictment reversed and case remanded for new trial.

1. Indictment and Information ⇨144

Second degree murder indictment should not have been dismissed as based on perjured testimony even though there was variance in grand jury testimony and trial testimony of decedent's widow as to position of decedent's body when the first two shots were fired, where four other witnesses had been examined by grand jury. Const. art. 1, § 8; Rules of Criminal Procedure, rule 7(c).

2. Grand Jury ⇨1

A vital function of grand jury is protection of innocent against oppression and unjust prosecution.

3. Indictment and Information ⇨10.2(6)

There is a presumption that grand jury acted on sufficient evidence when it returned indictment.

4. Criminal Law ⇨1024(2)

Dismissal of indictment as based on perjured testimony raised issue of "sufficiency" of indictment and state could appeal and Supreme Court could review the matter. Laws 1959, c. 50, § 1; A.C.L.A.1949, § 66-9-14.

See publication Words and Phrases, for other judicial constructions and definitions of "Sufficient".

5. Indictment and Information ⇨17

The word "sufficient" in statute setting forth when an indictment is sufficient denotes the concept of adequacy and adaptation to a desired end. A.C.L.A.1949, § 66-9-14.

6. Indictment and Information ⇨1, 17

The purpose of indictment is to require defendant to stand trial for criminal offense with which he is charged, and if indictment is not adequate to answer such purpose it is insufficient, regardless of the fact that it may meet all the formal statutory requisites and have all the appearances of validity. A.C.L.A.1949, § 66-9-14.

7. Criminal Law ⇨1024(2)

When an indictment is dismissed for any reason, the question of its sufficiency may create an issue, and the Supreme Court has the power of review. A.C.L.A.1949, § 66-9-14.

William Taylor, Dist. Atty., Fairbanks,
Robert C. Erwin, Dist. Atty., Nome, for
appellant.

Charles E. Cole, Fairbanks, for appellee.

Before NESBETT, C. J., and DIMOND
and AREND, JJ.

DIMOND, Justice.

[1] Shelton was indicted and went to trial on a charge of second degree murder. At the close of the state's case he moved for a judgment of acquittal on the ground that the evidence was insufficient to sustain a conviction. The motion was denied. He then moved to dismiss the indictment on the ground that it was based on perjured

testimony. This motion was granted, the indictment was dismissed, and the state has appealed.

What has been characterized as "perjured testimony" consisted of inconsistent statements made by Mrs. Joan Nokes, widow of the deceased. Before the grand jury she had testified that Shelton had hit her husband and knocked him down, and then killed him by shooting him four times while he was flat on his back. At the trial she testified that the first two shots were fired, not while her husband was on his back, but while he was on his hands and knees attempting to regain his balance after having been knocked down. Thus, the variance in her testimony had to do only with the position of her husband's body when the first two shots were fired. The witness admitted the inconsistency at the trial. She stated that the first version of the shooting was the one she told the police because it was all she remembered at the time, and thought it was correct. She recalled it was incorrect at the time she appeared before the grand jury, but was reluctant to change her story for fear that they would think she was lying.

The Alaska constitution provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * *."¹ This language is identical with a like provision in the Fifth Amendment to the federal constitution. In 1956 the Supreme Court of the United States said that "Neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act", and that "An indictment returned by a legally constituted and unbiased grand jury, like an informa-

tion drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."²

That language, literally applied to this case, would mean that the judge should not have dismissed the indictment—there being no showing that the grand jury was not legally qualified nor that it was biased. But the situation here is not apposite to that in *Costello v. United States*. There the court was considering the single question of whether a defendant should be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him.³ Here we are considering the question of whether a defendant must stand trial when one of five witnesses, who testified before the grand jury and implicated the defendant in the criminal event, testified at the trial somewhat at variance with the testimony she gave when before the grand jury. The issue here is one of sufficiency of the evidence, and not as in *Costello*, that of competency.

[2] The state relies heavily on the *Costello* decision. But the broad declaration made in that case, not considered in relation to the factual situation there presented, would appear to preclude the dismissal of an indictment even where it appeared that "no evidence had been offered that rationally established the facts"⁴, or that the indictment was returned "substantially upon evidence which was untrustworthy."⁵ We would have serious misgivings about concurring in such a result; for in the extreme and yet conceivable situation it could mean that a defendant would be obliged to stand the expense and humiliation of a public trial where the grand jury had acted either on no evidence at all or

1. Alaska Const. art. I, § 8.

2. *Costello v. United States*, 350 U.S. 359, 362-363, 76 S.Ct. 406, 408, 100 L.Ed. 397, 401-403 (1956).

3. *Costello v. United States*, supra note 2, at 359, 76 S.Ct. 406, 409, (100 L.Ed. at 400.).

4. Judge Learned Hand wrote the opinion in the *Costello* case when it was decided

by the United States Court of Appeals for the Second Circuit. He said: "We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." *United States v. Costello*, 221 F.2d 668, 677 (2d Cir. 1955).

5. Note, 62 Harv.L.Rev. 111, 115 (1945).

solely on the basis of evidence that would not support a guilty verdict after trial.⁶ This would rob the constitutional right⁷ of much of its protective value⁸, and would not be in accord with what we have stated to be a vital function of the grand jury—the protection of the innocent against oppression and unjust prosecution.⁹

In this case, however, there is no need to pass final judgment on whether to follow the broad rule suggested by the Supreme Court in *Costello*. Here it has not been shown that the grand jury did not have substantial or rationally persuasive evidence upon which to base its indictment. The only portion of Mrs. Nokes' testimony which conflicts with her story to the grand jury concerns the position of her husband's body when Shelton fired the shots. The question of which narrative was the correct one was a matter for determination at the trial of the action.¹⁰ We cannot say if the grand jury had heard the later version of the event that it would not have been reasonably persuaded to indict Shelton for second degree murder.

6. See Judge Frank's concurring opinion in *United States v. Costello*, supra note 4, at 679.
7. Alaska Const. art. I, § 8, supra note 1.
8. See concurring opinion of Justice Burton in *Costello v. United States*, 350 U.S. 359, 364, 76 S.Ct. 406, 100 L.Ed. 397, 404 (1956).
9. Alaska Grand Jury Handbook, pp. 1-2.
10. *United States v. Brandt*, 139 F.Supp. 367, 372 (N.D. Ohio 1955), rev'd on other grounds, 256 F.2d 79 (6th Cir. 1958).
11. This was in accordance with Crim.R. 7(c) which requires that "When an indictment is found the names of all witnesses examined before the grand jury must be inserted at the foot of the indictment, or endorsed thereon, before it is presented to the court."
12. *United States v. Weber*, 197 F.2d 237, 238 (2d Cir. 1952), cert. denied, 344 U.S. 834, 73 S.Ct. 42, 97 L.Ed. 649 (1952); *Carrado v. United States*, 210 F.2d 712, 717-718 (D.C. Cir. 1953), cert. denied, *Atkins v. United States*, 347 U.S. 1018, 74 S.Ct. 874, 98 L.Ed. 1140 (1954); *United States v. Nunan*, 236 F.2d 576,

[3] Moreover, the indictment gave the names of four other witnesses who were examined before the grand jury.¹¹ Each of those persons gave testimony at the trial during the presentation of the state's case. Each was cross-examined by Shelton's counsel, but no attempt was made to ascertain what these witnesses had said when they appeared before the grand jury. We cannot speculate that the testimony they gave there was not sufficient, even apart from Mrs. Nokes' narrative, to justify the grand jury's action. There is a presumption that it acted on sufficient evidence, and Shelton has not sustained his burden of showing that it did not.¹² The indictment should not have been dismissed.

[4] Shelton also questions our right to review this matter, relying upon a law which precludes the state from appealing in criminal cases "except to test the sufficiency of the indictment or information."¹³ He argues that the sufficiency of an indictment is to be determined by examination of the instrument itself, that the only tests of sufficiency are those provided by statute¹⁴,

594 (2d Cir. 1956), cert. denied 353 U.S. 912, 77 S.Ct. 661, 1 L.Ed.2d 665 (1957).

13. S.L.A.1959, ch. 50, § 1.

14. Section 66-9-14 A.C.L.A.1949 provides:

"When indictment sufficient. That the indictment is sufficient if it can be understood therefrom:

"First. That it is entitled in a court having authority to receive it, though the name of the court be not accurately stated;

"Second. That it was found by a grand jury of the political division in which the court was held;

"Third. That the defendant is named, or if his name can not be discovered, that he is described by a fictitious name, with the statement that his real name is to the jury unknown;

"Fourth. That the crime was committed within the jurisdiction of the court;

"Fifth. That the crime was committed at some time prior to the finding of the indictment, and within the time limited by law for the commencement of an action therefor;

"Sixth. That the act or omission charged as the crime is clearly and dis-

369

and that if the indictment meets the statutory requirements, there is no room for appellate review when it is dismissed for any other reason.

[5-7] The word "sufficient" has a larger meaning than that. It denotes the concept of adequacy and adaptation to a desired end.¹⁵ An indictment has a purpose—to require a defendant to stand trial for a criminal offense with which he is charged. If it is not adequate to answer the purpose for which it is intended, then it is insuffi-

ciently set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended; "Seventh. That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case."

cient, regardless of the fact that it may meet all the formal statutory requisites and have all the appearances of validity. When an indictment is dismissed for any reason, the question of its sufficiency may create an issue, and this court has the power of review.¹⁶

The order dismissing the indictment is reversed, and the case is remanded for a new trial.

AREND, Justice, concurs in the result.

15. *Galveston, H. & S. A. Ry. Co. v. Enderle*, 170 S.W. 276, 277 (Tex.Civ.App. 1914); Webster, *New International Dictionary* (unabr.) at 2520 (2d ed. 1960).
16. *State v. Linn*, No. 122, 303 P.2d 301 (Alaska 1961).

warrant is executed without unreasonable delay.⁵

[3] Statutes of limitation serve to encourage promptness in the prosecution of actions and thus avoid the injustice which may result from the prosecution of stale claims. *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979). We fail to see how permitting a bench warrant for failure to appear to stop the running of the limitation period is inconsistent with this general underlying policy. We do not believe that requiring the state to file a complaint for failure to appear and requiring the issuance of a second warrant would serve any useful purpose. We have concluded that there are sufficient safeguards provided in the statutes since the statute of limitations is only tolled for a prosecution based upon the conduct for which a warrant is issued and since the execution of the warrant may not be unreasonably delayed. We therefore find that the running of the statute of limitations was tolled for at least the one year, ten months, and five days necessary to bring prosecution of the offense of failure to appear within the five-year period allowed by the statute.

Accordingly, the judgment of the superior court is AFFIRMED.



STATE of Alaska, Appellant,

v.

Miguel MICHEL, Appellee.

No. 5381.

Court of Appeals of Alaska.

Oct. 8, 1981.

Defendant was indicted for crime of assault with a dangerous weapon. The Su-

5. The trial court found that there was a reasonable basis for delay in executing the warrant to toll the statute of limitations "for a period of at least the one year, ten months and five days

perior Court, Third Judicial District, Kodiak, Roy H. Madsen, J., granted mistrial at defendant's request, and entered order dismissing indictment and barring retrial, and State appealed. The Court of Appeals, Singleton, J., held that: (1) State may appeal any adverse final judgment of trial court in criminal action dismissing an indictment for any reason unless retrial would be barred by double jeopardy clauses of State or Federal Constitution, and (2) since it was not clear whether court found prosecutorial misconduct to be merely negligent, grossly negligent or intentional, case had to be remanded for further findings of fact and conclusions of law on double jeopardy issue.

