

HB303

HOUSE COMMITTEE REPC T

file

(11)

Date Referred: February 7, 1992

FURTHER REFERRALS:

Date of Committee Action: 3/11/92

The FINANCE Committee considered:

HB 303

HOUSE BILL NO. 303

CRIMINAL APPEALS

"An Act relating to the state's right to appeal in criminal cases; relating to sentence appeals from sentences imposed by the district court; amending Rule 202 of the Alaska Rules of Appellate Procedure; and providing for an effective date."

RECOMMENDATIONS:

be replaced with CS HB303 (FIN) the same title a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact _____

fiscal note(s) _____

2 zero fiscal note AK Court System; Public Safety 2 zero fiscal note(s); Admin 2/7/92; Law 2/7/92

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<u>Eileen P. Maclean</u> Maclean	<input checked="" type="checkbox"/>	<u>Tom Brown</u> Brown		<input checked="" type="checkbox"/>	
<u>Mike Navarre</u> NAVARRE	<input checked="" type="checkbox"/>	<u>John Koponen</u> Koponen		<input checked="" type="checkbox"/>	
<u>Mark Boyer</u> Boyer	X	<u>Chris Jack</u> Jack		<input checked="" type="checkbox"/>	
<u>Frank Larson</u> Larson	<input checked="" type="checkbox"/>	<u>Paul Phillips</u> Phillips		<input checked="" type="checkbox"/>	
<u>James Barnes</u> Barnes	<input checked="" type="checkbox"/>	<u>Best Sharp</u> sharp		<input checked="" type="checkbox"/>	

Mike Navarre NAVARRE E P Maclean Maclean
CHAIRMAN'S SIGNATURE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 303

Revision Date: _____
 Title: "An Act relating to the State's right to appeal in criminal cases . . ."
 Sponsor: House Judiciary
 Requestor: House Judiciary

Department Affected: Administration
 BRU: Public Defender Agency
 Component: Public Defender Agency

COMPONENT SERIAL NO.

1	6	3	1
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)
 The fiscal impact of this bill depends entirely on the numbers of cases where review was previously denied, which now must be heard by the appellate courts. It is doubtful that there are any such cases. The appellate courts rarely have denied discretionary review to the State.

Prepared by: John Salemi, Public Defender
 Division: Public Defender Agency

Phone: 279-7541
 Date: February 3, 1992

Approved by Commissioner: Nancy Bear Usina
 Agency: Administration

Date: 2/4/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

FISCAL NOTE

**STATE OF ALASKA
1992 LEGISLATIVE SESSION**

BILL NO. CSHB 303(JUD)

Revision Date: _____ Department Affected: Public Safety
 Title: "An Act relating to the state's right to appeal in criminal cases." BRU: Alaska State Troopers
 Component: Detachments
 Sponsor: House Judiciary
 Requestor: House Finance COMPONENT SERIAL NO.

	7	9	9
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EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact is anticipated.

Prepared By: Gayle A. Horetski Phone: 465-4322
 Division: Commissioner's Office Date: 3/5/92
 Approved by Commissioner: *Gayle A. Horetski for* Richard L. Burton
 Agency: Department of Public Safety Date: 3/5/92

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 303

Revision Date: _____ Department Affected: Department of Law
 Title: "An Act relating to the state's right to appeal in criminal cases..." BRU: Prosecution
 Sponsor: House Judiciary Committee Component: All
 Requestor: House Judiciary Committee COMPONENT SERIAL NO.

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EXPENDITURES/REVENUES: (Thousands of Dollars)

85 through 91

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

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

REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

 Please see the attached analysis.

Prepared By: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services / RAL Date: January 21, 1992
 Approved by Commissioner: Charles E. Cole, Attorney General
 Agency: Department of Law Date: January 21, 1992

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 303

This bill amends AS 22.07, AS 22.10, AS 22.15, and repeals Rule 202(c), Alaska Rules of Appellate Procedure, to provide that the state's right to appeal in criminal cases is limited by the prohibition against double jeopardy contained in the United States Constitution and the Alaska Constitution. Existing law limits this right except to test the sufficiency of the indictment or information or to appeal a sentence on the ground it is too lenient. The effect of granting broadened appeals rights to the state will be to permit it to test evidentiary rulings that are adverse to the state's case at the outset. Currently, the state's only opportunity to test evidentiary rulings is when a defendant appeals a ruling adverse to the defense and the state gets to respond.

