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# The Prosecution at a Lohss: Time for Statutory Revision

# THE PROSECUTION AT A *LOHSS*: TIME FOR STATUTORY REVISION

In *Lohss v. State*,[1] the Court of Appeals of Maryland denied the State the right to appeal from dismissals of two indictments, because the State had, by failing to object to the dismissals, waived any right to review it might otherwise have had. Since the State's consent to the dismissals was conditioned on the trial court's grant of defendants' pretrial motion to suppress evidence and was, far from a voluntary abandonment of prosecution, no more than an admission of the state's unwillingness to prosecute the case without the suppressed evidence,[2] the decision of the Court of Appeals underscores what is commonly seen as a need for statutory revision.

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1. 272 Md. 113, 321 A.2d 534 (1974).

2. The rule that interlocutory orders are ordinarily not appealable until final judgment was set out in Lee v. State, 161 Md. 430, 157 A. 723 (1931):

> If, on a question left to the court's discretion . . . a prisoner is permitted to take an immediate appeal, then proceedings in every criminal case, great or small, may be stopped and delayed while the accused prosecutes an appeal . . . . [T]his would add just so much to the resources of those who might find vexatious delays advantageous, and would multiply appeals in criminal cases, often when acquittals, in the end, would render them profitless.

*Id.* at 434, 157 A. at 724. There is a narrow exception to the rule where an order denies an absolute constitutional right. *See* Neal v. State, 272 Md. 323, 322 A.2d 887 (1974), and cases cited therein; Montgomery v. State, 4 Md. App. 473, 243 A.2d 620 (1968) (speedy trial); Stevenson v. State, 4 Md. App. 1, 241 A.2d 174 (1968) (speedy trial); Brown v. State, 2 Md. App. 388, 234 A.2d 788 (1967) (double jeopardy).

Although a defendant has no right to an immediate appeal, the denial does not foreclose the possibility of appeal altogether. Of course, if there is a verdict of acquittal the issue becomes moot. In the event of a conviction, then appellate review is open to the defendant under MD. R.P. 729(f) and (g)(2), and the accused may obtain a reversal and new trial if the evidence were in fact, both illegally obtained and so important to the State's case that its admission would be reversible error.

The State may not appeal the grant of a motion to suppress after an acquittal because of the double jeopardy provisions of the fifth amendment as applied to the states through the fourteenth amendment. *See* note 61 *infra*. Although permitted in a few other jurisdictions, in Maryland the State may not pursue a moot appeal, because the situation in which it may appeal are limited by the statute. *See* note 42 *infra*. Following a conviction, the State similarly cannot appeal the grant of a motion to suppress because it is again limited by the situations set forth in MD. ANN. CODE, Cts. & Jud. Proc. Art., § 12-302(c) (1974), and as a practical matter, it would already have achieved its goal, the conviction of the accused. In short, while the defendant may appeal the denial of the motion after conviction, the State may not appeal its grant after acquittal. Thus to oppose the dismissal is to ask to go to trial with no evidence, while to acquiesce in the motion is to give up the right of review.

Lohss and Sprenkle were jointly indicted for violation of the controlled dangerous substance law.[3] Before trial, the court found that evidence in the form of contraband had been unlawfully obtained and granted the defendants' motion to suppress it. As in many narcotics cases, the suppression left the State without any useful evidence. Consequently, when Lohss next moved to dismiss the indictment against him for want of admissible evidence to support it, the State conceded, making "no objection" to the order, and the indictment was dismissed.[4] The State itself then moved successfully to dismiss Sprenkle's indictment.[5]

The State appealed the dismissals to the Court of Special Appeals, basing the appeal on section 14 of Article 5 of the Maryland Code.[6] The Court of Special Appeals held, first, that it had jurisdiction under section 14 to hear the appeal and, second, that the grant of the pretrial motion

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3. Defendants were arrested at Friendship Airport [now Baltimore-Washington International] on the basis of communications from the Department of Public Safety in Austin, Texas, that a passenger [Sprenkle] would be arriving in Baltimore with three suitcases containing thirty pounds of marijuana. Following his arrival, Sprenkle was met by Lohss and both were apprehended by the State Police. A search of the suitcases revealed the contraband which was seized and became the subject of the motion to suppress.

4. State v. Lohss, 19 Md. App. 489, 491-92, 313 A.2d 87, 89 (1973). The record contains a notation on a piece of paper bearing the printed name of Judge Evans [the trial judge]: "Mr. Anders [Assistant State's Attorney] concedes; no objection to order." *Id.* at 492, 313 A.2d at 89.

5. *Id.*

6. MD. ANN. CODE art. 5, § 14 (1966) provided:

> The State may appeal to the Court of Special Appeals from a final order or judgment granting a motion to dismiss, or quashing or dismissing any indictment, information, presentment or inquisition in a criminal action, but the State shall have no right of appeal in any criminal action where the defendant has been tried and acquitted.