Vacated and remanded.

1. Criminal Law ⇐1024(3)

State may appeal any adverse final judgment of a trial court in a criminal action dismissing an indictment for any reason unless retrial would be barred by the double jeopardy clauses of the State or Federal Constitution. U.S.C.A.Const. Amends. 5, 14; Const. Art. 1, § 9; AS 22.05.010, 22.07.020(d)(2).

2. Criminal Law ⇐1181

Where trial court, in its written decision dismissing indictment, found that mistrial was result of "prejudicial and prosecutorial misconduct" barring retrial, but it was not clear whether court found this conduct to be merely negligent, grossly negligent, or intentional, case had to be remanded for further findings of fact and conclusions of law on double jeopardy issue to determine whether State could appeal. AS 22.07.020(d)(2); U.S.C.A.Const. Amends. 5, 14; Const. Art. 1, § 9.

3. Indictment and Information ⇐144.2

Whenever a judge feels that dismissal of indictment is required, under circum-

necessary to bring prosecution of the offense charged herein within the period allowed by the statute of limitations." This finding has not been challenged on appeal.

stances not determining guilt or innocence, he should make explicit findings of fact and conclusions of law to explain his decision to parties and public and to enable intelligent review of case. AS 22.05.010, 22.07.020(d)(2).

W. H. Hawley, Jr., Asst. Atty. Gen., Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellants.

James G. Robinson and Joel H. Bolger, Alaska Public Defender Agency, Kodiak, and Brian Shortell, Public Defender, Anchorage, for appellee.

Before BRYNER, C. J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

Miguel Michel was indicted for the crime of assault with a dangerous weapon (former AS 11.15.220). The trial court granted a mistrial at defendant's request and, after hearing argument from the parties, found prosecutorial prejudicial misconduct and entered an order dismissing the indictment and barring retrial. The state has appealed.

The relevant facts are few. During the course of trial, while cross-examining defendant's wife, who was a state's witness, counsel for the state obtained a hearing out of the jury's presence and unsuccessfully sought court permission to impeach her by showing threats by Michel to shoot police officers. The court allowed the state to make an offer of proof by voir dire Mrs. Michel, heard argument, and sustained the defendant's objection to this line of testimony. The jury was recalled and the state resumed cross-examination of Mrs. Michel, during which the state asked her if she had said (during voir dire out of the jury's presence) that she "heard him [defendant] say that he was going to blow somebody's blankety-blank head" The defense moved for a mistrial which was granted and later, arguing prosecutorial misconduct, successfully sought dismissal of the indict-

ment on double jeopardy grounds. This appeal followed.

Before proceeding to the merits, it is necessary to resolve Michel's contention that we lack jurisdiction over the state's "appeal." Michel relies on AS 22.07.020(d)(2) which provides:

(d) An appeal to the court of appeals is a matter of right in all actions and proceedings within its jurisdiction except that . . . (2) the state has no right of appeal in criminal cases except to test the sufficiency of the indictment or information or to appeal a sentence on the ground that it is too lenient.

Michel also relies on Alaska Rule of Appellate Procedure 202 which provides in relevant part:

Judgments from Which Appeal May Be Taken.

....

(c) In criminal cases, the prosecution has a right to appeal only to test the sufficiency of the indictment or on the ground that the sentence is too lenient.

[1] Michel reasons that to "test the sufficiency" of the complaint or indictment is to determine its efficacy as a charging document, *i. e.*, does it state an offense and, by extension, was the evidence submitted to the grand jury or charging authority, resulting in the publication of the indictment or information, adequate? Michel cites cases from other jurisdictions which have strictly construed similar statutory provisions in the manner he suggests. *See, e. g.*, *State v. Garrett*, 228 Or. 1, 363 P.2d 762, 763 (1961); *State v. Ulmer*, 351 S.W.2d 7, 10 (Mo.1961); *State v. Fayle*, 114 Ariz. 219, 560 P.2d 403, 403-04 (1976) (adopting the holding of *State v. Lopez*, 26 Ariz.App. 559, 550 P.2d 113 (1976)).

We reject this interpretation, concluding, after reviewing Alaska law, that the reasons for strictly construing statutes providing for appeals by the government, *i. e.*, to prevent harassment of a defendant by multiple prosecutions draining away his financial resources and subjecting him to the emotional strain of pending proceedings,

are more than adequately answered by the liberal interpretation given the double jeopardy clause of our state constitution. We consider this case as an appeal rather than as a petition for review, *State v. Browder*, 486 P.2d 925 (Alaska 1971), because the judgment herein is unquestionably final, unless reversed. See *Jordan v. Reed*, 544 P.2d 75, 78-79 (Alaska 1975). We therefore conclude that the state may appeal to this court any adverse final judgment of a trial court in a criminal action dismissing an indictment for any reason unless retrial would be barred by the double jeopardy clauses of the state¹ or federal constitutions.² We thus construe Alaska law regarding appeals by the government as essentially the same as current federal law. See Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* § 3919 (1976 and Supp. 1980).

We believe this decision is foreshadowed in a number of our supreme court's decisions. In *State v. Shelton*, 368 P.2d 817 (Alaska 1962) the court rejected the argument that a statute, similar to AS 22.07.020(d)(2), preventing government appeals in criminal cases "except to test the sufficiency of the indictment or information" permitted appeals only where the face of the indictment was found defective. The court reasoned:

The word "sufficient" has a larger meaning than that. It denotes the concept of adequacy and adaptation to a desired end. An indictment has a purpose—to require a defendant to stand trial for a criminal offense with which he is charged. If it is not adequate to answer the purpose for which it is intended, then it is insufficient, regardless of the fact that it may meet all the formal statutory requisites and have all the appearance of validity. When an indictment is dismissed for any reason, the question of its sufficiency may create an

1. Article 1 § 9 of the state constitution states: "No person shall be put in jeopardy twice for the same offense."
2. The fifth amendment to the United States Constitution provides in pertinent part: "[N]or shall any person be subject for the same of-

issue, and this court has the power of review. [Footnotes omitted.]

Id. at 820.

In *State v. Keep*, 409 P.2d 321 (Alaska 1965), *aff'g*, *State v. Keep*, 397 P.2d 973 (Alaska 1965), the court refused review of a judgment favoring the accused where the state conceded retrial was barred by double jeopardy but requested an "advisory opinion" on the law.

Further, in *State v. Browder*, 486 P.2d 925 (Alaska 1971), the court rejected a challenge to its jurisdiction to grant petitions for review based upon *Keep* and AS 22.05.010, the statute governing appeals to the supreme court, substantially identical in form to AS 22.07.020(d)(2). The supreme court reasoned:

[E]rroneous rulings involving important questions of constitutional law will be made during a trial, or at the superior court appellate level, in favor of an accused. How are such mistakes to be corrected? Neither AS 22.05.010 nor Alaska's constitutional prohibition against double jeopardy requires that an erroneous non-final order or decision, favorable to the accused, must stand uncorrected

Id. 486 P.2d at 931.

Finally, in *State v. Marathon Oil Co.*, 528 P.2d 293, 295-296 (Alaska 1974), the court permitted a further appeal to it by the state after a defendant obtained an acquittal at the intermediate appellate level, reasoning that AS 22.05.010 was intended to implement constitutional protection for double jeopardy and was not infringed by allowing a subsequent appeal by the state where the defendant prevailed on the first appeal following his conviction.

Read consistently with *Shelton* and *Keep*, we believe that the supreme court in *Browder* and *Marathon Oil* was recognizing the

sense to be twice put in jeopardy of life or limb This provision is applicable to the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

fact that some erroneous final orders would bar retrial under the double jeopardy clause, but that erroneous non-final orders would not. Thus, we conclude, reading all of our supreme court cases together, that AS 22.05.010, governing appeals to the supreme court, and AS 22.07.020(d)(2), governing appeals to this court, will bar prosecution appeals only where double jeopardy would bar retrial if the appeal was successful.

Unfortunately, the record is not sufficient to determine the double jeopardy issue. The parties recognize that double jeopardy normally does not preclude retrial where a mistrial is declared at defendant's request. *Piesik v. State*, 572 P.2d 94, 96 (Alaska 1977). They likewise agree that mere negligence on the part of the prosecutor resulting in a mistrial will not bar retrial. *Muller v. State*, 478 P.2d 822, 827 (Alaska 1971). Finally, they agree that where the prosecutor, motivated by a desire to avoid an acquittal in a case which is going badly, engages in purposeful misconduct forcing the defendant to move for and the court to declare a mistrial further prosecution will be barred by double jeopardy. *Piesik v. State*, 572 P.2d at 97; *Torres v. State*, 519 P.2d 788, 791 (Alaska 1974); *Muller v. State*, 478 P.2d at 827.

The parties disagree as to whether "gross negligence" by the prosecutor, resulting in

3. Dismissal of a prosecution without a determination of guilt or innocence may be necessary to vindicate constitutional rights. Nevertheless, the community, apart from the state government and its prosecutors, has a substantial interest in seeing the guilty punished. Consequently, whenever a judge feels that a dis-

a mistrial, will bar a retrial. Michel cites *United States v. Martin*, 561 F.2d 135 (8th Cir. 1977), for the proposition that it should, while the state cites *United States v. Leonard*, 593 F.2d 951 (10th Cir. 1979), for the proposition that an intent to abort the trial is required before double jeopardy will preclude retrial. Our supreme court expressly reserved the issue in *Piesik v. State*, 572 P.2d at 97 n. 16.

[2, 3] The trial court, in its written decision dismissing the indictment, found that the mistrial was a result of "prejudicial prosecutorial misconduct" barring retrial. It is not clear whether the court found the misconduct to be merely negligent, grossly negligent, or intentional, or in context, what he understood these terms to mean. Therefore, the case must be remanded for further findings of fact and conclusions of law.³

The judgment of the superior court is vacated and the case REMANDED for the entry of findings of fact, conclusions of law and a new judgment.



miss' is required, under circumstances not determining guilt or innocence, he should make explicit findings of fact and conclusions of law to explain his decision to the parties and the public and to enable intelligent review by this court. Cf. Civil Rule 52 (findings of fact and conclusions of law required in civil cases).

STATE of Alaska, Petitioner,

v.

Casimer KOTT, Respondent.

No. 5570.

Court of Appeals of Alaska.

Nov. 19, 1981.

... expression of legislative intent is a factor which should be considered in judging Sundberg's sentence.⁷ Since this issue was not addressed in the trial court, we believe that a remand for resentencing is the most appropriate procedure.

The case is remanded to the superior court to vacate the conviction and sentence for receiving or concealing stolen property, and for resentencing in accordance with this opinion.

BRYNER, C. J., not participating.