Although there will be some incremental cost when the state elects to affirmatively bring an evidentiary appeal, it will certainly be more efficient than the current system where we must wait for a defense appeal before evidence issues are finally resolved.

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 303

Revision Date: _____
 Title: "An Act relating to the State's right to appeal in criminal cases . . ."
 Sponsor: House Judiciary
 Requestor: House Judiciary

Department Affected: Administration
 BRU: Public Defender Agency
 Component: Public Defender Agency

COMPONENT SERIAL NO.

1	6	3	1
---	---	---	---

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

The fiscal impact of this bill depends entirely on the numbers of cases where review was previously denied, which now must be heard by the appellate courts. It is doubtful that there are any such cases. The appellate courts rarely have denied discretionary review to the State.

Prepared by: John Salemi, Public Defender
 Division: Public Defender Agency

Phone: 279-7541
 Date: February 3, 1992

Approved by Commissioner: Nancy Bear Usafa
 Agency: Administration

Date: 2/7/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill No. CS HB 303

Revision Date: _____ Department Affected: Alaska Court System
 Title: An Act relating to the state's right to BRU: Trial Courts
appeal in criminal cases Components: _____
 Sponsor: House Judiciary
 Requestor: _____ COMPONENT SERIAL NO.

000 000	000 768
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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel *(Signature)* Phone: 264-8228
 Division: Alaska Court System Date: 03/04/92

Approved by: Arthur H. Snowden, II, Administrative Director *(Signature)* Date: 03/04/92
 Agency: Alaska Court System

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

CS FOR HOUSE BILL NO. 303 (FINANCE)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the state's right to appeal in criminal cases; relating to sentence
2 appeals; amending Rule 202 of the Alaska Rules of Appellate Procedure; and providing
3 for an effective date."

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 * Section 1. The legislature finds that AS 22.07.020, AS 22.10.020, and AS 22.15.240, which give
6 the state a right to appeal in criminal cases, are based on the provisions of 18 U.S.C. 3731.

7 * Sec. 2. AS 22.07.020(b) is amended to read:

8 (b) The court of appeals has jurisdiction to hear appeals of sentences of imprisonment
9 imposed by the superior or district court on the grounds that the sentence is excessive or too
10 lenient and, in the exercise of this jurisdiction, may modify the sentence as provided by law and
11 the state constitution.

12 * Sec. 3. AS 22.07.020(c) is amended to read:

13 (c) The court of appeals has jurisdiction to review [(1)] a final decision of the district
14 court in an action or proceeding involving criminal prosecution, post-conviction relief, extradition,

1 probation and parole, habeas corpus, or bail [; AND (2) THE FINAL DECISION OF THE
2 DISTRICT COURT ON A SENTENCE IMPOSED BY IT]. In this subsection, "final decision"
3 means a decision or order, other than dismissal by consent of all parties, that closes a matter in
4 the district court.

5 * Sec. 4. AS 22.07.020(d) is amended to read:

6 (d) An appeal to the court of appeals is a matter of right in all actions and proceedings
7 within its jurisdiction except that

8 (1) the right of appeal to the court of appeals is waived if an appellant chooses
9 to appeal the final decision of the district court to the superior court; and

10 (2) the state's right of appeal in criminal cases is limited by the prohibitions
11 against double jeopardy contained in the United States Constitution and the Alaska
12 Constitution [STATE HAS NO RIGHT OF APPEAL IN CRIMINAL CASES EXCEPT TO
13 TEST THE SUFFICIENCY OF THE INDICTMENT OR INFORMATION OR TO APPEAL A
14 SENTENCE ON THE GROUND THAT IT IS TOO LENIENT].

15 * Sec. 5. AS 22.10.020(e) is amended to read:

16 (e) An appeal to the superior court is a matter of right, but an appeal from a subordinate
17 court may not be taken by the defendant in a criminal case after a plea of guilty, except on the
18 ground that the sentence was excessive. The state's right of appeal in criminal cases is limited
19 by the prohibitions against double jeopardy contained in the United States Constitution and
20 the Alaska Constitution [STATE HAS NO RIGHT TO APPEAL IN CRIMINAL CASES,
21 EXCEPT TO TEST THE SUFFICIENCY OF AN INDICTMENT OR INFORMATION OR TO
22 APPEAL A SENTENCE ON THE GROUND IT IS TOO LENIENT].