Article 5 was subsequently repealed by Acts of 1973, 1st Sp. Sess., ch. 2, § 2, effective Jan. 1, 1974; 1974, ch. 691, § 1, effective July 1, 1974. The section is now recodified as MD. ANN. CODE, Cts. & Jud. Proc. Art., § 12-302 (1974), which provides:

> (a) Unless a right to appeal is expressly granted by law, § 12-301 does not permit an appeal from a final judgment of a court entered or made in the exercise of appellate jurisdiction in reviewing the decision of the District Court, an administrative agency, or a local legislative body.
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> (b) Section 12-301 does not apply to appeals in contempt cases, which are governed by §§ 12-304 and 12-403.
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> (c) In a criminal case, the state may appeal only from a final judgment granting a motion to dismiss or quashing or dismissing any indictment, information, presentment, or inquisition in a criminal case.
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> (d) Section 12-301 does not permit an appeal from the decision of the judges of a circuit court sitting in banc pursuant to Article IV, § 22 of the Constitution if the party seeking to appeal is the party who moved to have the point or question reserved for consideration of the court in banc.

to suppress evidence was erroneous.[7] This Note, however, will be confined to the jurisdictional question of the State's right to appeal the dismissal and will not address the substantive issue of the propriety of the grant of the motion to suppress.

Under Maryland law a party's right to appeal in both civil and criminal cases is entirely statutory.[8] In *Lohss,* the Court of Special Appeals interpreted section 14 to give it jurisdiction to hear an appeal by the State from a dismissal of an indictment regardless of the cause of dismissal. The Court of Special Appeals noted that it had already entertained appeals from dismissals of indictments based on motions to suppress evidence;[9] however, the dismissals in all four of the cited cases[10] resulted from defendant's motion without consent or acquiescence by the State. While recognizing the distincton, the court nevertheless ruled that the clear meaning of the statute allows the appeal — the "*only* exception being where 'the defendant has been tried and acquitted.' "[11]

Having found jurisdiction, the Court of Special Appeals then reviewed the propriety of the grant of the motion to suppress under Maryland Rule 1087[12] and found that it had been improper.

## THE DECISION OF THE COURT OF APPEALS

The Court of Appeals reversed.[13] While the court agreed with the Court of Special Appeals that if the appeal were proper, the motion to suppress could be reviewed under Rule 1087,[14] the State was nevertheless denied a right to appeal on two grounds.

First, the State, by consenting to or acquiescing in the dismissals, lost any rights of appeal it may have had under section 14. With only civil cases[15] as authority, the court felt that the State's actions amounted to an

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7. 19 Md. App. at 494, 506, 313 A.2d at 90, 94.

8. *See, e.g.,* Mace Produce v. State's Attorney, 251 Md. 503, 508–09, 248 A.2d 346, 350 (1968); State v. Denisio, 21 Md. App. 159, 162, 318 A.2d 559, 561 (1974).

9. 19 Md. App. at 494, 313 A.2d at 90.

10. State v. Graziano, 17 Md. App. 276, 301 A.2d 36 (1973); State v. Lee, 16 Md. App. 296, 295 A.2d 812 (1972); State v. Siegel, 13 Md. App. 444, 285 A.2d 671 (1971); State v. Swales, 12 Md. App. 69, 277 A.2d 449 (1971).

11. 19 Md. App. at 494, 313 A.2d at 90 (emphasis in original).

12. MD. R.P. 1087, concerning the reviewability of interlocutory orders, provides: On an appeal from a final judgment, every interlocutory order which has previously been entered in the action shall be open to review by this Court unless an appeal has theretofore been taken from such interlocutory order and been decided on the merits by this Court.

13. Lohss v. State, 272 Md. 113, 321 A.2d 534 (1974).

14. *Id.* at 118, 321 A.2d at 537.

15. Enumerated, *id.* at 118–19, 321 A.2d at 538.

abandonment of its prosecution, analogous to entering a *nolle prosequi.*[16] The ruling of the court on the question rests on the maxim of jurisprudence that no appeal will lie without genuine adversity.

The second articulated ground for reversal was the State's failure to fulfill the requirements of Maryland Rule 1085.[17] The court ruled that, by not questioning the propriety of the dismissals, the State had waived its right of review on the motion.[18] Although the authority relied on by the Court of Appeals concerns the waiver by defendants in criminal proceedings, the State is also bound by the rule.[19] Although both appellate courts recognized the State's need for review of a pretrial motion to suppress evidence, the Court of Appeals expressly refused to supply a right of appeal to the State and suggested, not for the first time, that "[i]f a broader right of review is necessary in the interest of criminal justice, it must be granted by the legislature."[20]

The first case involving the State's appeal from the grant of a motion to suppress evidence was *State v. Mariana.*[21] There the Court of Appeals did indeed reverse a judgment of acquittal because of the erroneous grant of a pretrial motion to suppress evidence; however, no motion to dismiss the State's appeal was made and the right to appeal was not mentioned in the opinion.