State brought petition for review of summary judgment of acquittal entered by the District Court, Fourth Judicial District, Fairbanks, Monroe Clayton, J., dismissing complaint against defendant on ground that his prosecution was barred by collateral estoppel. The Court of Appeals, Singleton, J., held that: (1) although characterized as judgment of acquittal, trial court's action was in effect order of dismissal entered prior to attachment of jeopardy and therefore did not preclude review under prohibition against placing defendant twice in jeopardy, and (2) judgment in criminal case favorable to codefendant did not bar prosecution of defendant in subsequent proceeding.

Reversed and remanded.

1. Criminal Law ⇌ 172

Although trial judge termed his judgment an acquittal, where trial judge neither heard all evidence against defendant nor concluded that reasonable jury could not find him guilty beyond reasonable doubt based upon that evidence, but rather, con-

shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155—12.55.175:

(1) if the offense is a second felony conviction, two years;

(2) if the offense is a third felony conviction, three years.

7. Another factor which the trial court should consider in imposing Sundberg's sentence is that a sentence "ought not to exceed ten years except in unusual cases and normally should not exceed five years." ABA Standards, Sentencing Alternatives and Procedures § 2.1 at 1 (Approved Draft, 1971); *Pascoe v. State*, 628 P.2d 547 (Alaska, 1980).

5. AS 11.46.130 reads as follows:

THEFT IN THE SECOND DEGREE. (a) A person commits the crime of theft in the second degree if he commits theft as defined in § 100 of this chapter and

(1) the value of the property or services is \$500 or more but less than \$25,000;

(2) the property is a firearm or explosive;

or
(3) the property is taken from the person of another.

(b) Theft in the second degree is a class C felony.

6. AS 12.55.125(e) reads as follows:

A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and

Cite as, Alaska App., 636 P.2d 622

cluded that judgment of acquittal previously entered in favor of codefendant barred trial of defendant under doctrine of collateral estoppel, trial court in effect granted defendant summary judgment, and such ruling prior to attachment of jeopardy through swearing of jury did not preclude appellate review by virtue of prohibition against placing defendant twice in jeopardy. U.S.C.A.Const.Amend. 5, 14; Const. Art. 1, § 9.

2. Criminal Law ⇐190

Double jeopardy clause does not preclude retrial after order of dismissal if order was erroneous. U.S.C.A.Const.Amend. 5; Const.Art. 1, § 9.

3. Judgment ⇐751

While state had as much incentive to prosecute codefendant as it did defendant, and while codefendant's involvement was certainly decided by prior judge, State did not have right to appeal codefendant's acquittal, and consequently, State could not be said to have had full and fair hearing on facts; thus, judgment in criminal case favorable to codefendant did not bar prosecution of defendant, on grounds of collateral estoppel, in subsequent proceeding.

James P. Doogan, Jr., Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, and Wilson L. Condon, Atty. Gen., Juneau, for petitioner.

Lloyd I. Hoppner, Rice, Hoppner, Ingraham & Brown, Fairbanks, for respondent.

Before BRYNER, C. J., SINGLETON, J., and MOORE, Superior Court Judge.*

* Daniel A. Moore, Superior Court Judge, sitting by assignment made pursuant to article IV, section 16 of the Constitution of Alaska.

1. It is therefore not necessary for us to consider defendant's argument that this court lacks jurisdiction to hear this matter as a petition for review in light of certain limitations found in the district court rules (and in the rules of this court) governing appeals.

Further, we reject defendant's argument that AS 22.07.020(d)(2) which prevents appeals by the state except to test the sufficiency of the indictment, information or, by extension, com-

SINGLETON, Judge.

This is a petition for review of a summary judgment of acquittal entered by the district court dismissing the complaint against defendant on the ground that his prosecution was barred by collateral estoppel. The state first petitioned the superior court for review of the district court's decision. Upon denial by the superior court, the state renewed its petition in this court. Having concluded that the petition challenges a final judgment, we have determined to treat the petition as an appeal. *Jordan v. Reed*, 544 P.2d 75, 78-79 (Alaska 1975).¹

[1,2] The trial judge termed his judgment an acquittal. Generally judgments of acquittal are not reviewable on appeal by the state. See *Selman v. State*, 406 P.2d 181 (Alaska 1965). Both the state and federal constitutional prohibitions against placing a defendant twice in jeopardy insulate him from an appeal from a judgment of acquittal however erroneous the trial judge's view of the facts or the law. However, both state and federal courts have held that the reviewing court is not bound by the trial court's characterization of its order but must look to the legal effect of what actually was done. See *United States v. Jorn*, 400 U.S. 470, 478 n.7, 91 S.Ct. 547, 553 n.7, 27 L.Ed.2d 543, 552 (1971) (opinion of Harlan, J.); *Selman v. State*, 406 P.2d at 186. Here the trial judge neither heard all of the evidence against respondent nor concluded that a reasonable jury could not find him guilty beyond reasonable doubt based upon that evidence. Rather, he concluded

plaint, precludes consideration of this matter as an appeal. In *State v. Michel*, 634 P.2d 383, (Alaska App., 1981), we relied upon *State v. Shelton*, 368 P.2d 817, 819-20 (Alaska 1962), in construing AS 22.07.020(d)(2) to preclude state appeals only in situations where retrial would be barred by double jeopardy; that is, we consider an indictment or information "insufficient" if it is dismissed for any reason other than a determination by a trier of fact that the defendant is innocent. We will consider the impact of the double jeopardy clauses of the state and federal constitutions hereafter.

337

338

Digest

that a judgment of acquittal previously entered in favor of a codefendant barred trial of respondent under the doctrine of collateral estoppel. Thus, the trial court in effect granted the defendant summary judgment. Such a pretrial ruling prior to the attachment of jeopardy through the swearing of the jury does not preclude appellate review by virtue of the prohibition against placing a defendant twice in jeopardy. See *Serfass v. United States*, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975). The United States Supreme Court has held that nothing in the double jeopardy clause of the federal constitution forecloses putting the defendant to trial as an aider and abettor simply because another jury has determined that his principal was not guilty of the offenses charged. See *Standefer v. United States*, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980). We see no reason to interpret our state constitution's double jeopardy clause differently. Consequently, we conclude that the trial judge's characterization of his decision as a judgment of acquittal was erroneous and that the judgment should have been characterized as a dismissal based upon a plea in bar, *i. e.*, nonmutual collateral estoppel. The double jeopardy clause does not preclude retrial after such an order of dismissal if the order was erroneous, and consequently, the superior court and this court may review the case.² See *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3919, at 675 (1976).

A determination that the constitution does not bar retrial is not dispositive, however, since nonmutual collateral estoppel, if available, might bar retrial as a matter of

common law. It was the trial judge's determination that the common law barred retrial which generated the order of dismissal under consideration here.

In order to understand the context in which respondent was granted a judgment of acquittal, it is necessary to review the procedural history of this case. Defendant Kott and codefendant Roland Bonneville are police officers employed by the City of Fairbanks. On January 10, 1979, they were engaged in their duties attempting to videotape an individual whom they suspected of driving while intoxicated. During the videotaping, an altercation occurred resulting in a complaint against Kott and Bonneville charging them with assault of the suspect and erasure of the videotape to cover up evidence of that assault. Kott and Bonneville were initially tried together before District Court Judge Hugh Connelly and a jury on May 17, 1979. Fearing the unconstitutional use of one defendant's statements against the other, Judge Connelly issued a detailed order *in limine* precluding testimony relating admissions of one defendant implicating the other. On May 24, 1979, finding that the state had violated that order *in limine*, Judge Connelly granted a mistrial as to Kott only, and trial against Bonneville continued. Ultimately, Judge Connelly granted Bonneville a judgment of acquittal before submitting the case to the jury. Finally, Judge Connelly determined that the mistrial granted Kott was the result of prosecutorial misconduct and that therefore his retrial was barred. Nevertheless, he stayed entry of his judgment to allow the state to seek review. The state's petition for review was granted

2. The superior court denied review in the apparent belief that it was bound by the trial court's characterization of its decision as a judgment of acquittal. Respondent cites the carefully reasoned opinion of the superior court in *State v. Gardner*, No. 4 FA-78-1876 Cr. (Alaska Super., May 10, 1979), for the proposition that the district court's failure to stay entry of its judgment to permit review in the superior court is binding on the superior court and ousts that court of jurisdiction. For the reasons set out in *State v. Browder*, 486 P.2d 925, 929-31 (Alaska 1971), in support of the

view that it is improper to permit a trial court to insulate its own errors from review, *e. g.*, by failing to grant a stay, we refuse to follow *State v. Gardner*. Consequently, we could remand this case to the superior court with directions to exercise its discretion regarding the granting or denial of the petition for review. Under the circumstances, however, we feel that the issue is of sufficient importance to warrant a decision by this court, and consequently, a remand would simply delay the ultimate outcome. We therefore decline to remand the case.

by Superior Court Judge Taylor who reviewed the facts of the case carefully, concluded that the state's actions were not sufficiently egregious to bar retrial, and reversed Judge Connelly's decision and remanded for trial. This decision is not before us at this time and we express no opinion regarding its resolution. The matter was reassigned to Judge Monroe Clayton. Kott then filed a motion to dismiss the complaint on grounds of collateral estoppel. After reviewing the material submitted by the parties, Judge Clayton entered an oral decision on July 15, 1980, granting the defendant's motion to dismiss, finding further prosecution barred by collateral estoppel. The oral decision was supplemented by a written judgment of acquittal filed on July 17, 1980. This petition followed on July 28, 1980.

The remaining issue is therefore: in a criminal case, may a defendant invoke a judgment of acquittal granted a codefendant in a prior case as a bar to his prosecution under the doctrine of collateral estoppel? The issue is one of first impression in this jurisdiction, though our state supreme court has on a number of occasions discussed *res judicata* and collateral estoppel in both civil and criminal cases. We feel that the proper resolution of this case can be gleaned from those earlier cases.

In *State v. Baker*, 393 P.2d 893, 896-97 (Alaska 1964), the supreme court defined the application and purpose of *res judicata* as follows:

This doctrine bars a second suit between the same parties on the same subject matter resolving the same issues between the parties in the same capacity or quality. It is founded upon the principle that parties ought not to be permitted to litigate the same issue more than once and that when a right or fact has been judicially determined by a court of competent jurisdiction or an opportunity for such trial has been given, the judgment of the court, as long as it remains unreversed, should be conclusive upon the parties and those in privity with them in law or estate. [Footnotes omitted.]

The court said the following about the doctrine of collateral estoppel:

While the general rule of *res judicata* applies to repetitious suits involving only the same cause of action it has been employed in situations where the second action between the same parties is upon a different cause or demand. But in the latter event the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. *Res judicata* is then more accurately referred to as collateral estoppel or estoppel by judgment.

Id. at 879 (footnotes omitted).

In its cases, the supreme court recognized that "mutuality" was normally required before collateral estoppel could be invoked. That is, both the party asserting estoppel and the party against whom estoppel was asserted in the second action had to have been parties to the first action. In *Pennington v. Snow*, 471 P.2d 370, 376-77 (Alaska 1970), the supreme court discussed circumstances under which a requirement of "mutuality" could be relaxed. There the court held that while the mutuality of estoppel requirement would be necessary in some cases, it would not as a rule be necessary for the invocation of *res judicata* or collateral estoppel against a party. Of note in this regard is *Scott v. Robertson*, 583 P.2d 188 (Alaska 1978), where the supreme court permitted a party to use a criminal conviction for driving while intoxicated against a defendant in a subsequent civil proceeding to establish negligence. The court held that three factors must be present before the criminal conviction can be used as conclusive in the civil proceeding: first, the prior conviction must be for a serious offense in order that the accused have the motivation to defend himself fully; second, that the defendant in fact have a full and fair hearing; and third, that the issue in which the judgment is offered must necessarily have been decided in the prior case. *Id.* at 191-92.

