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COMBATTING OFFICIAL CORRUPTION IN NEW JERSEY: DETERRENCE AND DETECTION *

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Public corruption may be the most undetected and unreported offense against society. Most person-to-person crime becomes known to the authorities in some fashion, although some offenses, particularly those that tend to bring embarrassment or fear to the victim, are concealed to a degree. Corruption, on the other hand, is iin its nature designed to remain undetected. No one really knows how many kickbacks are paid every year, how many contract awards are tainted by bid collusion, or how often a vendor delivers short weight or goods or services that fail to meet specifications.

In most states the Attorney General and the county or district attorneys are elected, whereas in New Jersey these officials are appointed by the Governor. Consequently there is, I believe, more of a tendency in my state to share law enforcement authority and to structure a coordinated criminal justice system. It is my strong belief that this leads to a more effective program to attack public corruption, as well as organized crime and other problems that transcend municipal or county boundaries.

Further, in many states the Attorney General has limited criminal jurisdiction. Therefore, it is important to understand from the outset that Attorneys General have a widely varying capacity to direct the prestige of their office toward the corruption problem. These limitations and variations are highly regrettable, for while many criminal problems are best handled by local authorities, corruption in government needs in addition to local attention, the leadership, resolve and resources of the state itself if it is to be contained.

Government is founded upon trust. We entrust those who govern with the power to formulate and implement public policy and we have faith that they will properly perform their obligation. Members of government stand in a fiduciary relationship to the people whom they serve. "As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity".[1] It is incumbent upon them to "be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly".[2]

These obligations are not mere theoretical concepts or idealistic abstractions. They are responsibilities imposed on public officers as a matter of law. "The enforcement of these obligations is essential to the soundness and efficiency of our government . . ."[3] But history has sadly revealed that faith in government and its officers is not enough and that a lack of accountability breeds public ineptitude, waste and criminal misconduct. Although our government is one of law, it is managed by men. It would be naive indeed to assume that all public officers are immune from

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* Remarks of William F. Hyland, Attorney General of New Jersey, Federal Bar Association, National Convention, Atlanta, Georgia, September 10, 1975. The contents of the speech were formulated into an article by Deputy Attorneys General David S. Baime and John DeCicco.

1 *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 474 (1952), *cert.* denied 344 U.S. 838 (1952).

2 *Id.* at 475.

3 *Id.* at 476.

human frailties. Breaches of the public trust will inevitably occur. Our purpose must be to cleanse government of its criminal elements. Detection of criminal behavior following its occurrence is plainly not enough, however. Our systems of laws must seek to deter insolence in office, not merely to rectify a wrong already done. Thus, we have a dual role in combatting public corruption. We must discourage those who might otherwise be inclined to embark upon a course of official misconduct, and we must pursue and punish through criminal prosecutions those who disobey our laws.

The Attorney General's office in New Jersey is uniquely suited to perform those functions. Prior to 1970, the criminal business of the State was prosecuted by twenty-one independent law enforcement agencies. Specifically, the county prosecutor was the chief law enforcement officer in his district.[4] Piecemeal efforts at detecting and prosecuting public corruption and organized crime proved wholly unsatisfactory. Thus, in 1970, our Legislature enacted the Criminal Justice Act,[5] which established the Attorney General as the chief law enforcement officer in the State and created the Division of Criminal Justice within his office. The Director of the Division is appointed by the Attorney General and "serve(s) at (his) pleasure".[6] The articulated objective of the statutory scheme, and hence the essential responsibilities of the Division, are to encourage cooperation among law enforcement agencies and to coordinate their efforts "in order to secure the benefits of a uniform and efficient enforcement of the criminal law".[7] The legislative intendment, as plainly revealed in the Act, was to establish a central agency having a state-wide perspective over the administration of criminal justice with both line and staff functions.

The need for such a coordinated effort had become more pronounced with the growing sophistication and mobility of syndicated crime. Simply put, no longer is criminal behavior, particularly political corruption, confined within recognized municipal, county or even state boundaries. Rather, public corruption is carried on cautiously and furtively and in as many different ways and by as many conceivable methods as human ingenuity can devise.[8] Correspondingly, these complexities demand a coordinated effort on the part of all law enforcement agencies to cope with the dirty realities of criminal conduct. In New Jersey, the Attorney General, the primary prosecutorial officer, directs this massive effort.

In furtherance of this objective, the Division of Criminal Justice has been structured to both discourage violations of the law and to effectively prosecute wrongdoers. The Criminal Justice Act expressly empowers the Attorney General to conduct "such investigations, criminal actions or proceedings as shall be necessary for the protection of the rights and interests of the State".[9] This authority is supplemented by the provisions of the State Grand Jury Act which dispense with ordinary procedural rules relating to venue and permit the Attorney General to try cases in counties other than those in which the offense occurred.[10] In effectuating the statutory mandate, we have established within the Division of Criminal Justice a

4 *N.J.S.A.* 2A:158-4 and 158-5; *State v. Winnie*, 12 N.J. 152, 167 (1953).

5 *N.J.S.A.* 52:17B-97 *et seq.*

6 *N.J.S.A.* 52:17B-99.

7 *N.J.S.A.* 52:17B-98.

8 *Cf. State v. Romeo*, 43 N.J. 188, 207 (1964), *cert.* denied 379 U.S. 970 (1965).

9 *N.J.S.A.* 52:17B-106.

10 *N.J.S.A.* 2A:73A-2.

Corruption Control Unit and a Special Prosecutions Section.[11] The Corruption Unit is financed by a grant from L.E.A.A. It is comprised of six experienced attorneys, eight accountants and twelve specially trained State Police investigators. Fortunately, the Attorney General's Office in New Jersey also encompasses a State Police force of approximately 1,800 persons. The Corruption Unit is to act as a watchdog with respect to the expenditure of public monies. It is envisioned that the combined expertise of attorneys, accountants and police personnel will detect complex misappropriations of public funds. The Special Prosecutions Section focuses its attention primarily on investigating syndicated criminal activities and official corruption at all levels of government. Utilizing the State Grand Jury, this section is able to investigate complex criminal activities transcending county and municipal boundaries.

As I have noted previously, our role must go beyond the mere apprehension of corrupt public officials. Rather, our responsibility encompasses as well the deterrence of official wrongdoing. To the extent that political corruption is motivated by greed, the most effective means to prevent it is by removing its incentive. Towards this end, we have established in the Division of Criminal Justice a Civil Remedies Section and an Anti-Trust Section. The Anti-Trust Section was created by special legislation in 1970.[12] Pursuant to its statutory mandate, the Section has been extremely successful in investigating and prosecuting, both criminally and civilly, monopolistic business practices. Only recently have law enforcement personnel begun to realize the effectivenes of anti-trust legislation as a means to combat syndicated criminal activity. In public bid rigging cases, for example, conspirators can be prosecuted under the criminal provisions contained in the anti-trust statute and treble damages can be assessed as well. The anti-trust remedy may also be employed to combat other forms of public corruption. For example, we have recently instituted an anti-trust suit in which we have named 232 corporate and individual defendants. This action is grounded upon the theory that the defendants, public officials and private vendors and suppliers of goods, entered into a conspiracy, the result of which was to restrain free competition and inflate the costs of governmental services. Although this litigation is ongoing, it is envisioned that tens of millions of dollars may eventually be recovered. Although anti-trust litigation is generally protracted and complex and, thus, should not be considered a panacea, the remedy afforded provides a potent weapon in the Attorney General's arsenal. We in New Jersey intend to take full advantage of that effective remedy.

So too, we have employed other means to separate the offender from his ill-gotten gains. Simply stated, the shortcomings of some public officers may not make them accountable in the criminal courts, but their nefarious acts can successfully be attacked through the process of the civil law. It bears repeating that the citizen is not at the mercy of his servants holding positions of public trust, nor is he limited to securing relief from their machinations through the medium of the ballot, the pressure of public opinion or criminal prosecution. By statute and case law,[13] the Attorney General may sue public officials and deprive them of monies received by bribery or extortionate demands. Employing traditional theories for the recovery of civil damages, the public can recover from the culprit everything he gained from his

11 *N.J.S.A.* 52:17B-98.

12 *N.J.S.A.* 56:9-1 *et seq.*

13 *N.J.S.A.* 52:17A-4(g); *Driscoll v. Burlington-Bristol Bridge Co., supra* at 476; *Public Service Coordinated Transport v. State*, 5 N.J. 196, 207-209 (1950); see also *Jersey City v. Hague*, 18 N.J. 584 (1955).

misconduct. Suits seeking restitution, bills of accounting and contructive trusts are viable methods by which the public can be protected from the acts of its faithless servants. Finally, New Jersey's constitution and statutory law empower the Governor and the Attorney General to remove a dishonest public official from office.[14] A governmental employee so removed may thereafter be barred from holding public office.[15]

Civil remedies are also available against private individuals who solicit public corruption for personal gain.[16] We have already noted the applicability of anti-trust laws in bidrigging cases. Another remedy we have employed to discourage private citizens from participating in the corruption of public officials is the disqualification of such individuals from bidding on public contracts. Only recently, our Supreme Court sustained this practice and held that debarment may be ordered pending investigation when the public interest so requires.[17] Other civil remedies may also be employed. For example, we have instituted actions to revoke corporate charters and business licenses. So too, we have brought actions in equity to nullify transactions in which public officials have failed to exercise their discretion in good faith and free from corrupting influences. In sum, the imposition of financial sanctions divests offenders of their profits and discourages those similarly inclined from participating in corrupt practices.

I have emphasized the use of civil remedies to combat public corruption since they have been rarely employed in the past and are deserving of your consideration. I have also emphasized the role of Attorney General in preventing misconduct before it occurs. Before discussing the more traditional weapons against corruption, it would be well for me to briefly describe other preventive measures to discourage official misconduct. In 1973, our Legislature enacted the Campaign Contributions and Expenditures Reporting Act.[18] The Act prescribes stringent disclosure requirements and limits the amount which can be expended in aid of "any candidate for . . . public office".[19] Significantly, the statute established in my office an independent non-partisan agency to enforce the provisions of the election laws.[20] I allude to this statutory scheme at this point because, in my view, the disclosure requirement will discourage influence peddling and thus prevent political corruption.

Complementing the provisions of the election laws are other strict financial disclosure requirements which were promulgated by Governor Byrne in an Executive Order.[21] In brief, the Order requires higher level public officers in the executive branch to file a sworn statement with the Attorney General listing "financial assets and liabilities and business interests."[22] A copy of the statement is thereafter reviewed and is then filed in the Secretary of State's office "for public inspection".[23] Suffice it to say, disclosure of personal interest of officials will serve to restore faith and confidence in governmental representatives and will guard against conduct violative of the public trust.

14 *N.J. Const.*, Art. 5, §4. par. 5; *N.J.S.A.* 2A:135-9; *N.J.S.A.* 40:69A-166; *cf. N.J.S.A.* 2A:81-17.2a3.

15 See *N.J.S.A.* 2A:135-9 and *N.J.S.A.* 2A:93-5.

16 *E.g., Driscoll v. Burlington-Bristol Bridge Co., supra.*

17 *Trap Rock Industries, Inc. v. Kohl*, 59 N.J. 471 (1971), *cert.* denied 405 U.S. 1065 (1972). *Cf. N.J.S.A.* 27:7-35.1.

18 *N.J.S.A.* 19:44A-1 *et seq.*

19 *N.J.S.A.* 19:44A-7.

20 *N.J.S.A.* 19:44A-5.

21 Executive Order No. 15.

22 *Id.* at 2.

23 *Id.* at 5.

The Governor's order was designed to assist in the enforcement of New Jersey's comprehensive Conflicts of Interest Law.[24] That Act prohibits State Officers and employees from having any interest in or engaging in any activity that is in substantial conflict with the proper discharge of his public duties.[25] Additionally, the law requires all state agencies to promulgate codes of ethics which are binding upon their employees.[26] The Act established the Executive Commission on Ethical Standards which is charged with the responsibility of enforcing its provisions.[27] In this context, the Commission has broad investigative and quasi-judicial powers. Pursuant to the statute, the Attorney General acts as "legal advisor and counsel" to the Commission.[28] It is my duty, under the Act, to assist the Commission in the rendering of advisory opinions, and in the review and approval of codes of ethics adopted by State agencies. At present, the Commission's jurisdiction encompasses only State employees. Governor Byrne has recommended that the Legislature expand the jurisdiction of the Commission to include county and municipal employees. Quite obviously, New Jersey's Conflicts of Interest Law constitutes another effective means to insure both the fact and the appearance of integrity in government.

I now turn to devices employed in the prosecution of criminal cases against public officials. Our Legislature has enacted several statutes dealing with immunity. One statute specifically provides for "use plus fruits" immunity with respect to public officials who testify before investigative bodies regarding matters directly related to their offices. Under the Public Employee Act,[29] all governmental agents are obliged to testify regarding the performance of their public duties. Failure to adhere to this statutory mandate may result in removal from office. In return, the State cannot utilize their testimony or the fruits thereof against them in a criminal prosecution. A second immunity statute applies to all individuals, not merely public officials.[30] Under its provisions, the Attorny General and county prosecutors, with the Attorney General's approval, may grant use plus fruits immunity when reasonably necessary to insure effective prosecution. In my experience, New Jersey's immunity laws have greatly enhanced our fight against public corruption and have thus served the ends of justice. Nevertheless, indiscriminate grants of immunity must be avoided. The testimony of those seeking to curry favor with the State in order to avoid prosecution should be closely scrutinized.

One other tool to combat political corruption bears mention. Electronic surveillance has been the source of great concern and controversy.[31] The issue has engendered strong emotions on both sides. Nevertheless, closely circumscribed, court ordered wiretaps have yielded valuable incriminating evidence against members of organized crime and corrupt public officials.