*State v. Adams*[22] was the first case to deal explicity with the State's right to appeal. The Court of Appeals distinguished *Mariana,* as above,

16. 272 Md. at 119, 321 A.2d at 538.

17. MD. R.P. 1085 provides:
This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.

18. 272 Md. at 119, 321 A.2d at 538.

19. *Id.*

20. 272 Md. at 120, 321 A.2d at 539.

21. 174 Md. 85, 197 A. 620 (1938). This case is discussed in Note, *Appeals by the State in Criminal Cases,* 4 MD. L. REV. 303 (1940).

22. 196 Md. 341, 76 A.2d 575 (1950). The defendant had been acquitted on indictments that charged violations of the gambling laws. Before trial, defendant had moved to dismiss the indictments, but the court of appeals held these motions to be effectively motions to suppress evidence. At the end of the testimony, the trial judge held the arrest, search, and seizure illegal and rendered a verdict of not guilty. The court held that under Palko v. Connecticut, 302 U.S. 319 (1939), the issue of an appeal did not involve any constitutional question. The court having decided that, the case turned on statutory construction.

and dismissed the appeal. The State had argued that the motion to suppress was equivalent to a demurrer to an indictment and, therefore, appealable under the statute,[23] yet the court discounted the assertion as unsound both in law and in fact and stated that the distinction between cases which the State may appeal and those which it cannot is purely historical — based on whether the case is reviewable on writ of error or not.[24] The motion to suppress did not fall within the category of motions so reviewable, and, therefore, the statute allowed no appeal from such a notion.

The following year the state again attempted to circumvent the statute in *State v. Barshack*.[25] A defendant moved to quash a search warrant and the court granted the motion and a continuance. The State appealed on two points: first, while technically the grant of the motion was not final as required by the statute,[26] the State argued that the practical effect of the grant was to foreclose further prosecution; second, the State argued that the grant of a continuance enlarged the right of review.[27] The Court of Appeals denied the State the right of review on the first contention, following the holding of *State v. Adams*[28] and did not discuss the merits of the second.

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23. MD. ANN. CODE art. 5, § 86 (1939), provided:

> The parties to criminal proceedings shall be entitled to bills of exceptions in the same manner as in civil proceedings, and appeals from judgments in criminal cases may be taken in the same manner as in civil cases; but no appeal in a criminal case shall stay execution of sentence unless the counsel for the accused shall make oath that the appeal is not taken for delay; and such appeal shall be heard at the earliest convenient day after the same shall have been transmitted to the court of appeals; and the accused, upon taking such appeal, shall, in all cases not punishable by death, or imprisonment in the penitentiary, be entitled to remain on bail, and in other cases not capital, the court from which the appeal is taken shall have the discretionary power to admit to bail; provided that nothing herein contained shall be construed to prohibit the court from requiring additional or greater bail, pending an appeal, than the accused may already have given before conviction.

24. 196 Md. at 349–50, 76 A.2d at 578.

25. 197 Md. 543, 80 A.2d 32 (1951).

26. MD. ANN. CODE art. 5, § 86 (1951).

27. The continuance was given ostensibly to allow the State to appeal. The trial judge, Judge Manley, after granting the motion to suppress, spoke to the prosecution:

> I will grant the motion and I will take any other procedure in the case that is, for further disposition of it, that you might suggest, so that the State will not lose its right to appeal. In other words, I will be glad to handle it in such a way that might preserve your right to appeal. I will follow any suggestion you have to make as to what to do in order to preserve the right of the State to take an appeal.

Brief for Appellant at app. 15–16. Judge Manley expressed doubts whether the State could appeal before a verdict — doubts that were borne out on appeal — but allowed the continuance so that the State might try it.

28. 196 Md. 341, 76 A.2d 575 (1950).

Eighteen years later the issue was raised again in the Court of Special Appeals in *State v. Mather.*[29] In that interval, the legislature had repealed all prior statutes regulating the right of appeal in criminal cases and enacted article 5, section 14 of the Code.[30] In *Mather,* the defendant moved to suppress evidence, and the motion was granted. The State appealed and again argued, as it had before the Court of Appeals in *Adams* and *Barshack,* that the grant of the motion was tantamount to terminating the prosecution and discharging the defendant;[31] and as the Court of Appeals had in *Adams* and *Barshack,* the Court of Special Appeals denied the appeal, ruling that section 14 had not further enlarged the State's right of appeal. The second argument essayed by the State was that the "inquisition" in section 14 was broad enough in meaning to include the judicial inquiry adjudicating the motion to suppress. According to the Court of Special Appeals, however, no construction of the term *inquisition* was broad enough to grant the State a new right of appeal.