037

038

Digest

Finally, in *DeSacia v. State*, 469 P.2d 369, 379-81 (Alaska 1970), the Alaska Supreme Court, in partial reliance on *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), applied the doctrine of collateral estoppel to criminal cases, but in so doing, held that collateral estoppel would only be applied where it was fair to do so. See *Dapceovich v. State*, 360 P.2d 789, 792-93 (Alaska 1961). Specifically, in *DeSacia*, the court refused to give a defendant the benefit of inconsistent verdicts, one of guilty and one of not guilty, to bar any conviction at all.

[3] Having reviewed these Alaska cases, we have come to the conclusion that a judgment in a criminal case favorable to one defendant should not bar prosecution of a codefendant in a subsequent proceeding. While the state had as much incentive to prosecute Bonneville as it did Kott, and while Bonneville's involvement was certainly decided by Judge Connelly, the state did not have a right to appeal Bonneville's acquittal, and consequently, the state cannot be said to have had a full and fair hearing on the facts. We therefore reject nonmutual collateral estoppel in such criminal cases.³ In so doing, we adopt the reasoning of the United States Supreme Court in *Standefer v. United States*, 447 U.S. at 22-23, 100 S.Ct. at 2007, 64 L.Ed.2d at 699-700, where the court refused to allow the use of a prior acquittal to bar prosecution against a codefendant and, in justification, said in part:

First, in a criminal case, the government is often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel. Several aspects of our criminal law make this so: the prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt, compare

Fed.Rule Civ.Proc. 50; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence, compare Fed.Rule Civ.Proc. 59; and it cannot secure appellate review where a defendant has been acquitted. The absence of these remedial procedures in criminal cases permits juries to acquit out of compassion or compromise or because of "their assumption of a power which they had no right to exercise, but to which they were disposed through leniency." It is of course true that verdicts induced by passion and prejudice are not unknown in civil suits. But in civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the government has no similar avenue to correct errors. Under contemporary principles of collateral estoppel, this factor strongly militates against giving an acquittal preclusive effect. [Citations and footnotes omitted.]

We recognize that these arguments might equally be made in any case where double jeopardy is asserted such as where a defendant invokes collateral estoppel in his own behalf based upon a prior acquittal. But in such a case, collateral estoppel has been held a matter of constitutional compulsion not reasonable choice; for there, the risk of harassment of a defendant by successive prosecutions is at least possible. As the Supreme Court pointed out in *Standefer*, there is no question of harassment by successive prosecutions of one who is tried but once, though a codefendant might earlier have been tried. Finally, we recognize that in *People v. Taylor*, 12 Cal.3d 686, 117 Cal.Rptr. 70, 527 P.2d 622 (1974), upon which defendant relies, the California Supreme Court has arguably reached a different result. While we believe *Taylor* to be distinguishable on its facts (it involved a situation where one defendant was being prosecuted on a theory of vicarious liability

3. Where the state does have an opportunity to obtain review of an adverse decision, we express no opinion regarding the propriety of a court's application of nonmutual collateral estoppel. Compare *Commonwealth v. Scala*, 8

Mass.App. 202, 392 N.E.2d 869 (1979), *aff'd*, 404 N.E.2d 83 (Mass.1980) (denying nonmutual collateral estoppel effect to an earlier suppression hearing) with *State v. Gonzalez*, 75 N.J. 181, 380 A.2d 1128 (1977) (allowing it).

STATE v. KOTT

Alaska 627

Cite as, Alaska App., 636 P.2d 622

for the acts of a codefendant previously acquitted), we prefer to reject its holding. We feel the factors cited from *Standefer* are more persuasive than those relied upon by *Taylor, i. e.*, promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system, and providing repose by preventing a person from being harassed by vexatious litigation. As previously mentioned, we see no harassment when an individual is tried for the first time, and we consider inconsistent judgments in criminal cases a necessary result of permitting jury trials where reasonable men can differ since where reasonable men can differ, they frequently will. Fi-

nally, we consider the need to enable the state to have a full and fair adversary proceeding more important than promoting judicial economy by minimizing repetitive litigation. The decision of the district court is REVERSED and this case is REMANDED for trial.

COATS, J., not participating.



037

038

Digest

Casimer KOTT, Petitioner,
v.
STATE of Alaska, Respondent.
No. 5570.

Supreme Court of Alaska.
Jan. 27, 1984.

State brought petition for review of summary judgment of acquittal entered by the District Court, Fourth Judicial District, Fairbanks, Monroe Clayton, J., dismissing complaint against defendant on ground that his prosecution was barred by collateral estoppel. The Court of Appeals, 636 P.2d 622, reversed and remanded, and defendant petitioned for hearing. The Supreme Court, Burke, C.J., held that: (1) Court of Appeals had jurisdiction to entertain petition; (2) State was not collaterally estopped from relitigating whether assault occurred; and (3) retrial was permissible under double jeopardy clauses of State and Federal Constitutions.

Court of Appeals affirmed.
Matthews, J., concurred with opinion.

1. Criminal Law \S 1023(2)

Judgment of acquittal following grant of motion to dismiss complaint on collateral estoppel grounds was final judgment.

2. Criminal Law \S 1024(5)

State was not entitled to appeal district court's judgment of acquittal following grant of motion to dismiss complaint on collateral estoppel grounds, pursuant to statute that precludes State's right to appeal in criminal cases except to test sufficiency of indictment or information or to appeal sentence on ground that it is too lenient; overruling *State v. Michel*, 634 P.2d 383. AS 22.07.020(d), (d)(2).

3. Criminal Law \S 1024(1)

Statute which precludes State from appealing in criminal cases except to test sufficiency of indictment or information or to appeal sentence on ground that it is too

lenient does not merely mimic double jeopardy clause, but more greatly limits State's right to appeal; overruling *State v. Michel*, 634 P.2d 383. 18 U.S.C.A. \S 3731; Const. Art. 1, \S 9; AS 22.07.020(d)(2); U.S.C.A. Const. Amend. 5.

4. Indictment and Information \S 71.2(2, 4)

As charging document, fundamental purposes of indictment or information are to furnish accused with description of charge against him to enable him to prepare his defense and to permit him to claim double jeopardy in future should he again be charged with same offense, and thus, two basic criteria for determining sufficiency of indictment are whether it contains elements of offense to be charged so as to sufficiently apprise accused of what he must be prepared to meet at trial, and whether offense charged is identified with sufficient particularity so that after judgment the accused may be able to plead judgment in bar of further prosecution for same offense. Const. Art. 1, \S 9.

5. Indictment and Information \S 71.2(2, 4)

Indictment is insufficient if it fails to either inform defendant adequately of charges against him or to identify offense with sufficient particularity so that resulting judgment may be pleaded as bar to subsequent prosecutions for same crime.

6. Indictment and Information \S 10.1(4), 10.2(1, 2)

If indictment is dismissed because evidence upon which it rests is perjured or insufficient, or because of some defect in procedures leading to indictment, so that defendant cannot be called to stand trial, then indictment is insufficient, regardless of fact that it may meet all formal statutory requisites and have all appearances of validity.

7. Criminal Law \S 1024(3)

Appellate review from dismissal of criminal indictment based on either consideration of whether there was sufficient, credible evidence to support indictment, or

whether indictment procedures themselves comported with statutory and constitutional requirements, is permissible under statute which permits state to appeal "to test the sufficiency of the indictment or information." AS 22.07.020(d)(2).

See publication Words and Phrases for other judicial constructions and definitions.

8. Criminal Law ⇨1024(1)

Erroneous decision should not go uncorrected, simply because it is favorable to accused, and discretionary review is available, even if lower court ruling is in form of final order, where appellate review is not barred by state and federal double jeopardy guarantees. 18 U.S.C.A. § 3731; AS 22.07.020(d)(2); U.S.C.A. Const.Amend. 5; Rules App.Proc., Rule 402.

9. Criminal Law ⇨1024(5)

Court of Appeals had jurisdiction to hear petition for appellate review of judgment of acquittal, which was final judgment, entered following grant of motion to dismiss criminal complaint against defendant on collateral estoppel grounds; abandoning State v. Keep, 397 P.2d 973. 18 U.S.C.A. § 3731; AS 22.07.020(d)(2); U.S.C.A. Const.Amend. 5; Rules App.Proc., Rule 402.

10. Judgment ⇨634

Requirements of collateral estoppel are that issue sought to be relitigated be precisely same as issue in previous litigation, that judgment in prior litigation must have decided issue, and that there be "mutuality" of parties, i.e., collateral estoppel could be invoked only by those who were parties or privies to action in which judgment was rendered.

See publication Words and Phrases for other judicial constructions and definitions.

11. Judgment ⇨751

Collateral estoppel did not preclude State from relitigating, in prosecution of alleged accomplice for assault, whether in

* Carpeneti, Superior Court Judge, sitting by assignment made pursuant to Article IV, section

fact assault occurred, following acquittal of alleged principal, despite possibility that alleged accomplice might be convicted in face of alleged principal's earlier acquittal, as there was no question of harassment by successive prosecutions and State's need to have full and fair adversary proceeding outweighed interest in promoting judicial economy.

12. Criminal Law ⇨186

Double jeopardy did not bar prosecution of defendant alleged accomplice following reversal of entry of judgment of acquittal, which was granted on collateral estoppel grounds based on alleged codefendant principal's acquittal, as defendant had not been subjected to risk of conviction. Const. Art. 1, § 9; U.S.C.A. Const. Amend. 5.

Roger L. Brunner, and Kenneth P. Ringstad, Rice, Hoppner, Brown & Brunner, Fairbanks, for petitioner.

James P. Doogan, Jr., Asst. Dist. Atty., Fairbanks, Harry L. Davis, Dist. Atty., Fairbanks, and Wilson Condon, Atty. Gen., Juneau, for respondent.

Before BURKE, C.J., RABINOVITZ, MATTHEWS and COMPTON, JJ., and CARPENETI, Superior Court Judge *.

OPINION

BURKE, Chief Justice.

Casimer Kott petitions for hearing from a court of appeals decision reversing a judgment of acquittal entered by the district court on collateral estoppel grounds. We affirm the decision of the court of appeals.

Kott and Roland Bonneville were Fairbanks police officers. On January 10, 1979, they were attempting to videotape an individual whom they suspected of drunk driving. During the videotaping an altercation occurred which led to the filing of a criminal complaint against Kott and Bonne-

16, of the Constitution of Alaska.

ville, charging them with assault of the suspect and erasure of the videotape to destroy evidence of the assault.