23 * Sec. 6. AS 22.10.020(f) is amended to read:

24 (f) An appeal to the superior court may be taken on the ground that a sentence of
25 imprisonment of 90 days or more was excessive and the superior court in the exercise of this
26 jurisdiction has the power to reduce the sentence. The state may appeal a sentence on the
27 ground that it is too lenient. When a sentence is appealed [BY THE STATE] on the ground
28 that it is too lenient, the court may not increase the sentence but may express its approval or
29 disapproval of the sentence and its reasons in a written opinion.

30 * Sec. 7. AS 22.15.240(b) is amended to read:

31 (b) The defendant may appeal a judgment of conviction given in the district court in a

1 criminal action to the superior court. When the judgment is given on a plea of guilty, an appeal
2 may not be taken by the defendant except on the ground that a sentence of imprisonment of 90
3 days or more was excessive. The state's right of appeal in criminal cases is limited by the
4 prohibition against double jeopardy contained in the United States Constitution and the
5 Alaska Constitution. The state may also [STATE HAS NO RIGHT OF APPEAL IN
6 CRIMINAL ACTIONS FOR WHICH JUDGMENT IS GIVEN IN THE DISTRICT COURTS,
7 EXCEPT TO TEST THE SUFFICIENCY OF THE INFORMATION OR TO] appeal a sentence
8 on the ground that it is too lenient. When a sentence is appealed [BY THE STATE] on the
9 ground that it is too lenient, the court may not increase the sentence but may express its approval
10 or disapproval of the sentence and its reasons in a written opinion.

11 * Sec. 8. Rule 202(c), Alaska Rules of Appellate Procedure, regarding the prosecution's right to
12 appeal in criminal cases, is repealed.

13 * Sec. 9. This Act takes effect immediately under AS 01.10.070(c).

Alaska State Legislature



House of Representatives
House Judiciary Committee
Chairman Dave Donley

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

ALLOWING STATE TO APPEAL IN CRIMINAL CASES

HB 303 enlarges the state's right to appeal in criminal cases by giving state prosecutors the same right to appeal as have federal prosecutors. Unlike Alaska law where the right of the prosecution to appeal is limited by statute (AS 22.07.020 and AS 22.10.020), the right of federal prosecutors to appeal erroneous decisions is limited only by constitutional double jeopardy provisions. A copy of the federal statute is attached.

Like all human institutions, our criminal justice system is not perfect and judges 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 a defendant, the state may not be able to obtain appellate review of the erroneous decisions. Constitutional prohibitions against double jeopardy do not require that these erroneous decisions stand uncorrected. The proposed amendment changes the statutes to allow the state to appeal in circumstances where an error has been made.

Under current state statutes, if a trial judge dismisses a case erroneously, the state must file a "petition for review", not an "appeal", with the court of appeals. The difference is two-fold.

First, the right to "appeal" means the right to have the court hear a case and consider it on the merits; the court cannot refuse to hear the case. But a "petition for review" is addressed to the court's discretionary power to review decisions of the trial court; the petitioner must convince the court that there is some good reason to take the case, aside from the fact that the judge may have made a mistake. The court can deny the petition because the legal issue raised is unusual, or because the issue is not likely to recur, or because the court is too busy, or for any other discretionary reason, without ever reaching the merits of the trial judge's decision. That is, the trial judge could be clearly wrong to have dismissed charges in a criminal case, but the court of appeals is not required to do anything to correct that wrong, even if it completely agrees with the state's legal argument.

Second, a petition for review must be drafted on very short notice. In the normal appeal process, a person has 30 days from the date of the trial judge's decision to file a simple pleading stating the person intends to appeal. The record on appeal is then prepared. After the record is completed, the person has an additional 30 days to file a brief. This means that, as a

practical matter, the person has several months to research and draft a brief before it must be filed with the court.