The Court of Special Appeals in *State v. Siegel*[32] reaffirmed the principle that the State has no right of appeal from the granting of a motion to suppress evidence, but the court also suggested an alternative means of securing review by the State that has not yet been litigated in Maryland.[33] This suggestion is reiterated in *State v. Graziano.*[34] The potential ground for appeal comes from two federal cases.[35] In *United States v. Tane,* the Second Circuit held that where "the basis of the dismissal of the indictment is inextricably intertwined with the basis of the suppression order, both orders must be reviewed together,"[36] but of course, this federal decision does not bind Maryland courts. In *United States v. Dote,* defendants made a motion to suppress. After a full hearing, the trial court granted the motion and dismissed the indictment as well, finding that but for the illegally obtained evidence, no indictment would have been returned.[37] In *Tane,* defendant made both a motion to suppress and a motion to dismiss the indictment. After several hearings, the trial court granted both motions.[38] The clear implication of *Siegel* and

29. 7 Md. App. 549, 256 A.2d 532 (1969).

30. MD. ANN. CODE art. 5, § 14 (1966), set out at note 6 *supra.*

31. 7 Md. App. at 552, 256 A.2d at 533–34.

32. 13 Md. App. 444, 470–71, 285 A.2d 671, 686 (1971).

33. *Id.* at 471 n.28, 285 A.2d at 686 n.28.

34. 17 Md. App. 276, 284 & n.1, 301 A.2d 36, 41 & n.1 (1973).

35. United States v. Dote, 371 F.2d 176 (7th Cir. 1966); United States v. Tane, 329 F.2d 848 (2d Cir. 1964).

36. 329 F.2d at 851–52.

37. 371 F.2d at 178.

38. 329 F.2d at 849–52.

*Graziano,* which seems untouched by the reversal of *Lohss,* is that under the proper factual circumstances the State may yet, using the *Dote-Tane* doctrine, acquire a right of review on a motion to suppress evidence that it does not presently enjoy. The right of review would not be unlimited, because in the situation where the defendant moves only to suppress and makes no motion to dismiss the indictment, the State, according to *Lohss,* would have no right of review. Similarly, the *Dote-Tane* doctrine would not cover the situation where the suppression order affects only a portion of an indictment. In that instance the State, using the *Dote-Tane* theory, could obtain review on the affected counts only after entering a *nolle prosequi* on the unaffected counts.[39] The effect would be to force the State to risk the complete dismissal of the case in order to obtain the right of review on the affected counts, a situation that could create more problems than it would solve.

It is clear that, while *Lohss* has frustrated another attempt by the State to circumvent the plain meaning of section 14, the decision has not resolved the question entirely. As long as section 12-302(c) remains as the codification of the State's right to appeal, the issue can be expected to reappear again as the State takes yet another tack, either the one suggested by the sympathetic court in *Siegel* or as the State's ingenuity and the facts of future cases suggest, in order to secure the right of appeal from the pretrial grant of a suppression order.

## OTHER JURISDICTIONS

Other states vary in their procedures for appeal by the prosecution following the issuance of a suppression order. Two states disallow the state the right of appeal by constitutional provision.[40] Fourteen states allow the state some right of appeal, but do not extend that right to include pretrial motions to suppress evidence.[41] Five states allow the state a right to a moot appeal, the appeal being only for an advisory opinion, and the judgment at the appellate level in no way affects the rights of the de-

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39. *See* State v. Gibson, 4 Md. App. 236, 240 n.1, 242 A.2d 575, 578 n.1 (1968).

40. TEX. CONST. art. 5, § 26; VA. CONST. art. 6, § 88.

41. ALA. CODE tit. 15, § 370 (1958); ALASKA STAT. § 22.05.010 (1959); IND. ANN. STAT. § 9-2304 (Supp. 1974); KY. REV. STAT. § 21.140 (1974); MD. ANN. CODE, Cts. & Jud. Proc. Art., § 12-302(c) (1974); MO. R. CRIM. P. 28.04; N.C. GEN. STAT. § 15-174 (1969); N.D. CENT. CODE § 29-28-07 (1974); S.C. CODE ANN. § 7-101 (1962); S.D. COMPILED LAWS ANN. § 23-51-2 (1967); TENN. CODE ANN. § 40-3401 (1950) (*but see* TENN. CR. CODE & CODE CRIM. P. § 40-1408 (Proposed final draft, Nov. 1973)); UTAH CODE ANN. § 77-39-4 (1953); WASH. CAROA 14(8), construed in State v. Rook, 9 Wash. App. 826, 515 P.2d 830 (1973); W. VA. CODE ANN. § 51-1-3 (1966).

fendant.[42] Five states allow appeals by the state with leave of the court following the grant of a motion to suppress.[43] The remaining twenty-five jurisdictions, including the District of Columbia, specifically allow the state the right to appeal in such situations.[44] The clear trend has been towards allowing the state the right of appeal. Since Illinois first allowed appeals by the state in 1964, twenty-three states have followed that state's lead.