In sum, public corruption tears at the very roots of our system of government. Those who are bound to make and enforce the law must comply with its prescriptions.

24 *N.J.S.A.* 52:13D-12 *et seq.*

25 *N.J.S.A.* 52:13D-12(a), (b) and (c).

26 *N.J.S.A.* 52:13D-23.

27 *N.J.S.A.* 52:13D-21.

28 *N.J.S.A.* 52:13D-21 (d).

29 *N.J.S.A.* 2A:81-17.2al *et seq.*

30 *N.J.S.A.* 2A:81-17.3.

31 *N.J.S.A.* 2A:156A-1 *et seq.*

Otherwise, citizens are deprived of their rightful expectations. As I have outlined, New Jersey has embarked upon a comprehensive program to discourage breaches of the public trust and to detect and prosecute criminal conduct. It would be premature at this time to report that our efforts have been successful, and it is painfully necessary to say that the fight against corruption, like the fight against disease, will never be put at rest. This fight must go on as we strive to restore public faith in government.

DEMISE OF THE EXCLUSIONARY RULE?
WOLFF v. RICE *

EDITOR's NOTE: The United States Supreme Court has agreed to review the parameters of the Fourth Amendment exclusionary rule, especially as it applies to the States. On June 30, 1975, the Court granted certiorari in *Wolff v. Rice, S.Ct.* 2677, Docket No. 74-1222. This case involves a search and seizure conducted in furtherance of a homicide investigation by the Omaha, Nebraska police. Convictions resulted from the eventual trial, and those verdicts were affirmed by the Nebraska courts. However, federal habeas corpus was granted and upheld by the Court of Appeals for the Eighth Circuit.

Consequently, Nebraska petitioned for certiorari. Among the issues in question are: 1) whether federal habeas corpus jurisdiction properly encompasses search and seizure issues; and 2) whether affidavits upon which search warrants are issued may be supplemented by oral testimony.

In view of the obvious magnitude of the issues presented by this case, the National Association of Attorneys General requested New Jersey to appear and file a brief *amicus curiae*. New Jersey is uniquely suited to participate in the resolution of these issues since our courts specifically declined to establish an exclusionary rule until *Mapp v. Ohio*, 367 U.S. 643 (1961) mandated its incorporation. See *Eleuteri v. Richman*, 26 *N.J.* 506 (1958). Moreover, since 1961 our Supreme Court has on various occasions questioned the efficacy and desirability of excluding evidence of guilt and thus allowing the guilty to go free. See *e.g. State v. Bisaccia*, 58 *N.J.* 586 (1971).

In view of the great significance of *Wolff v. Rice* it was determined that all those engaged in the administration of the criminal law should have the opportunity to review, and perhaps comment, on the state's brief as it was submitted to the Court.

LEGAL ARGUMENT

POINT I

The Fourth Amendment exclusionary rule should be modified or abrogated in favor of more efficacious remedies.

A. Introduction

The exclusionary rule exacts inestimable social cost. Successful motions to suppress eliminate reliable, competent, and relevant evidence. False verdicts result. Truth suffers as notions of "reasonableness" change. Since "truth and justice are

* The *Amicus Curiae* brief in *Wolff v. Rice* was prepared by Deputy Attorneys General David S. Baime, John DeCicco and Daniel Louis Grossman.

inseparable,"[1] justice diminishes when relevant evidence is suppressed. The validity of the adversarial system as a means to ascertain truth is demeaned. Loss of public confidence is inevitable. No legal principle which is not constitutionally compelled should reign when its consequences are so harsh. This Court has never held that the Fourth Amendment absolutely requires exclusion of evidence obtained through unreasonable searches and seizures. Clearly, therefore the exclusionary rule is not of constitutional dimension. Rather, this Court has justified application of the rule by relying on an assumption that it deters police misconduct,[2] although several decisions also express concern that judicial integrity might be sullied by the use of evidence obtained in violation of the Fourth Amendment.[3] Recent empirical studies indicate that the exclusionary rule does not serve to further either of these goals.[4] Consequently, the rule should be abrogated or modified in favor of a more effective remedy which balances the rights of individuals with those of the general citizenry.

B. The Fourth Amendment Exclusionary Rule is a Judge-Made Device Without Basis in Constitutional History And Without Precedential Logic or Rational Effect.

At common law, courts declined to examine the method by which evidence was obtained.[5] Evidence was judged for competence, materiality, and relevance, not for the manner in which it was obtained.[6] Moreover, the modern law of searches and seizures dates only to the Eighteenth Century. As this Court has noted,[7] John Wilkes' case and its contemporary companions mark the initial judicial recognition of a right to be free from unreasonable searches and seizures.[8]

Wilkes, of course, anonymously published the anti-Ministry *North Briton*. Lord Halifax, then Prime Minister, issued general warrants to four royal messengers to discover the identity of the publisher.[9] They eventually discovered Wilkes' role and ransacked his house, seizing various items. Wilkes was imprisioned in the Tower for

1 *State v. Bisaccia*, 58 N.J. 586, 598, 279 A. 2d 675, 676 (1971).

2 See, *e.g., United States v. Peltier*, ___ U.S. ___, 95 S. Ct. 2313, 2316 (1975); *United States v. Calandra*, 414 U.S. 338, 343 (1974); *Schneckloth v. Bustamonte*, 412 U.S. 218, 231-32 (1973); *Williams v. United States*, 401 U.S. 646, 654-55 (1971); *Davis v. Mississippi*, 394 U.S. 721, 723 (1969); *Desist v. United States*, 394 U.S. 244, 246 (1969); *Fuller v. Alaska* 393 U.S. 80, 81 (1969); *Lee v. Florida*, 392 U.S. 378, 381 (1968); *Linkletter v. Walker*, 381 U.S. 618, 635-37 (1965). See also *e.g.*, Gibbons, "Practical Prophlaxis and Appellate Methodology: the Exclusionary Rule as a Case Study in the Decisional Process," 3 *Seton Hall L. Rev.* 295, 298 (1972); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 *U. Chi. L. Rev.* 665, 668-72 (1970).

3 See, *e.g. United States v. Peltier, supra*, 95 S. Ct. 2317; *Linkletter v. Walker, supra*, 381 U.S. at 638; *Mapp v. Ohio*, 367 U.S. 643 U.S. 643, 659 (1961); *Elkins v. United States*, 364 U.S. 206, 223 (1960); *Olmstead v. United States*, 277 U.S. 438, 483-84 (1928), (Brandeis, J., dissenting). See also *e.g.*, Note, "The Fourth Amendment Exclusionary Rule: Past, Present, No Future," 12 *Am. Crim. L. Rev.* 507, 510-11 (1975).

4 Oaks, *supra*, 37 *U. Chi. L. Rev.* at 754-57; Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives," 2 *J. Legal Studies* 243, 275-78 (1973). See also, *e.g.*, LaFave, *Arrest: The Decision to Take the Suspect Into Custody*, (1972), at 222; Skolnick, *Justice Without Trial*, (1967) at pp. 215-28.

5 *E.g., Olmstead v. United States, supra, Weeks v. United States*, 233 U.S. 343 (1914); *Boyd v. United States*, 116 U.S. 616 (1886); See, *e.g., People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

6 *Id.*

7 *E.g, Boyd v. United States, supra.*

8 *Leach v. Three of the Kings Messengers*, 16 *How. St. Tr.* 1001 (1765); *Entick v. Carrington*, 19 *How. St. Tr.* 1029 (1765); *Huckle v. Money*, 95 *Eng. Rep.* 768 (1763); *Wilkes v. Wood*, 19 *How St. Tr.* 1153 (1763). See generally Lasson, *History and Development of the Fourth Amendment in the United States Constitution* (1937) pp. 35-45. See also Bailyn, *The Ideological Origins of the American Revolution* (paper ed. 1973) at 110-14.

9 Lasson, *supra*, at pp. 44-45.

seditious libel.[10] He, and others at his urging, sued the messengers in trespass and recovered.[11] On appeal, Lord Camden upheld the damage verdicts. These decisions, although critical of general warrants, intimate no right to exclusion of evidence. Wilkes himself was freed, not by asserting his rights in a criminal defense, but by claiming Parliamentary privilege in habeas corpus.[12] Nothing in this seminal period suggests that exclusion could substitute for trespass.

Much of the early American resentment against unreasonable searches and seizures emantes from royal officials' increasing reliance on general warrants and writs of assistance to enforce unpopular Parliamentary regulations of colonial trade.[13] It was against these executive warrants that James Otis so eloquently orated.[14] The opposition, though, focused on royal abuses and not on local law enforcement.

It is historically obvious that general warrants and writs of assistance were the continued focus of American restrictions on national government. Prohibitions against such devices were contained in the body of the Constitution, while the express freedom from unreasonable searches and seizures was appended thereafter.[15] Again, the concern was directed at national and not local government. For example, New Jersey's original 1776 Constitution contained no similar guarantee.[16] These matters, after Parliamentary repeal of the general warrant statutes,[17] were hardly of vital concern. Taxes and other significant oppressive measures, not searches, directly sparked the Revolution.[18] Moreover, notions of evidentiary exclusion are utterly absent from early constitutional history.

Indeed, almost a century passed from ratification of the Constitution until this Court decided that exclusion of evidence might be used as a remedy for governmental illegality. *Boyd v. United States*, 116 U.S. 616 (1886). Furthermore, *Boyd* created the remedy only by commingling the foundations of the Fourth with those of the Fifth Amendment. See 116 U.S. at 621, 630-33. In fact, the case involved neither a search nor a seizure. Rather, it concerned a customs statute which sanctioned non-production of documents by confession of the government's allegations. *Id.* at 620. Only Justice Miller, joined by Chief Justice Waite, protested Justice Bradley's imperfect analysis. *Id.* at 638-41. Subsequent historical scholarship has validated Justice Miller's concurring opinion, demonstrating that the Fourth and Fifth Amendments derive from separate and distinct sources and are directed at different official evils.[19] Nevertheless, this

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.* at 50-78. See also, *e.g.*, Aptheker, *The American Revolution* (1960) at Ch. 2; Bailyn, *supra*, at 118; 1 Boorstin, *The Americans: The Colonial Experience* (Prepared 1958) at 345-73; Few modern works though, catch the spirit of the times as well as John Dickinson's Letters from a Farmer in Pennsylvania.

14 2 Adams, *Works* 523-25; 10 *Id. passim*; Quincy, *Reports*, 395-540 (App. I) (1865).

15 *U.S. Const.* Amend IV. See Annals of Cong. 754 *et seq.* (June 8, 1789) (remarks of Reps. Gerry and Benson).

16 No such prohibition appeared until the 1844 New Jersey Constitution was promulgated.

17 13 and 14 *Car.* II, c. 11, §5 (1663); See 16 Hansard, Parliamentary Debates (1765). See generally Lasson, *supra* chs. 1, 2. But see Morris, ed., *The Era of the American Revolution* (1939) at 40-75 (Dickerson, "Writs of Assistance as a Cause of Revolution").

18 See sources cited note 13, *supra.*

19 See Lasson, *supra*, at 15 *et seq.*; Taylor, *Two Studies in Constitutional Interpretation* (1969); 3 Wigmore, *Evidence* (3d ed. 1940), §§817 to 820d at 291-308. See also Amsterdam, *General Perspectives on the Fourth Amendment*, 58 *Minn. L. Rev.* 349, 378, 456 at n. 269 (1974). *Contra*, Schrock and Welsh, "Up from Calandra," "The Exclusionary Rule as a Constitutional Requirement," 59 *Minn. L. Rev.* 251 (1974). See Levy, *Origins of the Fifth Amendment* (1968), 325-332. For older commentary, See Black, Constitutional Law 435-42 (1893); Cooley, Constitutional Limitation 299-308 (1868); Chancellor Kent however failed to mention any such freedoms. See Kent, 1 *Commentaries* 1-*37

Court has occasionally reverted to such dualistic analysis to apply the exclusionary rule. *E.g., Schmerber v. California*, 384 U.S. 757, 767 (1966); *Rochim v. California*, 342 U.S. 165 (1952). Yet, no decision holds that the Fourth Amendment *alone* requires exclusion of evidence. As previously noted, the exclusionary rule is entirely a judicially fashioned device not of constitutional stature. Only by compounding *Boyd's* fallacious conception of the relationship between the Fourth and Fifth Amendments can the exclusionary rule even be said to be constitutionally derived, though not required.

In fact, *Boyd's* faulty reasoning was the precise basis of the rule's eventual promulgation. *Weeks v. United States*, 232 U.S. 383 (1916). *Weeks* relied heavily on *Boyd* for its conclusion that an excision of evidence on Fourth Amendment grounds could ever be proper. 232 U.S. at 386-88. Moreover, much of the *Weeks* decision relates to conceptions of warrantless searches, seizures, and arrests which are now obsolete.[20] Additionally, the focus of the decision is delineated in terms of the evils of proprietary dispossession. See 232 U.S. at 393-98. These property concepts have been abandoned to a great extent. See *e.g., Katz v. United States*, 389 U.S. 347 (1967); *Jones v. United States*, 362 U.S. 257 (1960). Clearly, an analysis which contemplates total appropriation of property without due process is logically irrelevant to situations where property is taken solely for evidentiary purposes. This type of analysis further beclouded the exclusionary rule's foundation. So here, too, is another flaw in the rule's predicate. Its only precedential and historical bases are obviously undifferentiated mixtures of the law of other Amendments. The rule's only real justification, now discredited, was prophylaxis against police conduct.[21]

Subsequent to *Weeks*, the Court continued to allow evidence illegally seized by state officials to be used in federal courts,[22] and by federal officers in state courts.[23] A constitutional right to exclusion would have required exclusion under either circumstances. When the situations were finally "rectified", deterrence of official misconduct and systemic integrity once more were the rationales.[24]

Likewise, adherence to property concepts, not fully disavowed until *Katz, supra,*[25] created a maze of decisions concerning electronic surveillance.[26] That problem was not fully solved by court decisions, and a proliferation of state and federal statutes was necessary to bring order to the area.[27] The same proprietary

20 Compare 232 U.S. at 389 with *United States v. Wallace & Tiernan Co.*, 336 U.S. 796, 796-97 (1949).

21 See, *e.g., Elkins v. United States*, 364 U.S. 206, 208 (1960) (end of "silver platter" doctrine); *United States v. Lustig*, 338 U.S. 74, 79 (1949); *Feldman v. United States*, 322 U.S. 487, 492 (1944); *Gambino v. United States*, 275 U.S. 310 (1928); *Byars v. United States*, 273 U.S. 28 (1927). See generally, *e.g.*, Burrett, *"Personal Rights, Property Rights and the Fourth Amendment,"* 1960 *Sup. Ct. Rev.* 46, 55; Paulsen, *The Exclusionary Rule and Misconduct By the Police*, 52 *J. Crim. L., C., and P. S.* 255 (1961).