The officers were tried jointly, before a jury, in the district court. After several days of testimony, a mistrial was declared as to Kott, but trial against Bonneville continued. At the close of the case, the trial court granted Bonneville's motion for a judgment of acquittal. After Kott was assigned a new trial date, his attorney filed a motion to dismiss the complaint on collateral estoppel grounds. The motion was granted. The state thereafter petitioned the superior court for review of that decision but the petition was denied. On further petition to the court of appeals, however, the judgment of the district court was reversed, *State v. Kott*, 636 P.2d 622 (Alaska App.1981). This petition, by Kott, followed.

Kott urges in his petition: (1) that AS 22.07.020(d)(2) precludes the state from seeking review; (2) that the state and federal constitutional prohibitions against double jeopardy bar review of the trial court's judgment of acquittal; and (3) that the state is collaterally estopped from relitigating whether in fact an assault occurred. We hold that the court of appeals had jurisdiction to entertain the petition, that the state is not collaterally estopped from relitigating whether an assault occurred, and that a retrial is permissible under the double jeopardy clauses of the state and federal constitutions.

I. State's Right to Appeal

AS 22.07.020(d)(2) provides, in part, that "the state has no right to appeal in criminal cases except to test the sufficiency of the indictment or information or to appeal a sentence on the ground that it is too lenient."¹ Similarly, while Appellate Rule

1. AS 22.07.020(d) provides:

An appeal to the court of appeals is a matter of right in all actions and proceedings within its jurisdiction except that (1) the right to appeal to the court of appeals is waived if an appellant chooses to appeal the final decision of the district court to the superior court; and (2) the state has no right to appeal in criminal cases except to test the sufficiency of the in-

202 states that an appeal may be taken to the court of appeals from a final judgment entered by the superior or district court, "[i]n criminal cases, the prosecution has a right to appeal only to test the sufficiency of the indictment or on the ground that the sentence is too lenient." Alaska R.App.P. 202(c). The question presented here is whether this language precludes the state from seeking appellate review of the district court's decision to grant a judgment of acquittal.

The case is made to appear more complex than it really is because of its procedural history. Apparently in the belief that it had no right to appeal the decision, because of AS 22.07.020(d)(2) and Appellate Rule 202(c), the state petitioned for review pursuant to Appellate Rule 402. The latter provides, partly: "An aggrieved party, including the state . . . , may petition the appellate court . . . to review any order or decision of the trial court, not appealable under [Appellate] Rule 202. . . ." Alaska R.App.P. 402(a)(1). The court of appeals elected to treat the petition as an appeal, based upon its determination that the petition challenged a final judgment. *State v. Kott*, 636 P.2d 622, 623 (Alaska App.1981). The court concluded that the state's appeal was not barred by AS 22.07.020(d)(2) and reversed.

[1, 2] We do not quarrel with the court of appeals' decision that the judgment of acquittal was a final judgment.² We do, however, take issue with the court's further holding that AS 22.07.020(d)(2) did not preclude an *appeal* by the state. In so holding, the court of appeals relied on its earlier decision in *State v. Michel*, 634 P.2d 383 (Alaska App.1981), where the court held that "the state may appeal . . . any adverse final judgment of a trial court in a criminal action . . . for any reason unless

dictment or information or to appeal a sentence on the ground that it is too lenient.

2. The judgment below terminated the action against Kott. A more complete example of a final judgment would be hard to imagine. See generally *City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 631 n. 14 (Alaska 1979); *Jordan v. Reed*, 544 P.2d 75, 73-9 (Alaska 1975).

retrial would be barred by the double jeopardy clauses of the state or federal constitutions." 634 P.2d at 385 (footnotes omitted). The court reasoned that

the reasons for strictly construing statutes providing for appeals by the government, i.e., to prevent harassment of a defendant by multiple prosecutions draining away his financial resources and subjecting him to the emotional strain of pending proceedings, are more than adequately answered by the liberal interpretation given the double jeopardy clause of our state constitution.

Id. at 384-85.³

[3-7] We cannot agree that AS 22.07-020(d)(2) merely mimics the double jeopardy

3. In addition, the court believed that its decision was foreshadowed by decisions of this court, notably *State v. Shelton*, 368 P.2d 817, 820 (Alaska 1962) (where an indictment is dismissed for any reason, the question of its sufficiency may create an issue for review), *State v. Browder*, 486 P.2d 925, 931 (Alaska 1971) (nothing in the Alaska constitution or Alaska statutes requires that an erroneous non-final order, favorable to the accused, stand uncorrected), and *State v. Marathon Oil Co.*, 528 P.2d 293, 296 (Alaska 1974) (state may appeal where defendant has prevailed on the first appeal following his conviction).

4. Our prior cases give some guidance in determining when an appeal tests the sufficiency of an indictment or information. As a charging document, the fundamental purposes of the indictment or information "are to furnish the accused with a description of the charge against him to enable him to prepare his defense and to permit him to claim double jeopardy in the future should he again be charged with the same offense." *Christie v. State*, 580 P.2d 310, 321 (Alaska 1978), quoting *Thomas v. State*, 522 P.2d 528, 530 (Alaska 1974). See *Stewart v. State*, 438 P.2d 387, 390 (Alaska 1968); *Thomas v. State*, 391 P.2d 18, 24 (Alaska 1964). Thus, two of the basic criteria for determining the sufficiency of an indictment are "whether it contains the elements of the offense to be charged so as to sufficiently apprise the accused of what he must be prepared to meet at the trial," and "whether the offense charged is identified with sufficient particularity so that after judgment the accused may be able to plead the judgment in bar of further prosecution for the same offense." *Price v. State*, 437 P.2d 330, 331-32 (Alaska 1968) (footnotes omitted). *Accord*, *Davenport v. State*, 543 P.2d 1204, 1206 n. 1 (Alaska 1975); *Christian v. State*, 513 P.2d 664, 667 (Alaska 1973); *Roberts v. State*, 458 P.2d

340, 347-48, 348 n. 21 (Alaska 1969); *Adkins v. State*, 389 P.2d 915, 916 (Alaska 1964). An indictment is insufficient if it fails either to inform adequately the defendant of the charges against him or to identify the offense with sufficient particularity so that the resulting judgment may be pleaded as a bar to subsequent prosecutions for the same crime.

We note further that when the legislature enacted AS 22.07.020(d)(2) in 1980, it had the federal analogue to that provision before it. Under federal law, the United States may appeal from an adverse deci-

340, 347-48, 348 n. 21 (Alaska 1969); *Adkins v. State*, 389 P.2d 915, 916 (Alaska 1964). An indictment is insufficient if it fails either to inform adequately the defendant of the charges against him or to identify the offense with sufficient particularity so that the resulting judgment may be pleaded as a bar to subsequent prosecutions for the same crime.

We have recognized that the indictment or information has, in addition to its functions as a charging instrument, another purpose: "to require a defendant to stand trial for [the] offense with which he is charged." *State v. Shelton*, 368 P.2d 817, 820 (Alaska 1962); see *State v. Pete*, 420 P.2d 338, 341 (Alaska 1966); *State v. Smith*, 417 P.2d 252, 254 (Alaska 1966). Thus, if the indictment is dismissed because the evidence upon which it rests is perjured or insufficient, see *State v. Johnson*, 525 P.2d 532 (Alaska 1974); *Taggard v. State*, 500 P.2d 238 (Alaska 1972); *State v. Parks*, 437 P.2d 642 (Alaska 1968); *State v. Shelton*, 368 P.2d 817 (Alaska 1962), or because of some defect in the procedures leading to indictment, see *Peterson v. State*, 562 P.2d 1350 (Alaska 1977); *State v. Smith*, 417 P.2d 252 (Alaska 1966); *State v. Pete*, 420 P.2d 338 (Alaska 1966), so that the defendant cannot be called to stand trial, then the indictment is insufficient, "regardless of the fact that it may meet all the formal statutory requisites and have all the appearances of validity." *Shelton*, 368 P.2d at 820. These cases suggest two additional criteria, then, by which the sufficiency of the indictment or information is to be tested: whether there was sufficient, credible evidence to support the indictment, and whether the indictment procedures themselves comported with statutory and constitutional requirements. Appellate review from a dismissal based on either of these considerations is permissible under AS 22.07-020(d)(2) "to test the sufficiency of the indictment or information."

sion, "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731 (as amended 1971). In other words, the federal statute plainly says what the court of appeals interpreted the Alaska statute to mean. But if our legislature intended that the right of appeal be limited by double jeopardy considerations alone, why then did it not simply say so? The adoption of a more restrictive jurisdictional statute, in the face of a federal statute to the contrary, persuades us that the legislature did indeed intend to limit substantively the state's right to appeal.

Finally, the construction urged by the state would mean that the legislature enacted an entirely superfluous statute. The state constitution contains a provision prohibiting the state from twice subjecting a defendant to jeopardy. Alaska Const., art. I, § 9. To read AS 22.07.020(d)(2) as no more than a restatement of this constitutional prohibition renders the statute thoroughly superfluous.

For these reasons, we disagree with the court of appeals' interpretation of AS 22.07.020(d)(2), and its conclusion that the state was entitled to appeal the district court's judgment of acquittal. To the extent that it is contrary to our holding today, the court of appeals' decision in *State v. Michel*, 634 P.2d 383 (Alaska App.1981) is overruled.

The question that remains unanswered is whether the state was entitled to obtain appellate review by other means, namely, by petition for review pursuant to Appel-

5. Our holding in *Browder*, flowed from two considerations. First, in contrast to appeals, given as a matter of right, the other forms of review authorized by AS 22.05.010 have no limitation placed on them. Second, we noted that article IV, section 2 of the Alaska Constitution provides in part that the "supreme court shall be the highest court of the State, with final appellate jurisdiction."

Browder implicitly overruled *State v. Keep*, 397 P.2d 973, *aff'd on rehearing*, 409 P.2d 321 (Alaska 1965). In *Keep*, we rejected the state's argument that it had the right to petition for review in an instance where appeal was barred. We noted:

late Rule 402. The court of appeals declined to address this issue, stating: "It is ... not necessary for us to consider defendant's argument that this court lacks jurisdiction to hear this matter as a petition for review ... [given the court's determination that it could treat the petition as an appeal]." *State v. Kott*, 636 P.2d at 623 n. 1. Because of our decision that the state could not obtain review by means of a direct appeal, this question must now be answered.

[8] In *State v. Browder*, 486 P.2d 925 (Alaska 1971), we held that "the limitation placed upon the state's right to appeal in a criminal case ... was intended to apply only to instances where our jurisdiction is sought to be invoked by appeal." 486 P.2d at 930. Although *Browder* involved a non-final order, and is therefore distinguishable, it reflects our belief that an erroneous decision should not go uncorrected, simply because it is favorable to the accused.⁵ Discretionary review under Appellate Rule 402 is available from "any order or decision of the trial court, not appealable under Rule 202, and not subject to a petition for hearing under Rule 302, in any action or proceeding, civil or criminal." Alaska R.App.P. 402(a)(1). As noted in *Browder*, if an appellate court does not have the opportunity to review lower court decisions, the lower court becomes the court of final jurisdiction. 486 P.2d at 930-31.

[9] We are aware that some jurisdictions, in addressing this question, have held that the state may not seek relief by peti-

The legislature did not intend that the state should have the right to appeal a criminal case and said so in unambiguous language. If the legislature had intended that the state have some other analogous or related right or remedy with respect to criminal cases [i.e., review by petition] we assume that it would have said so in the same statute in which it prohibited the state from appealing criminal cases.