Unless the suppressed evidence was seized drugs[45] or the *Dote-Tane* distinction could be successfully argued, the United States had no right under federal law to appeal a suppression order until the Allot Amend-

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42. ARK. STAT. ANN. § 43-2720.1 (Supp. 1973); IOWA CODE ANN. § 793.1 (Supp. 1974); MISS. CODE ANN. § 99-35-103 (1972); NEB. REV. STAT. §§ 29-2315.01, 29-2316 (reissue 1964); WYO. STAT. ANN. §§ 7-288 to 7-291 (1957).

43. CONN. GEN. STAT. ANN. § 54-96 (Supp. 1975); DEL. CODE ANN. tit. 10, § 9903 (1974); MICH. COMP. LAWS § 770.12 (1968); N.H. REV. STAT. ANN. 491: App. R. 88 (Supp. 1972); VT. STAT. ANN. tit. 13, § 7403 (1974).

44. ARIZ. R. CRIM. P. 31.16; CAL. ANN. PENAL CODE § 1238(a)(7) (West Supp.); COLO. R. CRIM. P. 41.2; D.C. CODE ENCYCL. ANN. § 23-105(b) (Supp. 1970); FLA. STAT. ANN. § 924.071 (1973); GA. CODE ANN. § 6-1001(a) (Supp. 1973); HAWAII REV. STAT. § 641-12 (Supp. 1973); IDAHO CODE § 19-2804 (Supp. 1974); ILL. ANN. STAT. ch. 110A, § 604(a) (1968); KAN. STAT. ANN. § 22-3603 (Supp. 1972); LA. CODE CRIM. PRO. art. 703 (1967); ME. REV. STAT. ANN. tit. 15, § 2115-A (Supp. 1974); MASS. LAWS ANN. ch. 278, § 28E (Supp. 1974); MINN. STAT. ANN. § 632.11 (1975); MONT. REV. CODES ANN. § 95-2403(b)(5) (1969); NEV. REV. STAT. § 189.120 (1973); N.J. R. CRIM. P. 3:24; N.M. STAT. ANN. § 21-10-2.1 (Supp. 1973); N.Y. PENAL LAW §§ 450.20(8), 450.50 (McKinney 1971); OHIO R. CRIM. P. 12(J); State v. Caldwell, 496 P.2d 426 (Okla. Cr. 1972); ORE. REV. STAT. § 138.060(3) (1973); Commonwealth v. Fisher, 422 Pa. 134, 221 A.2d 115 (1966); R.I. GEN. LAWS ANN. § 12-5.1-12.5(d) (Supp. 1974); WIS. STAT. ANN. § 974.05(1)(d) (1969).

45. Narcotics Control Act, ch. 629, title II, § 201, 70 Stat. 573, provided:

> In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence made before the trial of a person charged with a violation of—
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> (1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,
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> (2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or
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> (3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a).
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> This section shall not apply with respect to any such motion unless the United States attorney shall certify, to the judge granting such motion, that the appeal is not taken for purposes of delay. Any appeal under this section shall be taken within 30 days after the date the order was entered and shall be diligently prosecuted.

The government's right to appeal in narcotics cases is now included in 18 U.S.C. § 3731 (1970). *See* note 47 *infra*.

ment to the Criminal Appeals Act of 1907[46] was passed. The amendment,[47] and the recommendations of the President's Commission on Law

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46. Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246, *as amended,* ch. 645, 62 Stat. 844 (codified as 18 U.S.C. § 3731 (1964)):

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
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> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.
>
> Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.
>
> If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.
>
> If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

18 U.S.C. § 3731 (1968) Pub. L. 90–351 added a paragraph to the existing codification:

> From an order, granting a motion for return of seized property or a motion to suppress evidence, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant.

For a discussion of the pre-amendment statute, *see* Friedenthal, *Government Appeals in Federal Criminal Cases,* 12 STAN. L. REV. 71 (1959).

47. For an extensive discussion of the legislative history of the Criminal Appeals Act of 1907, *see* Kurland, *The* Mersky *Case and the Criminal Appeals Act: A Suggestion for Amendment of the Statute,* 28 U. CHI. L. REV. 419 (1961). Congress

Enforcement and Administration of Justice[48] and those of the American Bar Association[49] have doubtless given some impetus to the movement. In

amended the Criminal Appeals Act of 1907 again in 1971 in an attempt to clarify the earlier codification which had been developed in a piecemeal fashion:

§ 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 court's 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 provisions of this section shall be liberally construed to effectuate its purposes.

Act of Jan. 2, 1971, Pub. L. No. 91-644, § 14(a), 84 Stat. 1890, *amending* 18 U.S.C. § 3731 (1968).