22 See *Elkins v. United States, supra.*

23 *Id.*

24 *Id.*

25 But see *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974); discussed in Note, *Air Pollution Variance Board v. Western Alfalfa*· Constitutional limits on Enforcement of Air Pollution Laws," 5 *Environmental L. Rev.* 142 (1974).

26 *E.g. Lee v. Florida*, 392 U.S. 378 (1968); *Berger v. New York*, 388 U.S. 41 (1967); *Lanza v. New York*, 370 U.S. 139 (1962); *Clinton v. Virginia*, 377 U.S. 158 (1964); *Silverman v. United States*, 365 U.S. 505 (1961); *On Lee v. United States*, 343 U.S. 747 (1955); *Goldman v. United States*, 316 U.S. 129 (1942); *Olmstead v. United States, supra.*

27 18 U.S.C. §§2510-20; *E.g., N.J. Stat. Ann.* Secs. 2A: 156A-1 to 26. See generally, *e.g.*, Note, *"New Jersey Electronic Surveillance Act"*, 26 *Rutgers L. Rev.* 617 (1973); Note, *"Wiretapping and Electronic Surveillance"* (Title III of the Crime Control Act of 1968), 23 *Rutgers L. Rev.* 319, 378-79 (1969). See also *United States v. United States District Court, E. D. Mich. S. D.*, 407 U.S. 297 (1972).

concepts have also produced an incredibly confused body of "standing" law, which remains unsettled.[28] Many of these decisions seem to be more result-oriented than a staunch commitment to the exclusionary rule otherwise might demand.[29] If evidence is obtained through official insolence, judicial integrity is stained whether the evidence is used against the conduct's victim or against another.[30] Moreover, illegally seized evidence may be used to impeach the credibility of a defendant.[31] Again, the integrity of the system theoretically suffers. The only principle that could justify this latter anomaly is that two wrongs do make a right. Consequently, diminution of the judicial integrity justification is evident from court decisions. There is no need for reference to empirical studies in this respect. Regardless, the lack of any cohesive approach to the rule is a clear expression of this Court's own doubts of exclusion as a viable remedy.

Furthermore, for almost fifty years this Court recognized that different problems confront state and federal law enforcement officials. The Court initially refused to force the states to apply the exclusionary rule even though it found the Fourth Amendment enforceable through the due process clause of the Fourteenth. *Wolf v. Colorado*, 338 U.S. 25 (1949). The Court also forbade federal courts to intervene in state proceedings to suppress evidence. *Stefanelli v. Minard*, 342 U.S. 117, 120 (1954). That prohibition still controls. *Cf., Kugler v. Helfant*, 421 U.S. 117 (1975).[32]

Each of these decisions emphasizes the non-Constitutional nature of the rule. Only when the Court foisted the rule upon the States did it deem the remedy a Constitutional requirement of any sort. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). Even so, the Court did not establish the rule as derived solely from the Fourth Amendment. Rather, the Court found it to derive from the due process clause of the Fourteenth Amendment. 367 U.S. at 656-57. Further, even in *Mapp* the Court seemed to recognize that exclusion was nothing more than a rule of evidence. 367 U.S. at 648-49. *Mapp* thus departed from long accepted notions of the rule's function and nature. Of course, for the Court to have found the rule binding on the States, it necessarily established a constitutional basis therefor.[33] The radical departure from earlier case law is easily explained by the result. The ends seem to have been perceived to have justified the means. Otherwise, *Mapp* is a logical travesty which ignores the fallacies of its predecessors and which uses earlier cases to reach a result which in no way follows from the precedents. See 367 U.S. 657 at n. 8. Regardless, the case did not actually

28 See, *e.g. Brown v. United States*, 411 U.S. 223 (1973); *Alderman v. United States*, 394 U.S. 165, (1969); *Simmons v. United States*, 390 U.S. 377 (1968); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Jones v. United States*, 362 U.S. 257 (1960); *United States v. Jeffers*, 342 U.S. 48 (1951); *Goldstein v. United States*, 316 U.S. 114 (1942); *New York ex rel. Hatch v. Reardon*, 204 U.S. 152 (1907). See generally, *e.g.*, Gutterman, "A Person Aggrieved-Standing to Suppress Illegally Seized Evidence in Transition," 23 *Emory L. Rev.* 111 (1974). See also Sedler, "Standing to Assert Constitutional Jus Tertii in the Supreme Court," 71 *Yale L.J.* 559 (1962); Note, "Standing to Assert Constitutional Jus Tertii," 88 *Harv. L. Rev.* 423 (1974).

29 *E.g.* Compare *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920) with cases cited Note 28 *supra*. It should be noted that Alderman, *supra*, involved a "national security" type fact pattern. *Cf. Abel v. United States*, 362 U.S. 217 (1959).

30 *Silverthorne Lumber Co. v. United States, supra*. See *Linkletter v. Walker, supra; Elkins v. United States, supra*. Of course the same might be true of other constitutional rights, but the concern here is only the Fourth Amendment.

31 *United States v. Calandra*, 414 U.S. 338 (1974); *Harris v. New York*, 400 U.S. 222 (1971); *Walder v. United States*, 353 U.S. 62 (1954).

32 If comity constraints are applicable in these types of cases, then surely they should support overruling at least of *Mapp v. Ohio, Cf., e.g., Steffel v. Thompson*, 415 U.S. 452 (1974). *Perez v. Ledesma*, 401 U.S. 82 (1971); *Samuels v. Mackel*, 401 U.S. 66 (1971); *Younger v. Harris*, 401 U.S. 37 (1971).

33 See, *e.g., Adamson v. California*, 332 U.S. 46 (1947); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Hurtado v. California*, 110 U.S. 516 (1884).

establish either a right to exclusion or elevate the exclusionary rule itself to constitutional stature. In fact, the constitutional basis of the rule is the right to be free from unreasonable searches and seizures, while the rule itself has been denominated as the "only effective way" to implement that right. 367 U.S. at 656 citing *Elkins v. United States*, 364 U.S. 206, 217 (1960). This assumption was unsupported then and is now discredited. The rule is neither effective nor does it implement the right. Moreover, this somewhat blithe assertion effected unnecessary disequilibrium in the relationship between the states and the federal government.[34]

However, the Court declined to apply the rule retroactively, *Linkletter v. Walker*, 381 U.S. 618 (1965). Consequently, its stature as a Constitutional remedy once more became questionable.[35] *Mapp*, then, is the only contemporary case which recognizes a constitutional basis for the exclusionary rule, stemming as much from the Fourteenth Amendment due process clause as from the Fourth Amendment.

C. The Exclusionary Rule Has Raised Insurmountable Obstacles To Good Faith Police Performance.

Concomitant with the forgoing procedural oddities attendant to the exclusionary rule is its substantive confusion. All warrantless searches are *per se* unreasonable except those within "well" delineated exceptions. Those exceptions, though, are fast devouring the rule. For example, searches incident to lawful arrests have always been legal but their scope has widened and narrowed so frequently and so drastically that no policeman could realistically either rely on or be deterred by judicial expositions.[36] Likewise, the law relevant to the permissible scope of automobile searches may possibly permit searches of vehicles if the officer could arrest the occupants for traffic violations, even if he does not arrest them, and even if he is unaware that he might.[37] Warrantless searches in "exigent circumstances" are also permitted, but appellate courts' changing notions of emergency cannot be said to comport with those of a working policeman in increasing fear for his safety.[38] The permissibility of warrantless administrative searches has also fluctuated.[39]

34 See note 32 *supra* and accompanying text.

35 Compare *e.g., Michigan v. Tucker*, 417 U.S. 433 (1974); *Frazier v. Cupp*, 394 U.S. 731 (1969); *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Tehan v. United States ex rel. Schott*, 382 U.S. 406 (1966).

36 *E.g. Vale v. Louisiana*, 399 U.S. 30 (1970); *Shipley v. California* 395 U.S. 818 (1969); *Chimmel v. California*, 395 U.S. 752 (1969); *McCray v. Illinois*, 386 U.S. 300 (1967); *Beck v. Ohio*, 379 U.S. 89 (1964); *Preston v. United States*, 376 U.S. 364 (1964); *Rios v. United States*, 364 U.S. 253 (1960); *United States v. Rabinowitz* 339 U.S. 56 (1950); *Brinegar v. United States*, 338 U.S. 150 (1948); *Trupiano v. United States*, 334 U.S. 699 (1947); *Harris v. United States*, 311 U.S. 145 (1947); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1935); *Marron v. United States*, 275 U.S. 192 (1927); *Carroll v. United States*, 267 U.S. 132 (1925).

37 *E.g., Cardwell v. Lewis*, 417 U.S. 583, (1974); *Gustafson v. Florida*, 414 U.S. 260 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Chambers v. Maroney*, 399 U.S. 51 (1970); *Cooper v. California*, 386 U.S. 58 (1967); *United States v. DiRe*, 332 U.S. 581 (1948); *Carroll v. United States*, 267 U.S. 132 (1925); See *Weeks, supra.*

38 *E.g. Warden v. Hayden*, 387 U.S. 294 (1967); *Chapman v. United States*, 365 U.S. 610 (1948). See also *Gilbert v. California*, 385 U.S. 263, 269 (1967) ("hot pursuit").

39 *E.g., United States v. Biswell*, 406 U.S. 311 (1972); *Colonade Catering Corp. v. United States*, 397 U.S. 72 (1970); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 523 (1967); See *United States v. Wallace & Tiernan Co.*, 336 U.S. 793 (1949); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); See also *Nathanson v. United States* 290 U.S. 41 (1933); *Silverthorne Lumber Co. v. United States, supra.*

Moreover, there is a whole range of police conduct which the Fourth Amendment, and thus the exclusionary rule, does not reach. This conduct is termed "investigative detention" which may be accompanied by a "non-search" pat-down.[40] Between this conduct and the arrest or exigent exceptions lies the *de facto* arrest, which may permit a warrantless search.[41] It is difficult for Constitutional scholars as well as policemen to definitively label any given law enforcement procedure within this range.[42] Surely a policeman would be hard pressed to explain the precise nature of his conduct in terms of the foregoing framework.

This Court has also attempted to delineate other forms of non-search conduct. Items in "plain view" are not the subject of searches.[43] Likewise, trespass *ab initio* in the "open fields" will not vitiate admission into evidence of objects seized as the result of observations made.[44] Nor are abandoned objects, *"bona vacantia,"* the subject of either search or seizure.[45] Consent searches have also undergone incredible permutations.[46]

Most importantly, and most frequently, underlying notions of probable cause have changed.[47] The Court often substitutes a syllogism for a policeman's initiative actions based on his expertise. Yet, the Court has never recognized that to some extent, an on-the-spot determination of probable cause is as much an expert opinion as testimony given concerning an autopsy. Once more, the concepts change so rapidly and so drastically that police reliance, by necessity, must be *de minimis*. Court decisions must be said to foster as much misconduct as they deter.[48] In any case, much of the "misconduct" is deemed so only *ex post facto* and as the result of doctrinal change.[49]

40 *E.g., Adams v. Williams*, 407 U.S. 143 (1972); *Recznick v. City of Lorain*, 393 U.S. 166 (1968); *Sibron v. New York*, 392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968). Likewise, a man's voice and his handwriting samples are not subjects of "seizures" when he is compelled to "present" either to a grand jury. *United States v. Nara*, 410 U.S. 19 (1973) (handwriting); *United States v. Dionisio*, 410 U.S. 1 (1973) (voice).

41 *E.g., Cupp v. Murphy*, 412 U.S. 291 (1974); *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959).

42 See generally, Amsterdam, *supra*, 58 *Minn. L. Rev.* at 386-92.

43 *E.g., Harris v. New York*, 390 U.S. 234, 236 (1967).

44 *E.g., Air Pollution Variance Board v. Western Alfalfa Corp., supra. Hester v. United States*, 265 U.S. 57 (1924). Yet some courts have found that there is a difference between "open fields" and "curtilage", creating even more confusion. See, *e.g., Patler v. Slayton*, 503 F. 2d 472 (4 Cir. 1974); *U.S. ex rel Saiken v. Bensinger*, 489 F. 2d 865 (7 Cir. 1973); *United States v. Broon*, 473 F. 2d 952 (5 Cir. 1973); *United States v. Haywood*, 464 F. 2d 756 (D.C. Cir. 1972); *United States v. Capps*, 435 F. 2d 136 (9 Cir. 1970); *Fulbright v. United States*, 392 F. 2d 432 (10 Cir. 1968); *McDowell v. United States*, 383 F. 2d 599 (8 Cir. 1967); *Roseneranz v. United States*, 356 F. 2d 310 (1 Cir. 1966); *United States v. Whitmore*, 345 F. 2d 28 (6 Cir. 1965); *United States v. Romano*, 330 F. 2d 566 (2 Cir. 1964).