397 P.2d at 975 (footnote omitted). While the cases are distinguishable, see *State v. Browder*, 486 P.2d at 933, the substance of the *Keep* opinion did not survive *Browder*.

tion in
have h
020(d):
as a m
discret
stitutio
ter rev
that no
that ar
accuse
is in tl
extend
pass al
final, w
by the
guaran
able to
in such
bring a
cording
had jur

II. Co

The
law pri
the sta

6. See
229 (N
ted to
do by
368-6
certior
make

7. See .
113, 1
where
Willia
(statut
mon l:

8. We .
Rule -
rected
utory
that r
sound
to be
weigh
propr
availa
that o
appell
grant
cases.

In v
ders ii

also see covering
opinion. 394-7
A 0391

KOTT v. STATE

Cite as 678 P.2d 386 (Alaska 1984)

tion in lieu of appeal.⁶ Others, however, have held that statutes similar to AS 22.07.020(d)(2) relate exclusively to direct appeals as a matter of right and have no effect on discretionary forms of review, such as constitutional or common-law certiorari.⁷ After reviewing this issue, we are convinced that nothing in AS 22.07.020(d)(2) requires that an erroneous ruling favorable to the accused go uncorrected, even if the ruling is in the form of a final order. We thus extend our holding in *Browder* to encompass all non-appealable orders, final or non-final, where appellate review is not barred by the state and federal double jeopardy guarantees. Discretionary review is available to the state under Appellate Rule 402 in such cases, despite the state's inability to bring an appeal as a matter of right. Accordingly, we hold that the court of appeals had jurisdiction to hear the matter.⁸

an assault occurred. The facts giving rise to that court's application of collateral estoppel are set forth in the opinion below and need not be restated here. Suffice it to say that the judge acquitted Bonneville, the principal in the alleged assault, and Kott attempted to use this acquittal to bar his subsequent prosecution.⁹ *State v. Kott*, 636 P.2d 622, 624 (Alaska App.1981).

[10] The narrow issue facing this court is whether, in a criminal case, a defendant may invoke a judgment of acquittal granted to a co-defendant in a prior case as a bar to his prosecution under the collateral estoppel doctrine. The traditional requirements of collateral estoppel are threefold: (1) the issue sought to be relitigated must be precisely the same as the issue in the previous litigation; (2) the judgment in the prior litigation must have decided the issue; and (3) there must be "n utuality" of parties, i.e., collateral estoppel could be invoked "only by those who were parties or privies to the action in which the judgment was rendered." *Pennington v. Snow*, 471

II. Collateral Estoppel

The trial court determined that common law principles of collateral estoppel barred the state from relitigating whether in fact

forth in Rule 402(b) we will submit the subject of modification of Appellate Rule 402 to our Standing Advisory Committee on Criminal Rules.

6. See *State v. Paul*, 8 N.M. 746, 461 P.2d 228, 229 (N.M.1969) (the state should not be permitted to accomplish by certiorari what it cannot do by appeal); *White v. State*, 543 S.W.2d 366, 368-69 (Tex.Cr.App.1976) (to say that review by certiorari does not constitute an appeal is to make a distinction without substance).

9. There is no question that Kott can be convicted even though Bonneville, the principal in the alleged assault, was acquitted. Former AS 12.15.010 provided:

7. See *State v. Lopez*, 26 Ariz.App. 559, 550 P.2d 113, 115 (1976) (may review by way of order where appeal precluded by statute); *State v. Williams*, 227 So.2d 253, 257 (Fla.App.1969) (statute barring appeals has no effect on common law or constitutional certiorari).

The distinction between an accessory before the fact and a principal, and between principals in the first and second degree is abrogated; and all persons concerned in the commission of a crime, whether they directly commit the act constituting the crime or, though not present, aid and abet in its commission, shall be prosecuted, tried, and punished as principals.

8. We are aware that the criteria expressed in Rule 402(b) for the granting of review are directed toward the propriety of allowing interlocutory review in a given case. Rule 402(b) states that review "will be granted only where the sound policy behind the rule requiring appeals to be taken from final judgments is outweighed." Such a balancing process is not appropriate in all cases where review is made available under Rule 402(a)(1). It is apparent that other considerations must be applied in an appellate court's consideration of whether to grant review from final orders in criminal cases.

AS 11.16.120(a)(2)(A), which became effective January 1, 1980, provides that in a criminal prosecution in which legal accountability is based on the conduct of another person it is not a defense that "the other person has not been prosecuted for or convicted of an offense based upon the conduct in question or has been convicted of a different offense or degree of offense." In its Commentary on the Alaska Revised Criminal Code, the Senate Judiciary Committee stated that the provision "eliminates the accessory's common law defense that the principal has not been convicted." 1978 Senate Journal Supplement No. 47 at 3.

In view of the fact that today's decision renders incomplete the criteria for reviewability set

P.2d 370, 374-75 (Alaska 1970); see generally 9 A.L.R.3d 203 (1966). In *Pennington*, we followed *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942) and held that "mutuality of estoppel will not as a rule be necessary for the invocation of res judicata or collateral estoppel against a party." 471 P.2d at 377. Kott, who was neither a party nor privy to the action against Bonnevillie, asks that we extend *Pennington* and abandon the mutuality rule in the criminal context.

The defendant relies primarily on *People v. Taylor*, 12 Cal.3d 686, 117 Cal.Rptr. 70, 527 P.2d 622 (1974) and *People v. Jackson*, 44 Cal.App.3d 494, 118 Cal.Rptr. 702 (1975). In *Taylor*, the California Supreme Court concluded that the lack of identity of the parties did not preclude application of the doctrine of collateral estoppel "where an accused's guilt must be predicated on his vicarious liability for the acts of a previously acquitted confederate." 527 P.2d at 630-31. The *Taylor* court found the application of collateral estoppel to be mandated by three important policy considerations:

- (1) to promote judicial economy by minimizing repetitive litigation;
- (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and
- (3) to provide repose by preventing a person from being harassed by vexatious litigation.

527 P.2d at 628.

In *Jackson*, the California Court of Appeal extended the use of nonmutual collateral estoppel to criminal cases involving "interdependent or joint responsibility." 118 Cal.Rptr. at 706-07. Defendant Jackson and two others had been charged with conspiracy. Following the acquittal of the others, the court held that the state was barred by collateral estoppel from prosecuting Jackson:

In *Taylor* the defendant could not have committed the alleged crime unless the previously acquitted perpetrator had committed said crime. Similarly, unless [Jackson's alleged co-conspirators] engaged in a conspiracy with Jackson (which it has been determined they did

not do) the latter cannot, by definition, have committed the criminal act charged. As in *Taylor*, it is impossible for Jackson to have committed the crime charged alone.

118 Cal.Rptr. at 707 (emphasis in original).

In contrast to these cases, the United States Supreme Court recently upheld the requirement of mutuality in the criminal area. See *Standesfer v. United States*, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980). Criminal cases, said the Court, present considerations different from those in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), or *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). First, the government is often without the kind of "full and fair opportunity to litigate" that is the hallmark of estoppel:

[T]he prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt, cf. Fed.Rule Civ.Proc. 50; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence, cf. Fed.Rule Civ. Proc. 59; and it cannot secure appellate review where a defendant has been acquitted. See *United States v. Ball*, 163 U.S. 662, 671 [16 S.Ct. 1192, 1195] 41 L.Ed. 300 (1896).

Standesfer, 447 U.S. at 22, 100 S.Ct. at 2007, 64 L.Ed.2d at 699. Secondly, the application of nonmutual estoppel in criminal cases is made problematical by the existence of rules of evidence and exclusion unique to the criminal law. Finally, criminal prosecutions involve considerations wholly absent in civil litigation: the important public interest in effective law enforcement.

[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindi-

Cite as 678 P.2d 386 (Alaska 1984)

cate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interests of the courts, nor the public.

447 U.S. at 25, 100 S.Ct. at 2008, 64 L.Ed.2d at 701 (quoting *United States v. Standefer*, 610 F.2d 1076, 1093 (3d Cir.1979)).

[11] With the court of appeals, we are persuaded by the reasoning in *Standefer*. As the court of appeals noted, "there is no question of harassment by successive prosecutions of one who is tried but once, though a co-defendant might earlier have been tried." 636 P.2d at 626; compare *People v. Taylor*, 12 Cal.3d 686, 527 P.2d 622, 527 P.2d 622, 628 (Cal.1974). Nor are we swayed by the fact that Kott might be convicted in the face of Bonneville's earlier acquittal; that possibility merely recognizes "the simple, if discomfoting, reality that 'different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.'" *Standefer*, 447 U.S. at 25, 100 S.Ct. at 2008, 64 L.Ed.2d at 701 (quoting *Roth v. United States*, 354 U.S. 476, 492 n. 30, 77 S.Ct. 1304, 1313 n. 30, 1 L.Ed.2d 1498, 1511 n. 30 (1957)). Finally, like the court of appeals we believe that the

state's need to have a full and fair adversary proceeding outweighs the interest in promoting judicial economy by minimizing repetitive litigation. Accordingly, we affirm the court of appeals and hold that collateral estoppel did not preclude the state from relitigating whether in fact an assault occurred.¹⁰

III. Double Jeopardy

[12] Kott argues that remanding this case for trial would contravene the state and federal prohibition against twice subjecting a criminal defendant to jeopardy. We disagree.

As the court of appeals noted in this case, "[h]ere the trial judge neither heard all of the evidence against respondent nor concluded that a reasonable jury could not find him guilty beyond a reasonable doubt based upon that evidence. Rather, he concluded that a judgment of acquittal previously entered in favor of a codefendant barred trial of [Kott] under the doctrine of collateral estoppel." *State v. Kott*, 636 P.2d 622, 623-24 (Alaska App.1981). The jury had not been empaneled and sworn, and there is no indication that the defendant had waived his right to a jury trial. At no time, therefore, was Kott subjected to the risk of conviction, and consequently jeopardy did not attach. It is immaterial that the trial judge reviewed the court file and the evidence presented against Kott in the original action against Bonneville. The fact is that at no time prior to the swearing of the jury could the defendant have been subjected to the "risk of a determination of guilt, . . . and neither an appeal nor further prosecution constitutes double jeopardy." *See Serfass v. United States*, 420 U.S. 377,

10. Most jurisdictions retain the requirement of mutuality in the criminal area. See *State v. Jiminez*, 130 Ariz. 138, 634 P.2d 950 (1981); *State v. Wilson*, 236 Iowa 429, 19 N.W.2d 232 (1945); *Commonwealth v. Scala*, 8 Mass.App. 202, 392 N.E.2d 869 (1979); *Larsen v. State*, 93 Nev. 397, 566 P.2d 413 (1977); *People v. Felton*, 95 Misc.2d 960, 408 N.Y.S.2d 646 (N.Y.Sup. 1978); *Cleveland v. Ryan*, 106 Ohio App. 110, 148 N.E.2d 691 (1958). See generally, 9 A.L.R.3d 203 (1966).