The amendment broadens the scope of appeal by eliminating the common law terms of the former law and establishes double jeopardy as the only limitation to governmental appeal. The second paragraph, which in part applies to suppression orders, retains the certification-of-substantial proof requirement of the old law, but modifies the use to which the evidence must be put from "proof of the charge pending against the defendant" to "proof of a fact material to the proceeding." The thirty-day rule and the bail provisions of the former law were left unchanged by the new third and fourth paragraphs. The fifth paragraph introduces a liberal construction provision in order to effectuate the purpose of the statute. This provision is a response to the strict construction by the federal courts in earlier cases requiring construction of the statute. *See* United States v. Mersky, 261 F.2d 40 (2d Cir. 1958); Carroll v. United States, 354 U.S. 395 (1957); United States v. Sisson, 399 U.S. 267 (1970). In *Sisson,* the Court seemingly recognized a need for revision: the majority opinion stated, "until such time as Congress decides to amend the statute, this Court must abide by the limitations imposed by this awkward and ancient statute." 399 U.S. at 308.

For a more complete discussion of the 1970 amendment to the statute, *see* Note, *Government Appeal in Criminal Prosecutions: The 1970 Amendment to 18 U.S.C.* § 3731, 12 AM. CRIM. L. REV. 539 (1975).

48. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

The Commission recommended:

Congress and the States should enact statutes giving the prosecution the right to appeal from the grant of all pre-trial motions to suppress evidence or confessions.

*Id.* at 140.

49. ABA STANDARDS RELATING TO CRIM. APPEALS 33-34 (Approved Draft 1970).

order to eliminate the state's dilemma in a situation like that in *Lohss*, Maryland should join the trend by allowing the state an interlocutory appeal from a pretrial suppression order.

## PROPOSED MARYLAND STATUTE

The Joint Committees of the Maryland Judicial Conference and Maryland State Bar Association to Implement the ABA Standards for Criminal Justice have recommended the repeal of Article 26, section 12–302(c)[50] and the enactment of section 12–302½.[51] The policy favoring the proposed statute is apparent. Without it, the decision of the trial judge in favor of suppression, whether correct or erroneous, forecloses the prosecution of the case and operates as an acquittal. The opportunity for abuse is obvious, and even without abuse, uncorrectable error is foreign to the usual notions

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50. SUPPLEMENTAL COMMITTEE REPORT ON ABA STANDARDS RELATING TO CRIM. APPEALS.

51. Proposed section 12–302½, *Appeals from Certain Interlocutory Orders in Criminal Cases* would provide:

(A) A defendant may appeal from any of the following interlocutory orders entered by a circuit court in a criminal case:

(1) An order granting a new trial when the defendant contends that the court should have entered a judgment of acquittal.

(2) Any order adverse to the defendant when in the same criminal case the State appeals pursuant to Section 12–302(C) or pursuant to paragraph 1 of subsection B of this section.

(B) The State may appeal from any of the following interlocutory orders entered by a circuit court in a criminal case:

(1) An order entered before trial which results in the suppression or exclusion of evidence which the State's Attorney intended to use at trial on the ground that the evidence was illegally obtained. No appeal shall be allowed under this paragraph unless the State's Attorney certifies to the circuit court that the appeal is not taken for purposes of delay and that the suppression or exclusion of the evidence seriously impedes the prosecution of one or more of the offenses charged. For purposes of this paragraph, the trial begins when the jury is impaneled and sworn or when the judge in a non-jury trial begins to hear evidence. A defendant who is not otherwise in custody shall be released on his own recognizance pending the determination of an appeal by the State pursuant to this paragraph unless the State presents to the circuit court convincing evidence that it is necessary to require bail or to impose additional conditions of release to insure that the defendant will abide by the judgment of the appellate court. If the State seeks further review of an adverse decision on appeal, the defendant shall be released on the same basis.

(2) An order that grants release, pending sentence or appeal, to a defendant convicted of an offense in the circuit court.

(C) A defendant may apply for leave to appeal from a bail determination of the circuit court, including a determination made in exercise of the court's appellate jurisdiction under Section 12–401(D), that orders that the defendant be detained prior to trial or pending sentence or appeal or imposes conditions of release that result in the defendant's detention prior to trial or pending sentence or appeal.

of fair play and justice.[52] The result of disallowing a state's appeal is to force society to reabsorb an accused criminal whose innocence has not been determined by an adjudication on the merits, but rather by a lapse in the proper functioning of the judicial system at its lowest level.[53] The proposed measure would probably result in more convictions. At the very least, there would be more determinations on the merits, and this would build morale within the criminal justice system and confidence without. That there is a general policy of kindness to criminal defendants hardly justifies the retention of any irrational procedure merely because it can only operate in favor of a defendant.