45 *Abel v. United States, supra.*

46 *E.g, Schneckloth v. Bustamonte, supra; Lee v. Florida, supra; Osborn v. United States*, 385 U.S. 323 (1966); *Stoner v. California*, 376 U.S. 483 (1904); *Chapman v. United States*, 365 U.S. 610 (1961); *United States v. DiRe*, 332 U.S. 581 (1948); *Zap v. United States*, 328 U.S. 624 (1966); *Davis v. United States*, 328 U.S. 582 (1946).

47 See, *e.g., Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. Harris*, 403 U.S. 573 (1971); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Recznik v. City of Lorain, supra; Sibron v. New York, supra; Terry v. Ohio, supra; United States v. Ventresca*, 380 U.S. 102 (1965); *Rios v. United States, supra; Draper v. United States*, 358 U.S. 307 (1959); *Brinegar v. United States, supra.*

48 See, *e.g., Oaks, supra; Spiotto, supra.*

49 See, *e.g., United States v. Peltier, supra; Williams v. United States*, 401 U.S. 646 (1971); *Schmerber v. California*, 384 U.S. 757 (1966); *Linkletter v. Walker, supra; Elkins v. United States, supra; Irvine v. California*, 347 U.S. 128 (1954); *Wolf v. Colorado, supra.*

Although the requirements for obtaining warrants has remained relatively constant,[50] these criteria have changed with sufficient frequency to obscure requirements concerning informant reliability and factual basis.[51] Again, police confusion is the only discernible result. The proliferation of doctrines concerning the Fourth Amendment, which in no way can be said to realistically affect routine police performance also perverts judicial integrity.

D. Systemic Integrity is Destroyed by the Exclusionary Rule.

There is no right to break the law.[52] Nor is there a right to avoid detection.[53] The Fourth Amendment exclusionary rule contravenes both of these basic tenets. In effect, it tends at least to establish a right to avoid detection. This is an incentive to break the law. So, rather than being an extraordinary remedy of infrequent use, the exclusionary rule has fostered crime. Criminals, especially recidivists, appear to be well aware than any criminal activity, even when discovered, may well go unpunished.[54] This cannot be considered maintenance of "judicial integrity." "A deliberately false verdict debases the judicial process." *State v. Bisaccia*, 58 N.J. 586, 589, 279 A. 2d 675, 676 (1971).

Moreover, society's most basic assurance to its members, and its most cogent abstract existential justification is the protection of its members. "Primarily, governments exist for the maintenance of social order." *Chicago v. Sturges*, 222 U.S. 313, 322 (1911). Indeed, "[t]he first right of the individual is to be protected from criminal attack. The Bill of Rights was not intended to deny that primary mission." *State v. Bisaccia*, 58 N.J. at 540, 279 A. 2d *supra* at 677. Liberty, to some extent is surrendered by the very formation of society. Even so, democratic society protects freedom as well as assuring security. In return, it asks only for co-operation in the enforcement of its laws. If a policeman has broken the law, he should be punished. But society need not leave itself so unprotected as the exclusionary rule now requires.

Once, these arguments might have met with objection on the grounds that police conduct, at its most arrogant, was based upon a citizen's race, economic class, or political views.[55] Now, though, one need only look about. Attitudes toward people are changing, as is the composition of the police force. The exclusionary rule has outlived its usefulness, if it ever had any utility.

In view, of new realities, the judicial system protests its virtue too much. Indeed, if policemen injure themselves to uphold their conduct, the system's integrity has suffered whether or not the conduct is upheld. First, it fosters criminal activity. Second, the police response may be equally criminal. Third, it produces perjury. No system of justice can claim integrity when it creates such dysfunctional conflict. In addition,

> [We] must be mindful that the contest is not between the State and the individual. The contest is wholly between competing rights of the individual - -

50 See, *e.g., Coolidge v. New Hampshire, supra; Davis v. Mississippi, supra; Spinelli v. United States*, 393 U.S. 410 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Chapman v. United States, supra; Giordanello v. United States*, 357 U.S. 480 (1958); *Johnson v. United States*, 333 U.S. 10 (1948); *Nathanson v. United States*, 290 U.S. 41 (1933); *Agnello v. United States*, 269 U.S. 20 (1925).

51 See, *e.g., Spinelli v. United States, supra; United States v. Ventresca, supra; Aguilar v. Texas, supra; Nathanson v. United States, supra.*

52 See *e.g., Walker v. Birmingham*, 388 U.S. 307 (1967).

53 See, *e.g.*, 18 U.S.C. §§921, 922, 1071 to 1074 (flight statutes).

54 See *Spiotto, supra*, at 255-59

55 See Amsterdam, *supra* 58 *Minn. L. Rev.* at 394-95.

> the right to be protected from criminal attack and the several rights in the Amendments. When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, *Mapp* denies the innocent the protection due them.
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> * * *
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> But *Mapp* as applied calls for suppression whenever a search is found to violate the Amendment, even by a bare majority of a court, and notwithstanding that the policeman and the magistrate acted without a trace of insolence. *State v. Bisaccia, supra*, 58 N.J. at 590, 279 A. 2d at 677.

If insolence is to be deterred, other remedies can be effected.

Nonetheless, in some cases the egregiousness of the police conduct may still demand suppression of evidence. However, there is no reason that such conduct be defined as "unreasonable" on the basis of current standards. Other parameters exist, such as bad faith, or intrusion disproportionate to the protection needed, while basic notions of due process would continue to assure the integrity of the judicial systems in extreme cases of official misconduct.[56]

Of these possibilities, in addition to strong civil remedies, *amicus curiae* respectfully submits that the Fourth Amendment rights can be protected adequately by judging searches and seizures according to the good faith of the officers involved. Bad faith police conduct would still not preclude suppression of evidence. However, good faith police conduct need not be penalized. An operative definition of good faith should involve two components. First, whether the conduct under judicial scrutiny was obviously designd to effectuate legitimate police functions or was designed to harrass a "victim." Second, whether the officers themselves honestly believed that their search would disclose evidence of a crime. Honest belief and effectuation of legitimate police functions are more than sufficient to assure that the police will not sully the integrity of the judicial system by arrogant or insolent action. Likewise, such a standard would eliminate the somewhat anomalous *ex post facto* "probable cause" determination of a trial judge who cannot fathom those indescribable, unquanitfiable instincts which a working policeman must develop in order to survive "on the streets." Official insolence would be deterred and the integrity of the judicial system assured, but the guilty would have no escape either because of mere negligence or due to differing interpretations of "exigent circumstances" and "probable cause."

It may well be difficult to posit a policeman's good faith behavior as unreasonable under any circumstances. Yet, this is the end result of any successful invocation of the exclusionary rule. Any of the substitutions suggested immediately above would be

56 See, *e.g., Schmerber v. California, supra; Breithaupt v. Abram*, 352 U.S. 432 (1957); *Irvine v. California, supra; Rockin v. California, supra; Wolf v. Colorado, supra;* A.L.I. *Model Code of Pre-Arraignment Procedure*, Official Draft No. 1 §290.2 (2). See generally, Delinger, "Of Rights and Remedies; The Constitution As a Sword", 85 *Harv. L. Rev.* 532 (1972). Friendly, "The Bill Of Rights As a Code of Criminal Procedure"; 53 *Calif. L. Rev.* 929, 953 (1965). Levin, "An Alternative to The Exclusionary Rule For Fourth Amendment Violation." 55 *Judic.* 74, 75-76 (1974). Wright, "Must the Criminal Go Free If the Constable Banders?" 50 *Texas L. Rev.* 736, 741-45 (1972). See also Gray, "The Admissibility of Evidence Illegally Obtained In Scotland," 1966 *Judicial Rev.* 89; Hardin, "Other Answer: Search and Seizure, Coerced Confession and Criminal Trial in Scotland," 113 *U. Pa. L. Rev.* 165 (1964); Note, "The Exclusionary Rule," *supra*, 12 *Am. Crim. L. Rev.* at 524-36; Note, "Use of §1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards", 5 *Harv. Civ. Rts. L. Rev.* 64 (1970); Note, "The Federal Injunction As A Remedy For Unconstitutional Police Conduct," 75 *Yale L.J.* 143 (1968).

preferable. Perhaps if might be argued that these standards substitute subjective for objective analysis. But, in view of current judicial determination of probable cause *vel non*, subjectivity is already present in Fourth Amendment law. Actually, any parameters to some extent must be said to be subjective. It should be evident that "reasonableness" and "good faith" can be intimately related. This relationship could be more fully developed if Fourth Amendment determinations were made in a civil rather than a criminal context, and if "good faith" sufficed for the prosecution to withstand a motion to suppress.

E. Civil Remedies Are a Satisfactory Alternative To The Fourth Amendment Exclusionary Rule.

The exclusionary rule has failed to protect any legitimate rights. Law generally protects rights by assessing damages for invasions to those rights. The exclusionary rule simply does not do this. It protects only those who have transgressed criminal laws. It is a truism that the guilty go free and the innocent are generally left unprotected. This is an inversion of the goals which law is designed to achieve. Better the innocent should be protected. The establishment of strong civil remedial procedures will insure that the innocent will be protected, the guilty punished, and the Fourth Amendment more pervasively effectuated.

This Court has already held that Fourth Amendment rights may be the basis of recovery in tort suits against federal officers. *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).[57] Likewise, New Jersey has recently re-emphasized the efficacy of such remedies. *Cashen v. Spann*, 66 N.J. 541, 334 A. 2d 8 (1975). These remedies establish viable means for assertion of rights against truly unreasonable governmental intrusions. Theoretically, the guilty as well as the innocent may recover. But the guilty would also receive just deserts. Moreover, civil damage suits would not be the exclusive mode of redress. Police departments would of necessity become more responsive to citizen's complaints.[58] Disciplinary action could be taken, from mild reprimands to expulsion or imposition of criminal sanctions, depending on the character of the conduct.[59] Finally, an exclusionary rule would still exist, but its purview would extend only to cases of bad faith police conduct.

In any event, enforcement of the Fourth Amendment would reside more directly in the People. By placing the ultimate responsibility for enforcement at the local level, political pressure could more easily influence offensive police practices. From its adoption to 1961, the Fourth Amendment had been directed only against federal abuses. Return of the means of its vindication to the States, and ultimately to the People, would be consistent with its objectives. Local community democracy is at the very roots of the Republic.[60] Times have altered drastically since 1961. *Amicus curiae* respectfully submits that this Court should recognize those changes. At the very least, the choice of means by which the Fourth Amendment is enforced should be returned to the States.[61]

57 See 28 U.S.C. §1343 (3); 42 U.S.C. §1983; *Monroe v. Pape*, 365 U.S. 167 (1961). See also *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

58 See, *e.g., Burger*, "Who Will Watch the Watchmen?" 14 *Am. U. L. Rev.* 1 (1964).

59 See generally notes 55-58 *supra* and accompanying text.

60 See generally, *e.g.*, 2 Tocqueville, *Democracy in America* (Vintage Ed. 1945) at 99-130; Sydnor, *American Revolutionaries In the Making*, (Free Press Ed. 1967) at 107-18. Zuckerman, *Peaceable Kingdoms* (1970).

POINT II

If this Court declines to abrogate or modify the exclusionary rule, it should nevertheless hold that such issues are not cognizable as of course in federal habeas corpus proceedings.

Federal habeas corpus has been available to state prisoners on an expansive scale since *Fay v. Noia*, 572 U.S. 391 (1963). In *Fay v. Noia, supra*, however, this Court explicitly minimized the great effect its decision would have on the administration of justice throughout the state and federal systems. Rather, the Court opined that "[t]hose few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Id.* at 440-91. This prophecy has proven to be erroneous.

Historically, the Great Writ was available only to those who were incarcerated unjustly.[62] Recent scholarship has shown that, traditionally, the presence or absence of jurisdiction in the committing court determined "justice" or the lack thereof in any judgment of conviction.[63] Members of this Court have recently recognized the validity of that scholarship.[64] However, as they also recognize, it is not necessary to limit the writ's availability to jurisdictional cases.[65] As notions of justice have evolved, so too has the role of the writ changed. Nonetheless, the Great Writ's role as an extraordinary remedy, a "High Prerogative Writ",[66] must always be remembered if the modern writ is to have any real meaning.

However, various procedural and substantive requirements have been so relaxed that federal habeas has become but another phase in the general appellate process.[67] Few state criminal judgments are truly final. Relitigation may be endless. Comity has been discarded. Of course, in some situations, a federal collateral remedy is salutary. In search and seizure cases it is not a requisite to justice. Consequently, the Great Writ should not be available to state prisoners who seek release predicated on application of the exclusionary rule.

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61 *Amicus curiae* recognizes that there are some areas of Fourth Amendment law and application in which it has neither experience nor expertise, as in border searches. See, *e.g., Bower v. United States*, ___U.S. ___, 95 S. Ct. 2569 (1975); *United States v. Ortiz*, ___ U.S. ___, 95 S. Ct. 2585 (1975); *United States v. Brignonti-Ponce*, ___ U.S. ___, 95 S. Ct. 2574 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1975). Consequently, *amicus curiae* makes no representation concerning the efficacy of the exclusionary rule in the Federal courts. Thus, its representation and argument is focused on *Mapp v. Ohio*, and *amicus* asks only that case be overruled.

62 See, *e.g., Schneckloth v. Bustamonte, supra*, 412 U.S. at 256-58 (Powell, J., concurring); *Fay v. Noia, supra*, 372 U.S. at 401-02. Compare Pollak, "Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ," 66 *Yale L.J.* 50, 65 (1960) with Reitz, "Federal Habeas Corpus: Post Conviction Remedy for State Prisoners," 108 *U. Pa., L. Rev.* 461, 497 (1960).