Having determined that the state was barred by collateral estoppel from relitigating the issue of whether an assault occurred, the trial court dismissed Count II of the complaint charging Kott with unlawfully destroying evidence "concerning commission of the crime of assault and battery." There being no crime, reasoned the trial court, there could be no destruction of evidence of a crime. Inasmuch as the court erred in applying nonmutual collateral estoppel, however, it necessarily erred in dismissing the destruction of evidence count.

391-92, 95 S.Ct. 1055, 1064-65, 43 L.Ed.2d 265, 276 (1975).

The decision of the Court of Appeals is **AFFIRMED**.

MOORE, J., not participating.

MATTHEWS, Justice, concurring.

I agree with parts II and III of the majority opinion which concern collateral estoppel and double jeopardy, respectively. With respect to part I of the opinion, I concur in the result only.

The statute defining the jurisdiction of the court of appeals, AS 22.07.020, was passed by the Alaska State Legislature in 1980. The language in question in this case is that of subsection (d)(2):

the State has no right of appeal in criminal cases except to test the sufficiency of the indictment or information. . . .

This language was taken, without substantial change, from former AS 22.05.010 defining the jurisdiction of the Supreme Court;¹ and from AS 22.10.020(a) defining the appellate jurisdiction of the superior court.² The relevant language of these two statutes was first enacted by the Alaska State Legislature at the advent of statehood, ch. 50, §§ 1, 17, S.L.A. 1959, and has continued without change. Because there is no legislative history to the contrary, and because nearly identical language was used, the legislature clearly intended that the language used in AS 22.07.020(d)(2) would mean what the language used in former AS 22.05.010 and AS 22.10.020(a) had meant. Any other conclusion would border on the preposterous. If the legislature had intended a different meaning it would not have merely copied the phraseology of the earlier statutes.

The question becomes what the former statutes meant. There are two levels of inquiry. The first pertains to the historical purpose of statutes of this type. The second pertains to what these statutes had

been construed to mean prior to enactment of AS 22.07.020(d)(2).

The general rule at common law was that the State could not appeal in a criminal case. In *United States v. Sanges*, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445 (1892), the court, after making an exhaustive review of State authorities, summed up the prevailing view as follows:

But the decisions above cited conclusively show that under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the State, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not again to be vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the insistence of the government.

Id. at 318, 12 S.Ct. at 612, 36 L.Ed. at 448-449. The court made it plain that this rule was generally based on common law grounds rather than constitutional double jeopardy:

In a few states, decisions denying a writ of error to the State after judgment for the defendant on a verdict of acquittal have proceeded upon the ground that to grant it would be to put him twice in jeopardy, in violation of a constitutional provision.

But the courts of many states, including some of the great authority, have denied, upon broader grounds, the right of the State to bring a writ of error in any criminal case whatever, even when the discharge of the defendant was upon the decision of an issue of law by the

1. Former AS 22.05.010 provided in relevant part: "the State shall have no right of appeal in criminal cases, except to test the sufficiency of the indictment or information."

2. AS 22.10.020(a) provides in relevant part: "[t]he State has no right to appeal in criminal cases, except to test the sufficiency of an indictment or information. . . ."

court, as on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment.

Id. at 313, 12 S.Ct. at 610, 36 L.Ed. at 447 (citations omitted).

The purpose of statutes like AS 22.05.010 was not to constrict the right of the prosecution to appeal, for that was the preexisting common law rule, but to provide an exception to the common law rule and allow the prosecution to appeal. This is discussed at length in both the majority opinion and the dissenting opinion of Mr. Justice White in *United States v. Sisson*, 399 U.S. 267, 293-307, 335-349, 90 S.Ct. 2117, 2131-2138, 2153-2160, 26 L.Ed.2d 608, 626-634, 649-657 (1970). Therefore, from an historical perspective, the purpose of the statutory language is to permit the State to appeal in the circumstances described in the statute.

In *State v. Shelton*, 368 P.2d 817 (Alaska 1962) this court gave a broad reading to the language of AS 22.05.010 permitting the State to appeal to test the sufficiency of an indictment. In *Shelton* the indictment had been dismissed on the grounds that it was based on perjured testimony. As in the present case, there was nothing wrong with the form of the indictment. The trial court simply concluded that a substantive legal doctrine required dismissal. We rejected the view that the statutory term "sufficiency" related only to the form of the indictment and held the State could raise on appeal the validity of the rationale underlying dismissal of the case. In so holding we stated that "sufficiency":

denotes the concept of adequacy and adaptation to a desired end. An indictment has a purpose—to require a defendant to stand trial for a criminal offense with which he is charged. If it is not adequate to answer the purpose for which it is intended, then it is insufficient, regardless of the fact that it may meet all the formal statutory requisites and have all the appearances of validity. When an indictment is dismissed for any reason, the question of its sufficiency

may create an issue, and this court has the power of review.

Id. at 820 (emphasis added). This language can only be reasonably read to mean that former AS 22.05.010(a) permitted the State to appeal any dismissal of an indictment or information. Until today, so far as I am aware, this interpretation of *Shelton* has never been questioned.

The rule of interpretation which governs this case is as follows:

Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is reenacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law. Because court decisions are readily accessible to public view, the rule has special force when the former construction was made by the judiciary. Thus where the legislature adopts a legislative expression which has received judicial interpretation, such interpretation will be prima facie evidence of the legislative intent.

2A C. Sands, *Sutherland Statutory Construction* § 49.09, at 256 (4th ed. 1973). Thus, because the legislature reenacted the language formerly contained in AS 22.05.010 permitting the State to appeal to test the sufficiency of an indictment, it logically can be presumed that the legislature intended the reenacted language to mean what this court had formerly said it meant. That meaning is, as we have seen, that the State may appeal "[w]hen an indictment is dismissed for any reason . . ." *Shelton*, 368 P.2d at 820. Of course, such a grant of power is limited by constitutional double jeopardy. However, it is not necessary to express in statutory terms this limitation. To do so would be superfluous. Because this interpretation is not different from that given AS 22.07.020(d)(2) by the court of appeals in *State v. Michel*, 634 P.2d 383 (Alaska App.1981) which was in turn relied upon by that court in the present case, I would affirm the court of appeals' interpretation.

The conclusion of the majority opinion that the State may not appeal but it may take a petition for review was explicitly rejected in *State v. Keep*, 397 P.2d 973 (Alaska 1965). In *Keep*, the complaint was dismissed after trial began and the State challenged the dismissal by a petition for review. We held that because the state could not appeal from the final judgment it could not take a petition for review. Doing so would permit "the state to accomplish indirectly what it is prohibited from doing by statute." *Id.* at 975.

The logic of this holding seems correct and it is not directly attacked by today's majority opinion. Instead the majority holds that we implicitly overruled *Keep* in *State v. Browder*, 486 P.2d 925 (Alaska 1971). I think very few reasonable people reading *Browder* would conclude that *Keep* was intended to be overruled. *Keep*, as will be recalled, involved an acquittal after trial had begun. *Browder* involved a conviction at the trial level, an appeal by the defendant to the superior court acting as an intermediate appellate court, a reversal and remand by the superior court, and a petition for review by the state from the order of the superior court to this court. We held that we had jurisdiction to entertain the petition and distinguished *Keep* on the grounds that a final judgment of acquittal was involved in *Keep*, but not in *Browder*. We took pains in *Browder* to limit our holding to petitions taken from "a non-final order or decision..." *Id.* 486 P.2d at 931. We have in two separate cases cited *Keep* and *Browder* together, *State v. Gibson*, 543 P.2d 406, 408 n. 3, (Alaska 1975); *State v. Marathon Oil Co.*, 528 P.2d 293, 295 n. 6, (Alaska 1974), and, until today, we have never suggested that *Browder* is in any way inconsistent with *Keep*.

I also take issue with the majority's reasoning in two further respects. First, the majority states that when the legislature

enacted AS 22.07.020(d)(2) in 1980 it had an analogous federal statute before it. This statement is wrong except in the rather meaningless sense that the legislature had the federal statute available for reference. The legislature also could have looked at a statute of any other state concerning the prosecution's right to appeal, but there is no evidence that it did, just as there is no evidence that the legislature actually considered the federal statute. What the legislature clearly did was to consider the Alaska statutes which had been overruled by this court and from which the language of AS 22.07.020(d)(2) was copied.

Second, the majority opines that the construction of AS 22.07.020(d)(2) given by the court of appeals would render that subsection superfluous as no more than a restatement of the constitutional prohibition against double jeopardy. However, as we have established, from an historical perspective this statement is wrong. The purpose of statutes like that involved here was to allow the state to appeal. Without an express statutory grant of the right to appeal, the traditional view has been that the State may not appeal in a criminal case.³

In summary, the decision of the court of appeals in this case and in *Michel* is consistent with the historical purpose of the statute in question; is consistent with *Shelton* and *Keep*; and is consistent with the rule that when a legislature copies language which has been judicially interpreted, that interpretation is presumed to be what the legislature intended. By contrast, the reasoning of the majority opinion is in conflict with the historical purpose of the language in question; is inconsistent with *Shelton*; requires that the holding of *Keep* be overruled; fails to deal with the holding of *Keep* on its own merits, but takes the unjustified position that *Keep* has already been overruled; and ignores the

3. Further, superfluity in the sense of statutory repetition of a constitutional prohibition is surely one of the most minor of sins of a legislative draftsman. For example, the federal statute, 18 U.S.C. § 3731 (as amended 1971), cited by the

majority as a model, (at —) is guilty of superfluity. ["... no appeal shall lie when the double jeopardy clause of the United States Constitution prohibits further prosecution."]

rule of construction that reenacted language carries with it the meaning imparted by prior published judicial decisions. For these reasons I agree with the court of appeals and disagree with the majority opinion.

tion; and (9) eight-year sentence with five years suspended was not excessive.

Conviction and sentences affirmed.

Singleton, J., filed opinion concurring in part and dissenting in part.



Malcolm Scott HARRIS, Appellant,

v.

STATE of Alaska, Appellee.

No. 6580.

Court of Appeals of Alaska.

Feb. 24, 1984.

Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, J. Justin Ripley and Victor D. Carlson, JJ., of theft in second degree and forgery in second degree, and defendant appealed. The Court of Appeals, Coats, J., held that: (1) even if three grand jurors were selected from beyond 50-mile radius of Anchorage courthouse, error did not require dismissal of indictment; (2) defendant's confession was voluntary; (3) defendant voluntarily gave handwriting sample to police, was adequately warned of consequences, and was informed of his right to counsel; (4) State established sufficient foundation to admit testimony of bank official concerning stamp marks on stolen traveler's checks; (5) failure to indicate to jury that they had to find traveler's checks were stolen in order to convict defendant of theft by receiving was not reversible error; (6) offense of receiving stolen traveler's checks and offense of forging those same checks could be separated for purposes of sentencing; (7) defendant was not unfairly denied right to cross-examine author of presentence report; (8) trial court did not err in requiring defendant to pay \$7,000 restitu-

1. Indictment and Information \S 10.1(2)

Even if three grand jurors were selected from beyond 50-mile radius of Anchorage courthouse as required by Rules of Criminal Procedure, error did not require dismissal of indictment, where there was no showing there was any systematic exclusion of any class or group of grand jury or that defendant was prejudiced in any conceivable way. Rules Crim.Proc., Rule 6(c)(1).