*Lohss* exemplifies further problems the proposed statute would correct. The hearing judge, dubious as to the legality of the arrests, granted the motion to suppress because the circumstances, in his opinion, did not fall within the exigent circumstances necessary to justify a warrantless search.[54] The Court of Special Appeals disagreed and found that the probable cause requirements of the two-prong *Aguilar*[55] test were met, and thus the arrest and the search incident to it were legal.[56] The Court of Appeals reversed on other grounds and the correctness of the determination of the Court of Special Appeals was not reviewed. As a result of the reversal, law enforcement agencies are placed in an untenable position. They can follow the hearing judge's ruling and obtain a warrant in all similar situations. This course of action might not always be available, and evidence and resultant prosecutions could be lost because of the curtailment of legal police activity. Criminal justice is not aided when law enforcement agencies are forced to abandon practices and procedures that, but for the lack of appellate review, would be perfectly legal. The second alternative open to law enforcement agencies is to continue the practice or procedure ruled illegal by the trial court in the hope that another trial court would uphold the practice, and an aggrieved defendant would appeal and furnish the State an opportunity for review. This is as undesirable as the first course of action, because the law enforcement agency, not the courts, would determine which decisions it would abide by and which it would ignore. This is precisely what happened in *Waugh v. State*.[57] The contrasts of the results in *Lohss* and *Waugh* could not be more clear.

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52. *See* Dowling, *Extending the State's Right to Appeal in Criminal Cases in Illinois*, 42 CHI. B. REC. 361, 364 (1961) [hereinafter cited as Dowling].

53. For a discussion of the evils inherent to acquittals on technical grounds, *see*, Dowling, *supra* note 52, at 366.

54. 19 Md. App. at 501, 313 A.2d at 94.

55. Aguilar v. Texas, 378 U.S. 108 (1964).

56. 19 Md. App. at 502–06, 313 A.2d at 95–97.

57. 275 Md. 22, 338 A.2d 268 (1974). The trial court denied defendant's motion to suppress evidence. The denial became the subject of appeal because, as in *Lohss*, the evidence was marijuana, and if the defendant were able to successfully suppress the contraband, the State, as in *Lohss*, would be unable to proceed with the prosecution. The facts are strikingly similar. The Maryland State Police

The difference in result hinges on the decision of a trial judge on a pretrial motion, one foreclosing prosecution, the other sending the matter to trial. The fragile perception of the judicial system as the means of insuring a stable society cannot endure if seemingly capricious questions of procedure rather than the facts that brought the matter before the courts determine whether a defendant faces incarceration.

The current system may even result in preventable new trials that add congestion to already overloaded trial dockets. Trial judges knowing that the State cannot appeal the grant of a motion to suppress evidence may, in close cases, deny the motion knowing that the defendant may appeal if he is convicted. If the State were allowed to appeal, the problems associated with new trials caused by improper denials of motions to suppress would be obviated. Appeals and new trials would not disappear, but if the challenges concerning the admissibility of evidence could occur prior to trial, the issue would be closed promptly. The issue of guilt or innocence would be thoroughly and fairly resolved at trial, and any appeals would be on more abstract grounds. Additionally, the proposed measure would develop uniformity within the State as to what constitutes an illegal search and seizure and would allow the formulation of a definitive body of law on the subject that would aid judges in their decisions. The need for review on the point is again highlighted by the difference of opinion between the trial judges in the *Lohss* and *Waugh* cases over whether similar searches were valid. That two Anne Arundel County judges are unable to agree is indicative of the differences that can be expected to occur throughout the state; thus, without appellate review, a defendant's freedom or incarceration may be determined according to the jurisdiction where he is brought to trial. Just as the defendant should not be deprived of guaranteed rights because of locale, neither should the people of any political subdivision have more exposure to alleged criminals because of differing judicial interpretations of the search and seizure law. Passage of the proposed bill would be the legislative determination that the courts have requested.

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were informed by a detective in the Tucson, Arizona Police Department that a passenger was going to arrive at Friendship (Baltimore-Washington International) Airport with a shipment of marijuana. A detailed description of the passenger (Waugh) and his luggage was given. Although the claim check numbers were not included in the description, the description was sufficiently particular to identify the defendant. Waugh was arrested in the baggage area after he had claimed the suitcases. The trial court denied Waugh's motion to suppress and on appeal, the Court of Special Appeals affirmed. 20 Md. App. 682, 318 A.2d 204 (1974). The Court of Appeals, however, reversed because the information leading to the Maryland search was the result of an unconstitutional search in Tucson and therefore, should have been excluded under the *Wong Sun* "fruit of the poisonous tree" doctrine. 275 Md. at 30, 338 A.2d 268. *Accord,* Everhart v. State, 274 Md. 459, 337 A.2d 100 (1975), Carter v. State, 274 Md. 411, 337 A.2d 415 (1975). If the original motion had been granted, no body of case law would have developed because of section 12-302(c). *Cf.* Lohss v. State, 272 Md. at 114, 321 A.2d at 535.