63 Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harv. L. Rev.* 441, 466-75 (1963); Oaks, "Legal History in the High Court - Habeas Corpus," 64 *Mich. L. Rev.* 451, 452 (1966). See, *e.g., Schneckloth v. Bustamonte, supra*, 412 U.S. at 253-54 (Powell, J., concurring). Compare *Andrews v. Swartz*, 156 U.S. 272 (1895) with *In re Moran*, 203 U.S. 96 (1906) and *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830).

64 *Schneckloth v. Bustamonte, supra*, 372 U.S. at 250 (Powell, J., concurring, with Burger, C.J., and Rehnquist, J.). See *id* at 249 (Blackmun, J. concurring); *Kaufman v. United States* 394 U.S. 217, 231 (1969) (Black, J., dissenting); *id.* at 249 (Harla, J., with Stewart, J., dissenting).

65 *Id.*

66 3 *Blackstone, Commentaries* *331.

67 See, *e.g., State v. Funnicello*, N.J. 60, 69, 286 A. 2d 55, 59 (1972). (Weintraub, C. J., concurring) (concerning death penalty, but remarks relvant to *habeas corpus* applicable here).

Admittedly, an extraordinary deprivation of liberty demands an extraordinary remedy. Federal habeas corpus attempts to provide this remedy by issuing where basic federal constituional rights are involved.[68] Further, denial of certain federal rights may well produce incarceration of the innocent.[69] Hence, habeas is quite proper where such rights have been denied, for in such cases justice has been denied. However, the federal habeas petitioner who alleges only that he was incarcerated as a result of an "unreasonable" search or seizure has been deprived neither of justice nor of right.

"Justice" cannot hinge upon the reasonableness of a search or seizure. First, the prisoner is guilty, so his incarceration is just.[70] Second, since the whole concept of "reasonableness" is so ephemeral, no state court's characterization of a search as reasonable could be "unjust". See Point I, *supra*. Of course, it is presumed that motions to suppress are available in state courts and that these motions are decided in good faith. The failure of a state system to provide such a remedy would be a denial of procedural due process. Moreover, the good faith of courts is an inherent assumption in our system of justice. Consequently, a single federal district court's substitution of its judgment for a state determination insults both comity and the integrity of American justice. Only when this Court speaks may the needs of justice fairly be said to have been clarified. Of course, in Fourth Amendment law, justice may be obtained more easily than clarity. Again, in a pragmatic sense, the state prisoner who claims deprivation of Fourth Amendment rights is guilty. His incarceration is pragmatically just. Therefore, he should not be permitted to raise collaterally that which may well have been determined, or could have been determined, directly. Only if the deprivation becomes one of due process should he be heard. *Cf. Rochin v. California, supra.*

Moreover, one who has been incarcerated as the result of an unreasonable search or seizure really has been denied no constitutional right. There is no Fourth Amendment right to exclusion of evidence. See Point I, *supra*. Again, exclusionary rule issues have no place in federal habeas proceedings. The relationship of the rule to the right is too tenuous to be cognizable under 28 U.S.C. §2254 (a).

Neither right nor justice inhere in habeas cases hinging on the exclusionary rule. The innocence of such petitioners is never in issue. The Great Writ has been perverted. Its function is irrelevant to its nature in such cases. At the very least, habeas petitioners who would challenge their incarceration on search or seizure grounds should be compelled to demonstrate the justice of their claims. They should be required to make a colorable showing of innocence. This, at least, would restore the Great Writ to its role as an instrument of justice. In sum, *amicus curiae* respectfully submits that relief under 28 U.S.C. §2254 (a) should not be granted for unreasonable searches or seizures.

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68 See, *e.g., Fay v. Noia, supra; Townsend v. Sain*, 372 U.S. 293 (1963).

69 *E.g.*, denial of the right to counsel; denial of the right to trial by a jury of defendant's peers free from prejudice; denial of the right to be tried in the district where the offense was committed; denial of right to trial in atmosphere free of adverse pre-trial publicity; denial of right to speedy trial; denial of right to cross-examination; denial of right to be free from coercion in exercise of privilege against self-incrimination. The foregoing list is, of course, by no means exhaustive.

70 See, *e.g.*, Amsterdam, "Search and Seizure and Section 2255," 112 *U. Pa. L. Rev.* 378 (1964) (Federal prisoners, but analysis also applicable here). Friendly, "Is Innocence Irrelevant? Collateral Attack On Criminal Judgments" 38 *U. Chi. L. Rev.* 162 (1970).

POINT III

Rehabilitation of search warrants issued on less than probable cause is a realistic and balanced approach to cases where the exclusionary rule's purposes have been served by the fact that the officers involved have obtained a warrant prior to the search.

Police officers who, in good faith, have obtained a search warrant have demonstrated that they have been deterred from engaging in arrogant or insolent official conduct. Likewise, the pre-search determination of probable cause by a neutral magistrate clearly meets those criteria required by any concern for judicial integrity which in part produced the exclusionary rule. Consequently, the procedures attendant to obtaining a search warrant have theoretically satisfied the threshold requirements of the exclusionary rule's foundation. Any errors of judgment by the issuing magistrate reflect neither police misconduct nor judicial hypocrisy.

It would therefore seem illogical to contend that considerations derived from the exclusionary rule, or even the rule itself, prohibit rehabilitation of the warrant with additional oral testimony at the motion to suppress. Had the police known that more information was needed to establish probable cause, they undoubtedly would have endeavored to provide the issuing magistrate with that information. Policemen are not lawyers, and they cannot be held to know the legal intricacies of the criteria which define probable cause. See, *e.g., United States v. Ventresca, supra.* See also Point I, *supra*. Thus, this Court has held that affidavits in support of a warrant can be further bolstered by oral testimony at the initial issuance hearing. See *Whitely v. Warden*, 401 U.S. 560, n. 8 at 565 (1971).[71] If the magistrate errs by failing to elicit that additional data sufficient to demonstrate the existence of probable cause, and then if the magistrate compounds the error by issuing the warrant, the trial judge should have the discretion to rectify the error. However, the correctional process need not be limited to suppression of the evidence. If the officers did in fact have sufficient facts to establish probable cause, but the magistrate did not consider those facts necessary to issue the warrant, then the exclusionary rule's bases would not be offended by oral testimony at the motion to suppress to rehabilitate the warrant.

Consequently, it would follow that the prosecuting authority should be permitted to introduce whatever additional information it had at the time the warrant was issued.[72] If probable cause is then established, there would seem to be no reason proscribing the admission of the evidence. Such an approach would balance the interest of society in convicting the guilty with its current interest in requiring that searches be made only on probable cause.

In effect, this approach would simply deem the issuing magistrate's error to be harmless under the circumstances. *Cf. Chapman v. California*, 386 U.S. 18 (1967). *Amicus curiae* respectfully submits that nothing in the procedural or substantive law of the Fourth Amendment demands more. If any jurisdiction wishes to adopt an

71 See, *e.g., Aquilar v. Texas, supra*, 378 U.S. 109, n. 1; *Campbell v. Minnesota*, 487 F. 2d 1 (8 Cir. 1973); *United States ex rel. Gaugler v. Brierley*, 477 F. 2d 516 (3 Cir. 1973); *Boyer v. Arizona*, 455 F. 2d 804 (9 Cir. 1972); *United States ex rel. Pugach v. Mancusi*, 411 F. 2d 177 (2 Cir.) *cert. den.* 396 U.S. 889 (1969); *Naples v. Maxwell*, 393 F. 2d 615 (6 Cir. 1965).

72 Indeed, where defendant asserts perjury or misrepresentation, such examination is necessary. *United States v. Marihart*, 492 F. 2d 897 (8 Cir. 1974); *United States v. Carmichael*, 489 F. 2d 983 (7 Cir. 1973) (*en banc*); *United States v. Danning*, 425 F. 2d 836 (2 Cir. 1969).

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alternative approach, for whatever reasons, and to prohibit such rehabilitation, it undoubtledly may *Cf. e.g., Oregon v. Hass*, ____ U.S. ____. 95 S. Ct. 1215 (1975).[73] Nonetheless, the requirements of the Fourth Amendment exclusionary rule demand no such result. The matter is simply one of procedure and not of constitutional dimension.[74]

73 In New Jersey, the State Appellate Division has recently held that oral testimony may supplement affidavits at the initial hearing. *State v. Fariello*, 133 N.J. Super. 114, ___A. 2d ___ (App. Div.) *cert. gr.* ___ N.J. ___, ___ A.2d ___ (1975). See also, *e.g., Commonwealth v. Milliken*, 450 Pa. 310, 300 A. 2d 78 (1973); *State v. Beal*, 40 Wisc. 2d 607, 162 N. W. 2d 64 (1968); *State v. Misch*, 23 Ohio Misc. 47, 260 N. E. 2d 841 (C. Pl. 1970).

74 *Cf. Fed. R. Crim. P.* 41 (c); *Gillespie v. United States*, 368 F. 2d 1, 4 (8 Cir. 1966). But see also *United States v. Whitlong*, 339 F. 2d 975, 979 (7 Cir. 1964).

THE GROWTH OF APPEALS BY THE STATE IN CRIMINAL ACTIONS

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I. INTRODUCTION

Since the earliest pronouncement of the right of the State to seek appellate review in criminal cases, this authority has been limited by two types of considerations. The prohibition against double jeopardy has always formed the ultimate barrier to criminal appeals by the State. Also, within this framework, various non-constitutional policy considerations have further curtailed such review. The thesis of this article is as follows: The procedural safeguards afforded criminal defendants in our modern system of criminal justice have undercut the policy considerations traditionally espoused to limit appeals by the State; the only valid limit on the State's right to seek judicial review today is the double jeopardy doctrine; and the double jeopardy doctrine is only applicable to prevent governmental harassment and oppression in the form of multiple prosecution or multiple punishment for the same wrongful conduct.

II. DOUBLE JEOPARDY LIMITATIONS

The outer limits of what rights of review may be granted to the State in criminal cases are bounded by the constitutional prohibitions against double jeopardy.[1] However, because of the elusiveness of the concepts of "jeopardy" and "same offense," this constitutional barrier has not remained fixed. Rather, the doctrine of

* Note: the research of John Redden, Law Clerk with the Essex County Prosecutor's Office, was of great assistance in the preparation of this article.

1 The Fifth Amendment to the United States Constitution provides that:
"... Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."
New Jersey's Constitution provides that:
"No person, shall after acquittal, be tried for the same offense."
See, *e.g.*, 81 U. Pa. L. Rev. 340 (1933); *State v. B'Gos*, 165 S.E. 566 (S.Ct.Ga. 1932).

double jeopardy itself has evolved, and the courts have employed several different "tests" over the years.[2] In order to discern more clearly the parameters within which legislatures and courts may open avenues of criminal appellate review to the State, this evolution will now be traced.

While the ancient origins[3] of the prohibition against double jeopardy are somewhat shrouded in mystery,[4] the principle that no man shall be twice tried for the same offense is firmly embedded in our jurisprudence. In its traditional form this principle balances society's need for the truth against the individual's right to be free from governmental oppression manifested by successive retrials or multiple punishment for but a single offense.[5] Where there is no such governmental oppression, as in the case of a retrial after a successful appeal by a defendant, or after a mistrial granted for defendant's benefit or because of manifest necessity, the double jeopardy principle is not offended, albeit that jeopardy continues.

The guarantee against double jeopardy has been said to have been transported to this country through the medium of Blackstone.[6] In his commentaries, Blackstone states:[7]

> First, the pleas of *autrefois acquit*, or a former acquittal, is grounded on the universal maxim of the common law of England, that no man is to be brought into jeopardy more than once for the same offense. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime.
> Secondly, the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime.

2 See *Note, Double Jeopardy and Collateral Estoppel in New Jersey*, 3 Crim. Just. Q. 98, 100-113 (Spring 1975). Both the United States Supreme Court and the New Jersey Supreme Court have held that each case must turn on its own facts in deciding whether the double jeopardy bar is to be applied. *Gori v. United States*, 367 U.S. 364 (1961); *Downum v. United States*, 372 U.S. 734, 737 (1963); *State v. Farmer*, 48 N.J. 145, 183 (1966), *cert.* den 386 U.S. 991.

3 See *Bartkus v. Illinois*, 359 U.S. 121, 151-152 (Black, J. dissenting):

> "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times."

See also *United States v. Jenkins*, 490 F.2d 868, 870 (2 Cir. 1973), aff'd 420 U.S. 358 (1975), where Judge Friendly traces the origins of the double jeopardy concept back to the ancient Greeks.

4 See *Note, Double Jeopardy and Collateral Estoppel in New Jersey, supra*, 3 Crim. Just. Q. at 99.

5 *Id.* See *Smith and Bennett v. State*, 41 N.J.L. 598, 599-600 (E. & A. 1879), where the Court stated:

> "... [I]t should be noted that the proposition that a person cannot be twice tried under the same criminal accusation would take neither form nor place in any abstract system of morals. There is nothing inconsistent with the precepts of natural justice in the retrial of a person charged with crime, provided there is reasonable ground to believe that, on the first essay, a just result has not been reached. In such a position of affairs it would be manifestly just that the matter should be re-investigated as well on the application of society as on that of the party criminated. Where from a prosecution, either an acquittal or conviction has resulted, and from further examination it is made to appear that such conclusion does not express the truth of the case, the legitimate course would be to correct the error, and to substitute for it such truth. *And it seems to me, that in every well-constituted government this is really attempted to be done unless in those exceptional instances in which the right of retrial would put the defendant too much at the mercy of the government or would otherwise be oppressive.*" (Emphasis added).

6 *Benton v. Maryland*, 395 U.S. 784, 795 (1969); *United States v. Wilson*, 420 U.S. 332, 340-342 (1975); *United States v. Jenkins, supra*, 490 F.2d at p. 873.

7 4 *W. Blackstone, Commentaries* *335-*336.