The petition for review process is quite different. The state has only 10 days from the trial judge's order to draft a petition that includes a sufficiently convincing argument on the merits of the case to convince the court of appeals that they should take the case and reverse the trial judge's decision. This 10-day period was designed with interlocutory -- mid-trial -- appeals in mind. However, with mid-trial appeals the parties and the judicial system cannot afford the luxury of leisurely briefing because everyone needs to know quickly whether the court of appeals is going to interrupt the trial to decide the legal issue involved. This frantic pace does not make a lot of sense when the state appeals a final order in a case; by definition, a final order adverse to the state ends the case. There is no reason to rush the briefing schedule after a final order has been entered.

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

REPLY TO:

CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX 80
JUNEAU, ALASKA 99911-0310
PHONE: (907) 485-3428

OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

March 5, 1992

Representative Dave Donley
3111 C St., Suite 450
Anchorage, AK 99503

Ref: House Bill No. 303

Dear Representative Donley:

This letter is in response to your request for information regarding how House Bill No. 303, which broadens the state's right to appeal, would affect the Criminal Division of the Department of Law. The bill would eliminate the need to file petitions for discretionary review of adverse dispositive rulings by trial courts, thereby reducing the workload of the appellate office.

The Office of Special Prosecutions and Appeals represents the State of Alaska in all felony merit appeals, in all criminal cases in the Alaska supreme court, and in all federal actions challenging state convictions. Under existing law, the state's right to appeal in most cases is limited by the court of appeals' discretion. OSPA must file petitions for review, seeking discretionary appellate review of adverse dispositive rulings by the trial court. For example, the state cannot currently appeal a trial court's dismissal of charges based upon an alleged violation of the defendant's right to a speedy trial; it must file a petition for review. Though in practice the court of appeals nearly always decides to grant the state's petitions in these cases, OSPA must nevertheless devote a significant amount of time to draft the petition.

Under existing law, the state has thirty days from the certification of the record or the filing of the appellant's brief to file its brief, but only ten days from the adverse ruling to file a petition for review. This ten-day time frame for filing a

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3/5/92

petition for review puts a strain on OSPA. Because the appellate attorney is new to the case, he must review the trial court pleadings and listen to cassette tapes of any relevant hearing. The attorney must then research the law because the petition must contain a "[d]iscussion of the reasons why the decision below is alleged to be erroneous." This is often as time consuming as filing a brief on direct appeal, and usually takes several days. If the petition is granted, the case proceeds as if an appeal had been filed: the parties designate a record, the clerk prepares the record, and the parties file briefs.

Under House Bill No. 303, the state would be permitted to appeal adverse decisions as a matter of right. A state attorney could initiate an appeal by filing a notice of appeal, a statement of points on appeal, and a designation of record. Preparation of these documents ordinarily would occupy at most a few hours. Once the record is certified, the state would have thirty days to file a brief.

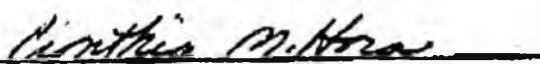
At the current time, OSPA has seven appellate attorneys, two trial attorneys and a supervising attorney. Thirty-eight briefs and other responsive pleadings are due within the next thirty days. Two of the cases in the office involve extremely long trials, requiring the assigned attorneys to read 4000 and 5800 pages of transcripts. It would be difficult today for an appellate attorney to drop everything and devote the necessary time to filing a petition for review. An appellate attorney can more easily juggle an appeal into his caseload than he can a petition for review.

I strongly urge you to support the passage of the bill for it will greatly assist OSPA in providing effective representation in all appellate proceedings.

Yours truly,

CHARLES E. COLE
ATTORNEY GENERAL

By:


Cynthia M. Hora
Assistant Attorney General

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 granting 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 granting 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. 3804.

Federal Practice and Procedure

Appellate review

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

Criminal contempt proceedings, see Wright: Criminal 2d § 713.

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 & Gresham: Jurisdiction §§ 3932, 3934.

Notes of Decisions

Decision or judgment

Acquittal 24a

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 subpoenas 90

States and territories, appeals by 9

Suppression of evidence

Generally 51

Time of ruling 31a

Writ of error 52

1. 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, 629 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

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.

K. — 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 144.

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.1, 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. Parin, 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.

CHAPTER 235—APPEAL

§ 3721. 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.