In the leading article[58] favoring appeals by the State, Professor Justin Miller states:

> Most members of the legal profession are willing to admit that the administration of criminal justice, as a whole, needs improvement. Our greatest difficulty lies in the unwillingness or inability of some others to understand that only by making changes in particular rules and practice, each of which by itself may seem trifling or insignificant, can we improve the administration of the whole.[59]

Opponents of state appeals rely on two principal detriments: the hardship on the defendant and the negation of the benefit of jury trial.[60] The latter difficulty is clearly not created by the proposed statute. Because the jury is not empaneled at the pretrial motion stage of the proceedings, the jury function would not be impaired.[61] In fact, interlocutory appeals may promote the jury function: after the state has appealed, the jury will be presented with *all* the admissible evidence and will, therefore, be better

58. Miller, *Appeal by the State in Criminal Cases,* 36 YALE L.J. 486 (1927) [hereinafter cited as Miller].

59. *Id.* at 512.

60. *See, e.g.,* ORFIELD, CRIMINAL APPEALS IN AMERICA 62, 71 (1939); Orfield, *Appeal by the State in Criminal Cases,* 15 ORE. L. REV. 306 (1936) [hereinafter cited as Orfield]; Kronenburg, *Right of State Appeal in Criminal Cases,* 49 J. CRIM. L.C. & P.S. 473, 479 (1959).

61. There is no state guarantee protecting criminal defendants from double jeopardy. Under the common law in Maryland, a defendant could not be placed in jeopardy after there had been a final verdict of either acquittal or conviction on an adequate charging instrument. Hoffman v. State, 20 Md. 425, 435 (1863); State v. Barger, 242 Md. 616, 220 A.2d 304 (1966); Smith v. State, 1 Md. App. 297, 229 A.2d 723 (1967); Greathouse v. State, 5 Md. App. 675, 249 A.2d 207 (1969).

Benton v. Maryland, 395 U.S. 784 (1969), *on remand,* 8 Md. App. 388, 260 A.2d 86 (1969), struck down the earlier formulation of the double jeopardy rule enunciated in Palko v. Connecticut, 302 U.S. 319 (1937), and the common law doctrine that had been applied in Maryland through *Greathouse.* In *Benton,* the double jeopardy clause of the fifth amendment was made applicable to the States through the fourteenth amendment. 395 U.S. at 794.

The Supreme Court has recognized that Congress intended to grant the United States the right of appeal in criminal cases subject only to constitutional restraints. United States v. Wilson, 420 U.S. 332, 337 (1975). The double jeopardy standard delineated in *Wilson* is that a bar to Government appeals under 18 U.S.C. § 3731 "attaches only where there is a danger of subjecting the defendant to a second trial for the same offense . . . ." *Id.* at 336. Under the Supreme Court test, there would be no constitutional barrier to such an appeal by the prosecution. In an appeal from a grant of a pretrial suppression order, there is no threat of either multiple punishment or successive prosecution. The appeal of a pretrial suppression order would increase the probability of conviction and subject the defendant to continuing hardship, but the "defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *Id.* at 345 (footnote omitted), *citing* Judge Learned Hand in United States v. Zisblatt, 172 F.2d 740, 743 (2d Cir.), *appeal dismissed,* 336 U.S. 934 (1949). Because of the requirements of the proposed statute, the appeal would necessarily occur before the first trial and there would be no question of constitutional infirmities in the procedure.

able to judge the guilt or innocence of the accused. The former problem is of more concern. There will be some hardship on the defendant if the State is given the right to appeal. Orfield opposes giving the State the right of appeal, because the State should not be allowed to take advantage of its own faulty procedures at the expense of the defendant.[62] To some, this is an appealing argument, but to others, it is outrageous that the public's protection from a criminal should be lost for such a trivial and irrational purpose. The requirement in the proposed statute that the prosecutor certify that the appeal is necessary and not frivolous should help preserve the State's good faith.

Professor Miller suggests two alternative reasons that explain why legislation has not been enacted allowing the right of appeal. First, society is less concerned with the ability of the State to prosecute criminal cases fully than with the protections afforded the defendant.[63] Even now only half of the states allow appeals from suppression orders — orders critical to many criminal proceedings. The second reason that Professor Miller suggests to explain the lack of State action is that most state legislators are lawyers, whose experience in criminal law has been as defense attorneys. Professor Miller asserts that, because of a desire to protect their own interests, they have thwarted any attempts to give the State more equality in the criminal law.[64] For whatever the reasons, *Lohss* reemphasizes the need for a statutory revision. The proposed statute responds to a need that has been apparent since *Adams*. The trend towards granting the State a right of appeal is growing. The mandate in *Lohss* from the Court of Appeals to the Legislature is manifest: "If a broader right of review is necessary in the interest of criminal justice, it must be granted by the Legislature."[65] The amendment has been proposed and all that remains is for the Legislature to enact the proposal and remove an impediment to the State's ability to fully — and fairly — prosecute a criminal trial.

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62. Orfield, *supra* note 60, at 310.

63. Miller, *supra* note 58, at 501.

64. *Id.* at 502.

65. 272 Md. at 120, 321 A.2d at 539, *quoting Adams, Barshack* and *Mather*.