In *Green v. United States,*[8] Justice Black delineated the underlying policy of the double jeopardy principle stating:

> The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
>
> * * *
>
> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by a judgment', is a bar to a subsequent offense. *U.S. v. Ball*, 163 U.S. 662, 671, 16 S.Ct. 1192, 1195, 41 *L.Ed.* 300. Thus *it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.* (Emphasis added).

The Supreme Court has also noted that the purpose of the Double Jeopardy Clause is to prohibit "merely punishing twice, or attempting a second time to punish criminally for the same offense." *Helvering v. Mitchell.*[9]

In *United States v. Ball,*[10] the Supreme Court ruled that an acquittal barred further proceedings against the defendant. That case did not actually deal with an appeal by the government, but dealt with an attempted reprosecution of a defendant after he had been acquitted. The defendant, Millard Fillmore Ball, and two others were indicted for committing murder in Indian Territory. The defendant was acquitted by a jury, but his two co-defendants were found guilty. The co-defendants won a reversal of their conviction on the ground that the indictment was defective. A new indictment was filed against all three defendants, and Ball filed a plea of former jeopardy and acquittal which was denied. At trial, Ball was convicted and he appealed. In reversing his conviction, the Supreme Court held that the verdict of acquittal was final and barred further review, for to allow same would place the defendant twice in jeopardy.[11] In so holding, the Court rejected the English doctrine that an acquittal upon a defective indictment would not support a plea of former acquittal.[12] The Court went on to state:

> The verdict of acquittal was final, and could not be reviewed, for error or otherwise without putting [the defendant] twice in jeopardy, and thereby

8 355 U.S. 184, 187-88 (1957).

9 303 U.S. 91, 99 (1938).

10 163 U.S. 662 (1896).

11 *Id.* at 671.

12 *Id.* at 666. See 4 *W. Blackstone, Commentaries*, 336:

> It is to be observed, that, 'if by reason of some defect in the record, either in the indictment, the place of trial, the process, or the like, the defendant was not lawfully liable to suffer judgment upon the offenses charged against him, he has not been *in jeopardy*, in the sense which entitles him to plead the former acquittal or conviction in bar of a subsequent indictment.

violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.[13]

Ball was followed nine years later by *Kepner v. United States.*[14] In that case, the defendant, a practicing lawyer in the Philippines, was tried for embezzlement. He was acquitted by a court sitting without a jury. The Supreme Court of the Philippines reversed the acquittal, and according to local law entered a finding of guilty. The defendant appealed to the United States Supreme Court claiming that the actions of the Supreme Court of the Philippines had violated his protection against double jeopardy which was extended to the Philippines by virture of a statutory provision. The United States Supreme Court agreed with the defendant, and, relying on *United States v. Ball, supra*, stated:

> It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. *The protection is not, as the court below held, against the peril of second punishment, but against being tried for the same offense.*
>
> * * *
>
> *The Ball case, 163 U.S., supra, establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment.*[15]

In his now famous dissent, Justice Holmes argued that the defendant had not been subjected to double jeopardy because the trial and the appeal constituted one continuing proceeding in which there was only one jeopardy. He stated:[16]

> . . . it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same case, however often he be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the case. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case.
>
> * * *
>
> If a statute should give the right to take exceptions to the Government, I believe it would be impossible to maintain that the prisoner be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm.

13 *United States v. Ball, supra*, 163 U.S. at 671.

14 195 U.S. 100 (1904).

15 *Kepner v. United States, supra*, 195 U.S. at 130, 133 (Emphasis added).

16 *Id.*, at 134, 135.

This position has been endorsed by a number of commentators.[17] However, the United States Supreme Court in a trilogy of cases has recently reaffirmed the view of the majority in *Kepner* and has expressly disapproved Holmes' "continuing jeopardy" theory.[18]

In *United States v. Jenkins*, 420 U.S. 358 (1973), Justice Rehnquist stated that the position taken by Holmes in *Kepner* "has never been adopted by a majority of this Court."[19] Addressing the same issue Justice Marshall writing for the Court in *United States v. Wilson*, 420 U.S. 332 (1975), commented:[20]

> A system permitting review of all claimed legal errors would have symmetry to recommend it and would avoid the release of some defendants who have benefited from instructions or evidentiary rulings that are unduly favorable to them. But we have rejected this position in the past, and we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal.

Fifty-eight years after *Kepner*, the Supreme Court decided *Fong Foo v. United States.*[21] There, the trial court directed the jury to return verdicts of acquittal for all the defendants after the government had presented its first three witnesses and was in the middle of eliciting testimony from a fourth witness. The Court of Appeals set aside the judgment of acquittal and directed that the defendants be tried again. The Supreme Court, in a *per curiam* decision reversed, holding that the Double Jeopardy Clause was violated "when the Court of Appeals set aside the judgment of acquittal and directed the petitioners to be tried again for the same offense."[22]

A case which has caused much confusion is *United States v. Sisson.*[23] There, the defendant was indicted for refusing induction into the armed forces. The jury returned a verdict of guilty. The district court then granted what it termed a motion in arrest of judgment. The Government sought to appeal the district court's ruling pursuant to the old Criminal Appeals Act, 18 *U.S.C.A.* §3731 (1964 ed. Supp. IV). Much of Justice Harlan's opinion for the Court in *Sisson* was devoted to demonstrating that under the terms of that statute the government was barred from bringing an appeal. However, Justice Harlan did not stop there. He went on, "[f]or the purposes of analysis", to pose a hypothetical situation in which the jury was instructed by the court that if they found the defendant "was as genuinely and profoundly governed by conscience as a martyr obedient to an orthodox religion, [they] must acquit him."[24] Justice Harlan concluded that if a jury had been so instructed and had acquitted a defendant there would be no doubt that the verdict could not be appealed under the old Federal Criminal Appeals Act, and further, apart from the statute, a verdict of acquittal is a bar

17 See *e.g., Miller, Appeals by the State in Criminal Cases*, 36 Yale L.J. 486 (1927); *Mayers and Yarbrough, Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L.Rev. 1, 8-15 (1960); *Comment, State Appeals in Criminal Cases*, 32 Tenn. L.Rev. 449 (1965); *Note, Criminal Procedure, Right of State to Appeal*, 57 Ky. L.J. 628 (1957); *Note, Right of a State to Appeal in Criminal Cases*, 49 J.Crim.L. & P.S. 473 (1959). See also *State v. Witte*, 243 Wis. 423, 10 N.W. 2d 117 (1943); *State v. Lee*, 65 Conn. 265, 30 A.1110 (1894).

18 See *U.S. v. Jenkins, supra; United States v. Wilson, supra; Serfass v. United States*, 420 U.S. 377 (1975).

19 420 U.S. at 369.

20 420 U.S. at 352.

21 369 U.S. 141 (1962).

22 *Id.* at 143.

23 399 U.S. 267 (1970).

24 *Id.* at 289.

to any further prosecution for the same offense.[25] In a footnote, Justice Harlan added that the principle that a verdict of acquittal bars a subsequent prosecution "would dictate that after this jurisdictional dismissal, Sisson may not be retried."[26]

Justice Harlan distinguished the case then at bar from the hypothetical case he had suggested. First, in the actual case, it was a judge, not the jury, who made the factual determinations. However, this difference in itself was of no legal consequence, since judges, like juries, can acquit defendants. Second, the acquittal in the actual case was rendered after the jury had returned a verdict of guilty. Third, the district court labeled the post-verdict decision an arrest of judgment rather than an acquittal. But Justice Harlan found that there was "no distinction between what the court below did, and a post-verdict directed acquittal."[27]

Subsequently, Justice Marshall writing for the Supreme Court in *United States v. Wilson*,[28] concluded that Justice Harlan's "reference to the Double Jeopardy Clause was meant to apply to the hypothetical jury verdict, not to the order entered by the trial court in *Sisson* itself." Justice Marshall expounded that:[29]

> Appeal from the hypothetical jury verdict would have been precluded by the statute and by the Constitution; appeal from the District Court's actual ruling in the case, however, was barred solely by the statute. The only direct effect of the Constitution was, as the Court pointed out in a footnote . . , that after this Court's jurisdictional dismissal, Sisson could not be retried.

In the recent trilogy of which *Wilson* was a part, the United States Supreme Court has had occasion to review the constitutional limits imposed on the government's right to appeal by the Double Jeopardy Clause. In *United States v. Wilson, supra*, the defendant was indicted for the conversion of union funds. The jury returned a verdict of guilty, but the district court dismissed the indictment on the grounds that the delay in bringing the indictment had resulted in prejudice to the defendant. The Third Circuit Court of Appeals dismissed the Government's appeal, holding that the Double Jeopardy Clause barred review of the district court's ruling. The Supreme Court reversed. The Court traced the history of the Double Jeopardy concept noting that "[i]n the course of debates over the Bill of Rights, there was no suggestion that the Double Jeopardy Clause imposed any general ban on appeals by the prosecution."[30] The Court further noted that the common law pleas of *autrefois acquit* and *autrefois convict* did not impose a bar against appeal by the King, but rather were directed at preventing a defendant from being indicted a second time after a conviction or acquittal.[31] Therefore, the Court concluded that: *"[t]he development of the Double Jeopardy Clause from its common law origins suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial."*[32] Reviewing the construction of the Double Jeopardy

25 *Id.* at 289-290.
26 *Id.* at 290, n.18.
27 *Id.* at p. 290.
28 420 U.S. 332 (1975).
29 *Id.* at pp. 350-351.
30 *Id.* at 342.
31 *Id.*
32 *Id.* (Emphasis added).

Clause in prior case law,[33] the Court noted that the Clause was designed to protect against successive prosecutions and multiple punishments. Thus, where a reversal on appeal by the Government would merely result in reinstatement of a jury's verdict, the Double Jeopardy Clause would not be violated since there was no possibility of either a multiple punishment or a second prosecution.[34] In conclusion, the Court stated: "When a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause."[35]

On the same day that *Wilson* was decided, the Supreme Court also decided *United States v. Jenkins, supra.*[36] In that case, the defendant was indicted for refusing induction into the armed forces. The defendant waived a jury trial and the case was tried to the court. After filing written findings of fact and conclusions of law, the district court ordered dismissal of the indictment. The Court of Appeals dismissed the government's appeal on the grounds that the district court's action amounted to an acquittal, and an appeal by the Government was precluded by the Double Jeopardy Clause. The Supreme Court affirmed. Citing *United States v. Wilson*, Justice Rehnquist stated:[37]

> When a case has been tried to a jury, the Double Jeopardy Clause does not prohibit an appeal by the Government providing that a retrial would not be required in the event the Government is successful in its appeal . . . When this principle is applied to the situation where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted.

The Court, in considering the application of the Double Jeopardy Clause to bench trials, noted that the Clause does not distinguish between a trial before a judge and a trial before a jury. The principles underlying the Clause, therefore, apply generally to a trial before a judge as well as to a trial before a jury.[38]

In the *Jenkins* case, the Supreme Court affirmed the dismissal of the government's appeal because the Court was unable to determine from the record whether the district court's dismissal of the indictment was made on the basis of factual findings or as a matter of law. Thus, the Court was unable to determine whether further proceedings of some sort devoted to the resolution of factual issues going to the elements of the offense charged would have been required upon reversal and remand. Since it would violate the Double Jeopardy Clause to subject defendant to further proceedings of this sort, the dismissal was affirmed.

Shortly after it rendered decisions in *Wilson* and *Jenkins*, the Supreme Court decided *Serfass v. United States.*[39] The defendant there refused induction into the

33 Justice Marshall distinguished the line of cases including *United States v. Ball, supra; Kepner v. United States, supra; Fong Foo v. United States, supra;* and *United States v. Sisson, supra. Ball, Kepner*, and *Fong Foo* all involved situations where, had the government been allowed to appeal, the defendant might have been subjected to a second trial. *Sisson*, actually held only that the government's right to appeal was barred by the former Criminal Appeals Act and not by the Double Jeopardy Clause.
34 *United States v. Wilson, supra*, 420 U.S. at 344-5.
35 *Id.* at 352-3.
36 420 U.S. 358 (1975).
37 *United States v. Jenkins, supra*, 420 U.S. at 365.
38 *Id.*
39 420 U.S. 377 (1975).

armed forces and was subsequently indicted. Prior to trial defendant moved to dismiss the indictment on the ground that the local draft board had failed to state adequate reasons for its refusal to reopen his file. The district court granted defendant's motion to dismiss the indictment. The Government appealed to the Third Circuit Court of Appeals. The Court of Appeals held that since the defendant had not waived his right to a jury trial and since no jury had been impaneled at the time of the motion to dismiss the indictment, jeopardy had not attached, and, therefore, the dismissal could be appealed without violating the Double Jeopardy Clause.

The Supreme Court affirmed, holding that jeopardy does not attach "until a defendant is put to trial before the trier of facts whether the trier be a judge or jury."[40] In a jury trial, jeopardy attaches once the jury is impaneled and sworn; where the judge is sitting as trier of facts, jeopardy attaches when the judge begins to hear evidence. Applying these principles to the case before it, the Supreme Court concluded that jeopardy had not attached when the district court granted the defendant's motion to dismiss.

In light of *Wilson*, *Jenkins* and *Serfass*, it is clear that the Double Jeopardy Clause of the Fifth Amendment does not preclude appeals by the State in two categories of cases. First, it does not offend the Clause for the State to bring an appeal before the defendant has been placed in jeopardy, *i.e.*, prior to commencement of the trial. Second, the State may appeal any post-verdict ruling where there is no possibility that an appellate decision would require further proceedings devoted to the resolution of factual issues involving the elements of the offense charged.