2. Criminal Law \S 412(4)

Suppression per se of unrecorded statements of defendant, where recording was feasible, is not required even though defendant alleges other facts which, if true, would entitle him to have statement suppressed.

3. Criminal Law \S 414

State has burden of showing that defendant was given *Miranda* warning, waived his *Miranda* rights and made voluntary statements. U.S.C.A. Const. Amend. 5.

4. Criminal Law \S 1139

In deciding whether confession is voluntary, Court of Appeals undertakes independent review of record.

5. Criminal Law \S 411

Prosecution must prove that defendant's statement is voluntary by preponderance of evidence.

6. Criminal Law \S 520(2)

Police conduct in urging defendant to tell truth and telling him that if he did cooperate by telling truth they would help him by bringing his cooperation to attention of prosecuting authorities is not improper as long as, under totality of circumstances, defendant's confession is voluntary.

Note 4

ing out of violation of injunction issued pursuant to section 160 of Title 29 in a case involving an unfair labor practice. In re Union Nacional de Trabajadores, C.A. Puerto Rico 1974, 502 F.2d 113.

5. — Right to jury trial

District court, which stated that it would not impose a sentence in excess of six months, properly denied the jury trial motion of defendants, Professional Air Traffic Controllers Organization officers who were charged with criminal contempt for failing to honor temporary restraining orders. U.S. v. Martinez, C.A.La.1982, 686 F.2d 334.

This section giving an accused a right to a speedy and public trial by an impartial jury in all cases of contempt arising under laws of United States governing issuance of injunction or restraining orders in any case involving or growing out of a labor dispute do not apply to contempt proceedings to enforce injunctions issued under section 141 et seq. of Title 29. Pabst Brewing Co. v. Brewery Workers Local Union No. 77, AFL-CIO, C.A.Ill.1977, 555 F.2d 146.

Failure to at least accord defendants statutory right to "demand" trial by jury in criminal contempt proceeding violated due process. Richmond Black Police Officers Ass'n v. City of Richmond, Va., C.A.Va.1977, 548 F.2d 123.

Writ of mandamus requiring jury trial in criminal contempt proceedings instituted by National Labor Relations Board was recalled, following United States Supreme Court decision that jury trials were not required in such cases, since withdrawal of mandate would not substantially prejudice rights of the union defendants and although defendants had spent considerable time and effort preparing for their challenge to jury selection procedure there was no vested interest in bringing such challenge in instant case and such work, which had been done by public interest legal group, presumably would be available in other cases. In re Union Nacional de Trabajadores, C.A.I. 1975, 527 F.2d 602.

Business agent for union local did not have constitutional or statutory right to jury trial on charge of contempt for violation of a "Boys Markets" temporary restraining order which enjoined the local and its officers, agents, members, and all persons in active concert and participation with them from in any manner engaging in a strike, work stoppage or picketing against employer. U.S. v. Partin, C.A.La.1975, 524 F.2d 992, certiorari denied 96 S.Ct. 1493, 425 U.S. 904, 47 L.Ed.2d 753.

Under this section providing that an accused is entitled to a jury trial in all cases of contempt arising under laws of the United States governing issuance of injunctions in any case involving or growing out of a labor dispute, union and officers cited for contempt arising out of their alleged violation of court order enjoining union from striking without complying with notice and waiting requirements of section 141 of Title 29, were entitled to jury trial. In re Union Nacional de Trabajadores, C.A. Puerto Rico 1974, 502 F.2d 113.

Section 160 of Title 29 stating that in granting or enforcing injunctive relief requested by National Labor Relations Board in connection with alleged unfair labor practice the jurisdiction of court sitting in equity shall not be limited by Norris-LaGuardia Act, section 101 et seq. of Title 29, does not insulate criminal contempt proceedings following issuance of Board-requested injunction from requirement of jury trial under this section giving an accused right to jury in all cases of contempt arising under laws of United States governing issuance of injunctions in a case involving a labor dispute. *Id.*

Air traffic controller's charged with contempt in violating preliminary injunction requiring them to refrain from concerted effort directed to work slow down or stoppage and to notify their supervisor of their medical and physical condition with supporting medical data were not entitled to jury trial. U.S. v. Robinson, C.A. Alaska 1971, 449 F.2d 925.

CHAPTER 235—APPEAL

§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The purposes.

(As amended)

1971 Act § 14(a)(1) court of appeal of district court information as to no appeal its further

Second provision decision or excluding seized property made after and before or information: taken for a substantial proceeding.

Such first first eight provided for preme Court aside, or decision, or an arresting judgment of indictment or judgment of construction of or information from decision bar, where duly. Part of from district there were Supreme Court aside, or decision, or an arresting order, grant property or before trial. Federal law. to the judge appeal was that the evidence charge pending

Third paragraph within thirty days

Fourth paragraph the provision tenth paragraph

Fifth paragraph as a fifth of this section respecting the court of appeals such court action to hear appeal were prior twelfth of case to Supreme Court's jurisdiction as if the appeal

Business agent for union local did not have constitutional or statutory right to jury trial on charge of contempt for violation of a "Boys Markets" temporary restraining order which enjoined the local and its officers, agents, members, and all persons in active concert and participation with them from in any manner engaging in a strike, work stoppage or picketing against employer. *U.S. v. Partin*, C.A.La.1975, 524 F.2d 992, certiorari denied 96 S.Ct. 1493, 425 U.S. 904, 47 L.Ed.2d 753.

Under this section providing that an accused is entitled to a jury trial in all cases of contempt arising under laws of the United States governing issuance of injunctions in any case involving or growing out of a labor dispute, union and officers cited for contempt arising out of their alleged violation of court order enjoining union from striking without complying with notice and waiting requirements of section 160 of Title 29, were entitled to jury trial. *In re Union Nacional de Trabajadores*, C.A. Puerto Rico 1974, 502 F.2d 113.

Section 160 of Title 29 stating that in granting or enforcing injunctive relief requested by National Labor Relations Board in connection with alleged unfair labor practice the jurisdiction of court sitting in equity shall not be limited by Norris-LaGuardia Act, section 101 et seq. of Title 29, does not insulate criminal contempt proceedings following issuance of Board-requested injunction from requirement of jury trial under this section giving an accused right to jury in all cases of contempt arising under laws of United States governing issuance of injunctions in a case involving a labor dispute. *Id.*

Air traffic controller's charged with contempt in violating preliminary injunction requiring them to refrain from concerted effort directed to work slow down or stoppage and to notify their supervisor of their medical and physical condition with supporting medical data were not entitled to jury trial. *U.S. v. Robinson*, C.A. Alaska 1971, 449 F.2d 925.

35—APPEAL

ited States shall lie to a court of appeals district court dismissing an indictment or except that no appeal shall lie where the as Constitution prohibits further prosecu-

to a court of appeals from a decision or excluding evidence or requiring the return of, not made after the defendant has been finding on an indictment or information, if district court that the appeal is not taken is a substantial proof of a fact material in

known within thirty days after the decision, shall be diligently prosecuted.

on of the appeal in the foregoing instance accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

(As amended Jan. 2, 1971, Pub.L. 91-644, Title III, § 14(a), 84 Stat. 1890.)

1971 Amendment. First par. Pub.L. 91-644, § 14(a)(1), enacted provision for appeal to a court of appeals from decision, judgment, or order of district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where double jeopardy prohibits further prosecution.

Second par. Pub.L. 91-644, § 14(a)(1), enacted provision for appeal to a court of appeals from decision or order of district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

Such first and second pars. superseded former first eight pars. Pars. one through four had provided for appeal from district courts to Supreme Court from decision or judgment setting aside, or dismissing any indictment or information, or any count thereof and from decision arresting judgment of conviction for insufficiency of indictment or information, where such decision or judgment was based upon invalidity or construction of the statute upon which the indictment or information was founded and for an appeal from decision or judgment sustaining a motion in bar, where defendant had not been put in jeopardy. Pars. five through eight provided for appeal from district courts to a court of appeals where there were no provisions for direct appeal to Supreme Court from decision or judgment setting aside, or dismissing any indictment or information, or any count thereof and from decision arresting a judgment of conviction, and from an order, granting a motion for return of seized property or a motion to suppress evidence, made before trial of a person charged with violation of a Federal law, if the United States attorney certified to the judge who granted the motion that the appeal was not taken for purpose of delay and that the evidence was a substantial proof of the charge pending against the defendant.

Third par. Pub.L. 91-644, § 14(a)(2), authorized within third par., formerly ninth, an appeal within thirty days after order has been rendered.

Fourth par. Pub.L. 91-644, § 14(a), in revising the provisions, had the effect of designating former tenth par. as fourth par.

Fifth par. Pub.L. 91-644, § 14(a)(3), substituted as a fifth par. provision for liberal construction of this section for prior eleventh par. provision respecting remand of case by Supreme Court to court of appeals that should have been taken to such court and treatment of the court's jurisdiction to hear and determine the case as if the appeal were so taken in the first instance and for prior twelfth par. provision respecting certification of case to Supreme Court that should have been taken directly to such Court and treatment of the Court's jurisdiction to hear and determine the case as if the appeal were taken directly to such Court.

Savings Provision. Section 14(b) of Pub.L. 91-644 provided that: "The amendments made by this section [to this section] shall not apply with respect to any criminal case begun in any district court before the effective date of this section [Jan. 2, 1971]."

Legislative History. For legislative history and purpose of Pub.L. 91-644, see 1970 U.S. Code Cong. and Adm. News, p. 5804.

Federal Practice and Procedure

Appellate review

Arrest of judgment, see Wright: Criminal 2d § 574.

Criminal contempt proceedings, see Wright: Criminal 2d § 715.

Decision setting aside or dismissing indictment or information, see Wright: Criminal 2d § 191.

Dismissal for unnecessary delay, see Wright: Criminal 2d § 814.

Motion for judgment of acquittal, see Wright: Criminal 2d § 469.

Search and seizure, see Wright: Criminal 2d § 678.

Government's right to appeal, see Wright: Criminal 2d § 874.

Mandatory release of defendant on his own recognizance upon dismissal of indictment, arrest of judgment and appeal by government, see Wright: Criminal 2d § 767.

Review of federal courts, see Wright, Miller & Cooper: Jurisdiction § 4034 et seq.

Writ applications, see Wright, Miller, Cooper & Grossman: Jurisdiction §§ 3932, 3934.

Notes of Decisions

Decision or judgment

Acquittal 34a

Double Jeopardy 89

Exclusion of evidence 31b

Exclusion of witnesses 31a

Instructions 55

Mandamus 33a

Motion to correct sentence 54a

New trial, order granting 47a

Order reducing sentence 54

Parole terms 53

Quashing of subpoena 90

States and territories, appeals by 9

Suppression of evidence

Generally 51

Time of ruling 51a

Writ of error 52

I. Constitutionality

Where there was a general finding of guilt rendered by court in a bench trial, and thereafter district court granted defendant's motion to suppress, double jeopardy did not bar an appeal by the government. *U.S. v. Rose*, 1976, 97 S.Ct. 26, 429 U.S. 5, 50 L.Ed.2d 5.

Where district court, following a nonjury trial, found defendant guilty of charge of possessing marijuana with intent to distribute and thereafter