III. THE HISTORY OF THE STATE'S RIGHT TO APPEAL

The existence of the government's right to appeal at common law is the subject of some confusion. It appears that at early common law neither the crown nor the defendant had a right to appeal.[41] A convicted defendant's sole recourse was the King's power to pardon.[42] In its original form the power was exercised only for the benefit of the King's favorites,[43] however, the pardon eventually evolved into the writ of error which was issued at the discretion of the Attorney General. The issuance of a writ of error was tantamount to an acquittal because once the Attorney General certified that there was error "he could not argue against his own certificate, or if the writ was issued out of the King's favor, the Attorney General was ordered not to oppose it."[44] By 1700, English law permitted a defendant who was convicted of a misdemeanor to bring a writ of error.[45] There is also authority to the effect that the defendant could sue out a writ of error as of right where there was probable cause to believe error had been committed.[46]

40 *Id.* at 388.

41 *Orfield Appeal By the State in Criminal Cases*, 15 Ore. L.Rev. 306, 307 (1936).

42 *Comment, State Appeals in Criminal Cases*, 32 Tenn. L.Rev. 449 (1965). See *State v. Sims*, 65 N.J. 359, 369 (1974); *ABA Project on Standards for Criminal Justice Relating to Criminal Appeals*, 35-58 (Approved Draft, 1970).

43 *Id.*; 47 Yale L.J. 489, 490 (1937).

44 *R. v. Wilkes*, 98 Eng. Rep. 327, 340 (K.B. 1770).

45 *Id.*

46 *Stephen, History of the Criminal Law of England*, 308 (1883).

By Blackstone's time, while the crown "was theoretically permitted to bring a writ of error when error appeared on the record", a new trial could not be granted unless the defendant's acquittal was the result of fraud or trickery.[47]

In 1907, the defendant was given the right to appeal from a conviction and sentence by the English Criminal Appeals Act of 1907.[48]

A minority of courts and commentators have contended that there did exist a common law right of appeal by the State.[49] But the great majority of American authority holds to the contrary.[50] In the absence of a statute or court rule authorizing an appeal, the State traditionally has been unable to obtain appellate review.[51] The United States Supreme Court considered this matter in *United States v. Sanges*,[52] stating:

> The law of England on this matter is not wholly free from doubt . .
>
> * * *
>
> But whatever may have been, or may be, the law of England upon the question it is settled by the overwhelming weight of American authority that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether the judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law.

After discussing a number of American decisions, the Court concluded:

> . . . 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 the 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 to be again vexed, unless the legislature acting within its authority, has made express provisions for a review of the judgment at the instance of the government.[53]

An early New Jersey case, *State v. Meyer*,[54] appears to have adopted the minority view. In that case, the defendant was convicted at Quarter Sessions and the Supreme Court reversed the conviction. The State sued out a writ of error to the Court of Errors and Appeals and the defendant moved to dismiss the appeal on the ground that the State was not entitled to a writ of error in a criminal case. Justice Dixon discussed the early English authorities and concluded:

> In view of these matters, it seems almost incredible that by the English common law the crown was not entitled to a writ of error in criminal cases.[55]

47 Judge Friendly writing for the court in *United States v. Jenkins*, *supra*, 490 F.2d at 872.

48 *Comment*, 32 Tenn. L.Rev. *supra*, at pp. 449-450 see also *Miller, Appeals by the State in Criminal Cases*, 36 Yale L.J. 486 (1926).

49 See *Johnson, The Right of the State to Sue Out a Writ of Error in Criminal Cases*, 11 Chi.-Kent L.Rev. 85 (1933); *Note, Right of a State to Appeal in Criminal Cases*, 49 J.Crim.L. & P.S. 473 (1959).

50 *Clark, Criminal Procedure*, 393 (1895), 20 Harv. L.Rev. 219 (1906).

51 *4 AM.Jur. 2d Appeal and Error*, §268, p. 762 (1962). See, *e.g.*, *Paul v. Stamm*, 106 Minn. 81 118 N.W. 154, 155 (1908); *State v. Peck*, 83 Mont. 327, 271 P.707, 708 (1928).

52 144 U.S. 310, 312 (1892).

53 *Id.* at 318.

54 65 N.J.L. 233 (E. & A. 1900).

55 65 N.J.L. at 235.

But fifteen years later in *State v. Hart,*[56] the former Supreme Court rejected Justice Dixon's statement in *Meyer* that the State had a common law right to appeal. Justice Swayze, citing *United States v. Sanges*, indicated that no such right existed.[57]

Justice Swayze distinguished *State v. Meyer, supra*, on the grounds that when *Meyer* was decided a state statute permitted the state to take an appeal from the Supreme Court to the Court of Errors and Appeals (as was done in *Meyer*), but no statute existed permitting the State to appeal from the trial court to an appellate court.[58] The Court of Errors and Appeals affirmed the Supreme Court's decision in *State v. Hart,*[59] but based its holding on broader grounds than the lack of a State's right to appeal at common law. Justice Kalisch held that the State was barred from appealing because of the constitutional provision against double jeopardy.

More recently, the Supreme Court in *State v. Sims,*[60] has opined that there was no right of appeal by the State at common law.[61] While many of the traditional objections to broadening the scope of criminal appellate review by the State may have had validity two hundred years ago and even up until fairly recent times, under our present system of criminal justice this is no longer the case. In light of the many procedural safeguards now afforded criminal defendants, the reasons for these traditional objections are largely undercut. In times when a defendant was not entitled to representation by counsel, could not call witnesses in his favor, could not testify in his own behalf, and in some cases had no right even to be present at his own trial,[62] it was indeed unfair to allow the sovereign to appeal from an adverse ruling.

As court decisions have protected the rights of criminal defendants, so too has the case law contributed to the growth of the State's right to appeal in criminal matters. In *State v. Sims,*[63] the State appealed[64] from an order granting defendant's motion for a new trial following a jury verdict of guilt. The basis of the appeal was that the trial court had applied the wrong legal standard in granting the new trial motion. The Supreme Court upheld the State's right to seek leave to appeal from an order granting defendant a new trial. The Court gave several reasons for its decision. First, it rejected the double jeopardy prohibition as a bar to the State's appeal, citing the "modern view, on which most commentators appear to agree, . . . that double jeopardy bars only a completely new prosecution after a final judgment has been rendered. The jeopardy begins when the jury is sworn and does not end until all the facts and law are decided, however many appeals and new trials it takes. [citations omitted]."[65]

56 85 N.J.L. 48 (Sup.Ct.1915) aff'd 90 N.J.L. 261 (E. & A. 1917).

57 *Id.* at 50.

58 *Id.* at 49.

59 90 N.J.L. at 269.

60 65 N.J. 359 (1974).

61 *Id.* at 369.

62 See 1 *Stephen, History of the Criminal Law in England*, 221-223 (1883); 2 *Wigmore, Evidence* 684 (3rd ed. 1940); *Note, Appeals by the Prosecution and Protection of the Accused in State Criminal Proceedings*, 35 U.Cinn.L.Rev. 501, 506 (1966).

63 *Supra.*

64 The Appellate Division granted the State's motion for leave to appeal, and the Supreme Court granted the State's motion for certification while the matter was pending unheard in the Appellate Division.

65 *Id.* at 370. The Court also indicated that when a defendant moves for a new trial he waives his right not to be placed twice in jeopardy. At least in this context the New Jersey Supreme Court appears to have adopted the "continuing jeopardy" theory espoused by Justice Holmes in his dissent in *Kepner*. Subsequent decisions of the United States Supreme Court in *Wilson, Jenkins* and *Serfass* rejected the "continuing jeopardy" theory and have cast some doubt on the present validity of this language in the *Sims* opinion.

The *Sims* Court went on to discuss other reasons why in a modern system of criminal justice the State should be allowed broad appellate review. The objection that criminal appeals by the State "permit the marshalling of the vast resources of the State against an individual defendant such that he will be unable to meet the renewed legal argument for lack of funds," has "less weight [today] than in the past. Indigents have, for example, the right to counsel on first appeal as of right." [citations omitted]. Also, the problem becomes negligible where State appeals are not as of right but are discretionary with the appellate court.[66]

Vesting the appellate court with the discretion to hear appeals by the State in large classes of cases undercuts the fear that the "right" of the State to appeal can become a tool of oppression in the hands of an unscrupulous prosecutor. Requiring the State first to seek leave to appeal provides an appropriate and adequate safeguard against such a danger. Furthermore, the mere possibility of such harassment certainly cannot justify a denial of any right to appeal on the part of the State.[67]

Some commentators[68] have contended that allowing the State to appeal from adverse pre-trial decisions in criminal matters might infringe on defendants' right to a speedy trial. This has not proven to be the case, however. Our Court Rules provide that, in scheduling of appeals for hearing or argument, appeals on leave granted shall be expedited insofar as possible and given preference on the calendar.[69] In addition, to further expedite final dispostition of the proceedings below and shorten any trial court hiatus created by an interlocutory appeal, the appellate court may elect to consider the merits of the appeal and decide it simultaneously with the motion for leave to appeal. Or the appellate court may grant leave to appeal and thereafter determine the appeal on the motion papers plus any additional papers the court may require, provided that the parties are advised of the court's intention and given a fair opportunity to be heard on the merits.[70]

The *Sims* Court also observed that there were "additional positive reasons"[71] for allowing the State the full right to seek leave to appeal in criminal cases.

> First, society is likely to be benefited by the development of the criminal law in a fairer way, since errors favoring a criminal defendant will be less likely to be perpetuated. See *State v. Browder*, [486 P.2d 925 (Alas.Sup.Ct. 1971)]. Under such a system, too, trial courts are more likely to be more circumspect in their rulings since they can be reversed by appeals brought by either side. Under the present system of limited state criminal appeals there is sometimes an inclination on the part of trial courts to lean toward the defense in making rulings. Furthermore, under a more comprehensive system of state appeals, criminals justly convicted at a first trial will be less likely to avoid conviction finally due to errors prejudicial to the prosecution. Lastly,

66 *State v. Sims, supra*, 65 N.J. at 371. See also, *R.* 2:9-4 concerning a defendant's right to bail pending appeal.

67 See *Comment*, 32 Tenn.L.Rev. 449, 465 (1965):
> "It is doubted whether the entire appellate system should be distorted because there remains the possibility that one or two defendant's cases might be appealed because they are unpopular . . ."

68 See *Oxfield, supra*, 15 Ore.L.Rev. 306; Note, 12 Am. Crim.L.Rev. 539, 566 (1975).

69 *R.*1:2-5(3); *R.*2:11-2; *R.*2:11-1.

70 *R.*2:11-2.

71 Justice Pashman, concurred in the result but dissented from this portion of the Court's opinion.

it should be pointed out that the trial court will probably have granted the new trial on a claim of error in the proceedings which the defense would have raised on appeal had the new trial been denied. On appeal, the prosecution would have had its claims reviewed by the appellate court. Thus, under the system of limited State appeals as set out by *LaFera*, the prosecution in many cases loses the chance to seek a ruling from a higher tribunal which it would have had under slightly different circumstances. See *ABA Project on Standards for Criminal Justice Relating to Criminal Appeals*, 39 (Approved Draft 1970).[72]

Presently, in this State the prosecution's criminal appellate rights are catalogued in *R.*2:3-1[73] as follows:

> "In any criminal action the State may appeal or, where appropriate, seek leave to appeal pursuant to *R.*2:5-6(a):
>
> a. to the Supreme Court from a final judgment or from an order of the Appellate Division, pursuant to *R.*2:2-2(b) or 2:2-3;
>
> b. to the appropriate appellate court from: (1) a judgment of the trial court entered before or after trial dismissing an indictment, accusation or complaint; (2) an order of the trial court entered before trial in accordance with *R.*3:5 (search warrants); (3) a judgment of acquittal entered in accordance with *R.*3:18-2 (judgment n.o.v.); (4) a judgment in a post-conviction proceeding collaterally attacking a conviction or sentence; (5) an interlocutory order entered before or after trial."

The intent of this rule was to specify expressly and exclusively those judgments and orders appealable by the State in criminal actions.[74] As the Appellate Division stated in *State v. Sheppard,*[75] "indeed, the practice rule [*R.*2:3-1] appears intended to afford the State broadly comprehensive review except for adjudications of acquittal and interlocutory orders during trial."[76]

In 1969, the New Jersey Court Rules were comprehensively revised. The 1969 revision of the Court rules broadened the State's right to appeal in several areas.

The purpose of the "before or after" proviso of paragraph (b)(1) of the rule (added during the 1969 revision) is to avoid any possible practical or constitutional problems resulting from a State's appeal from a trial court's dismissal of an indictment, accusation, or complaint entered during trial.[77] To avoid these problems and to

72 *State v. Sims, supra*, 65 N.J. at 372-373.

73 While there is no statute specifically on this point in New Jersey it is not the Legislature but the Supreme Court which promulgates the rules of practice and procedure. *New Jersey Constitution*, Art. VI, Sec. II, para.3; *Wineberry v. Salisbury*. 5 N.J. 240 (1950). Therefore, the Supreme Court by virtue of its rule making power may authorize the avenues of criminal appellate review open to the State. This it has done in *R.*2:3-1.

74 But see *State v. Sheppard*, 125 N.J.Super. 332, 336-339 (App.Div. 1973), wherein Judge Conford notes that *R.*2:3-1 does not catalogue all the classes of review by the State in criminal cases. There, Judge Conford indicated that the State had the right to invoke the substance of the *certiorari* jurisdiction of the Superior Court, inherited under the Constitution of 1947 from the former Supreme Court, to superintend and correct the act of an "inferior" court beyond its jurisdiction.

75 125 N.J.Super 332, 338 (App.Div.1973).

76 Appeal by the State from the impostion of an illegal sentence on conviction, prejudicial to the State, or from any other form of usurpation of jurisdiction in a final criminal judgment was found by the Court in *Sheppard* to be an unintended *casus omissus* in *R.*2:3-1. For that reason the court would not imply from the promulgation of that rule an intent by the Supreme Court to deny the State review in such a case. *Id.*

77 *R.*2:3-1(b)(1), Tentative Draft, Comment 2.

preserve the State's right to appeal, *R.*3:10-1, 2, 3, 4, provide for the making of certain defense motions only before or after trial.

Paragraph (b)(2) lists appeals from motions for return of property and motions to suppress evidence separately from interlocutory orders [paragraph (b)(5)] since, "such an order may constitute a final judgment if the motion seeking the return of property is made and granted before any criminal charge is actually made."[78]

Paragraph (b)(3)[79] was added during the 1969 revision to permit the State to appeal from a judgment of acquittal *n.o.v.* entered pursuant to *R.*3:18-2, a new rule added during the 1969 revision.

Paragraph (b)(4) was added in 1969 to clarify the State's right to appeal from a trial court judgment in a post-conviction proceeding.[80]

Paragraph (b)(5) enlarged the class of interlocutory orders appealable by the State to include those entered after trial.[81] *State v. Sims,*[82] laid to rest the problems raised by *State v. LaFere,*[83] and held that the State may seek leave to appeal from an order granting a new trial in a criminal case.

The 1969 revision also included new provisions permitting the State to seek leave to appeal from interlocutory orders entered before trial in courts of limited criminal jurisdiction. *R.*3:24 provides in pertinent part:

> Either the prosecuting attorney or the defendant may seek leave to appeal to the county court from an interlocutory order entered before trial by a court of limited criminal jurisdiction. . . The court may grant or deny leave to appeal on terms and may elect simultaneouly to grant the motion and decide the appeal on the merits on the papers before it, or it may direct the filing of additional briefs or make such other order as it deems appropriate for the expeditious disposition of the matter. . . ."

The final sentence of *R.*7:4-2(e) provides:

> Appeals from interlocutory orders dismissing or refusing to dismiss a complaint may be taken to the county court pursuant to *R.*3:24.

While *R.*7:4-2(e) seems to indicate that pre-trial dismissals are to be deemed interlocutory, there is case law to the contrary.[84] An appeal by the State from a pretrial disposition favorable to the defendant does not pose double jeopardy problems.[85] While the State may appeal pretrial dismissals in the municipal courts, it is not crystal clear whether this appeal is as of right or by leave of the county court.[86]

78 *R.*2:3-1(b)(2), Tentative Draft, Comment 3.

79 The constitutionality of *R.*2:3-1(b)(3) was recently upheld on double jeopardy grounds in *State v. Kleinwaks*, ___N.J. ___(1975).

80 See *State v. LaFera*, 42 N.J. 97 (1964).

81 *R.*2:3-1(b)(5), Tentative Draft, Comment 6.

82 *Supra*. See also *State v. Piscopo*, 131 N.J.Super. 257 (App.Div.1974).

83 *Supra.*

84 See *e.g., State v. Mullen*, 67 N.J. 134, 137 (1975).

85 *Serfass v. United States, supra*, See *State v. Holland*, 132 N.J.Super. 17 (App.Div.1975); *State v. Schwarcz*, 123 N.J.Super 482 (Cty.Ct. 1973); *State v. Cannarozzi*, 77 N.J.Super 236 (App.Div.1962). See also *State v. Sagarese*, 34 N.J.Super. 126 (App. Div.1955).

86 This matter is presently being considered by the Supreme Court Committee on Criminal Practice.

Subsequent to the *Sims* case, the Appellate Division decided *State v. Kluber.*[87] In *Kluber*, the defendant was indicted and tried for breaking and entering with intent to steal and larceny. At the conclusion of the trial the jury was unable to agree upon a verdict and was discharged. Eight days thereafter defendant moved pursuant to *R.*3:18-2 for a judgment of acquittal, which was granted by the trial court. The State appealed, and the Appellate Division reversed, holding that the trial court had not applied the proper standard in determining the motion for judgment of acquittal. The Appellate Division also held that allowing the State to appeal from a judgment of acquittal granted pursuant to *R.*3:18-2 did not violate the prohibition against double jeopardy. The *Kluber* panel found the Court's "continuing jeopardy" language in *State v. Sims* applicable to the double jeopardy question before it.[88] However, the later decisions in *Wilson, Jenkins*, and *Serfass* cast serious doubt on the present validity of this language and hence on the *Kluber* opinion. However, the later decisions in *Wilson, Jenkins* and *Serfass* cast serious doubt on the present validity of this language and hence on the *Kluber* opinion. Where, as in *Kluber*, a judgment of acquittal is granted after the jury fails to agree upon a verdict, a successful appeal by the State would necessitate a retrial. This could constitute a second jeopardy under the reasoning of the Supreme Court trilogy, and so the State might be barred from appealing such a judgment by the Double Jeopardy Clause of the Fifth Amendment.

The New Jersey Supreme Court recently failed to avail itself of an opportunity to consider the effect of *Wilson, Jenkins* and *Serfass* on both the "continuing jeopardy" language of *Sims* and on the *Kluber* problem. The case before it was *State v. Kleinwaks*, which presented the question of whether a criminal defendant is subjected to double jeopardy when the State appeals from a judgment of acquittal *n.o.v.* rendered after a jury verdict of guilt. The Court held that such an appeal by the State does not subject a defendant to double jeopardy under either the Federal or State Constitution, because it entails no possibility of a retrial of the defendant.[89] If the trial court's judgment of acquittal is affirmed on appeal, the defendant stands acquitted; if the judgment is reversed, the original jury verdict of guilty is reinstated.

87 130 N.J.Super. 236 (App.Div.1974).

88 *R.*3:18-2 also permits a defendant to move for judgment of acquittal after a jury has been discharged without having reached a verdict. This was the situation in *State v. Kluber, supra*. There the Appellate Division ruled that double jeopardy did not bar the State from appealing pursuant to *R.*2:3-1(b)(3), despite the fact that the State's successful appeal in that case meant that the defendant would be subjected to a new trial. Opining that "jeopardy does not end with the trial court's ruling under *R.*3-18-2," and relying on *State v. Sims, supra*, for the proposition that "the issue of defendant's guilt is still unresolved 'until all the facts and law are decided, however many appeals *and new trials* it takes,' " (Emphasis added), the *Kluber* panel reversed the trial court's judgment of acquittal and remanded the case for a new trial. The panel also noted that is was not "fundamentally unfair" to grant the State the right to appeal in the circumstances of that case for the following reason:

> "Ordinarily [had the defendant not moved for a judgment of acquittal after the jury failed to agree on a verdict], it would be anticipated that the prosecutor would move the indictment for retrial, and defendant's reasonable expectations are not to the contrary. The result of permitting appellate review of such a judgment of acquittal under the circumstances present here is to either affirm the action of the trial judge, in which case the defendant would not be subject to retrial, or to reverse the judgment. In the latter instance, defendant will not be placed in jeopardy a second time by a reversal of the trial court's ruling -- he is in the same position he was when the jury disagreed upon its verdict and was discharged."

130 N.J.Super. at 345. See *United States v. Perez* 22 U.S. (9 *Wheat.*) 579, 580 (1924).

89 While the Court noted the *Kluber* opinion and its reliance upon the language in *Sims*, it glossed over the distinction between the *Kluber* situation and the case before it. In fn. 5 of the majority opinion, the Court stated, "In the case of the reversal of an acquittal entered *during trial, it would require the defendant to stand trial again -- a clear case of double jeopardy*." *State v. Kleinwaks, supra*, ___ N.J. ___ at slip opinion p.10. (Emphasis added). The dissent *in Kleinwaks* observed: "It is noteworthy that in holding [in *Kluber*] would offend the rationale of *Wilson-Jenkins-Serfass* in that a reversal on appeal would subject the defendant to a retrial."

trial court's judgment of acquittal is affirmed on appeal, the defendant stands acquitted; if the judgment is reversed, the original jury verdict of guilty is reinstated.

Judge Conford, joined by Justice Pashman, dissented. Disagreeing with the rationale of *Wilson, Jenkins* and *Serfass*, they would construe the double jeopardy provision of our State Constitution so as to bar appeals by the State from judgments of acquittal entered after a jury verdict of guilty pursuant to *R.*2:3-1(b)(3). The contention of the dissent is that the first jeopardy terminates with the entry of the judgment of acquittal and a second jeopardy begins with the State's appeal therefrom.

The weakness in the reasoning of the dissenters becomes apparent when it is observed that the only "risk" involved in this second jeopardy is the risk of having the *original jury verdict of guilt reinstated* in the event that the trial court erred in granting the judgment of acquittal *n.o.v.* The State's appeal in such cases is no more a "second jeopardy" than is the State's further appeal from an adverse appellate decision in a criminal case. It cannot seriously be maintained that when a convicted defendant successfully appeals his conviction, the Double Jeopardy Clause bars the State from seeking further appellate review. The dissent's distinction between trial level decisions and appellate decisions is a spurious one for two reasons. A defendant is no more placed in a "second jeopardy" by a State's appeal from a trial level decision of acquittal *n.o.v.* than he is by a State's appeal from an appellate level decision of acquittal. Furthermore, if defendant is the one who initiates the appeal in the latter instance, defendant is the one who makes the motion in the former instance. In both situations a defendant who stands convicted by a jury asks a court to review the legal sufficiency of the evidence presented against him.

The dissent asks rhetorically "how and in what way the character of the action of the judge in granting an acquittal after the interposition of a jury verdict of guilt, rather than before, changes the constitutional justice universally conceded in the latter situation of perpetual absolution of the defendant thereafter of criminal liability for the identical offense or being placed in jeopardy thereof." The answer is that double jeopardy was never meant to bar the judicial search for truth and justice except where the government sought to oppress and harass a defendant with multiple prosecutions or multiple punishments for but a single criminal event.

In its mechanistic view of the principle, the dissent has lost sight of the fact that, except in situations where a retrial would put the defendant at the mercy of the state or would otherwise be oppressive, the double jeopardy principle must yield to society's right to have its judicial tribunals achieve a just and true result.

The viability of even our most fundamental juris-prudential principles becomes suspect when these principles are removed from the constellation of values and doctrines within which these principles evolved and were meant to serve. Any attempt to transplant such principles into contexts for which they were never designed runs the risk of so distorting them as to render them invalid. And this risk is greatest when a fundamental principle is sought to be applied in a situation where the very reasons for the existence of the principle are inapplicable.

The primary reasons for the deeply rooted constitutional prohibition against double jeopardy have always been to protect the individual from being subjected to the harassment[90] of *multiple* prosecutions by the state and from suffering *multiple*

90 See *e.g. State v. Farmer*, 48 N.J. 145, 171 (1966), *cert.* den. 386 U.S. 991; *State v. Gregory*, 66 N.J. 510, 513 (1975).

punishments at the hands of the state, where these prosecutions or punishments stem from but a single criminal incident. The very concept of *double* jeopardy implies a duplicity of charges or of penalties. The double jeopardy principle should not be removed from its proper context and applied to a situation where there is but a single prosecution resulting in a single sentence. Such a notion, the United States Supreme Court said in *Wade v. Hunter*, "would create an insuperable obstacle to the administration of justice in many cases where there is no semblance of the oppressive practices at which the double jeopardy provision is aimed."[91] It defies logic to say that a defendant is *twice* put in jeopardy where the State has instituted only one prosecution and imposed only one sentence.

CONCLUSION

The history of the State's right to appeal in criminal actions is the history of the growth of that right. As criminal defendants have been accorded greater procedural safeguards, the policy reasons for limiting the State's avenues of seeking appellate review have withered away. Today, the only remaining considerations which should validly limit the State's right to seek appellate review are those embodied in the constitutional prohibition against double jeopardy. The courts must take care not to lapse into a rigid, mechanistic application of the double jeopardy principle, "cherished by all free men,"[92] which loses sight of the very reason for the rule: the prevention of governmental harassment and oppression by multiple prosecution or punishment for the same wrongful conduct. Where there is no such oppression the search for the truth must remain unfettered.

91 336 U.S. 684 (1949); see *State v. Farmer, supra*, 48 N.J. at 169.

92 *State v. Gregory, supra*, 66 N.J. at 513.

COMMITMENT OF THE CRIMINALLY INSANE: FROM *MAIK* TO *KROL*

While insanity as a legal defense to a criminal prosecution is not a recent development, English law concerning the standard for acquittal due to insanity remained uncertain for centuries. It was not until 1843 that the now famous *M'Naughten* rule emerged:

> "[T]o establish a defense on the ground of insanity, it must clearly be proved that, at the time of the committing of the act, the party accused was laboring under a defect of reason, from disease of the mind, as to not know the nature and quality of the act he was doing; or if he did not know it, that he did not know what he was doing was wrong." M'Naughten's Case, 8 *Eng. Rep.* 718, 722 (H.L. 1843).

New Jersey's version of this rule is virtually identical with *M'Naughten*: while doing the act, the accused must have suffered from such a defect of reason that he either did not understand the nature and quality of his act or did not know that it was wrong. *State v. Maik*, 60 N.J. 203, 213 (1972); *Spencer v. State*, 21 N.J.L. 196, 201 (O. & T. 1846). Note, *Release From Confinement of Persons Acquitted by Reason of Insanity in New Jersey*, 27 Rutgers L.Rev. 160, 161-63 (1973).

However, once an individual has been found not guilty of a crime by reason of insanity, the problem remains as to the disposition of that individual. Such a conclusion depends essentially upon a reconciliation of competing social values, specifically the right of society at large to be protected from its potentially dangerous elements balanced against the right of the individual to his liberty. In New Jersey, the standard for the commitment or release of such individuals is statutorily based under *N.J.S.A.* 2A:163-2 and *N.J.S.A.* 2A:163-3.[1] In essence, the only difference between the two statutes is that *N.J.S.A.* 2A:163-2 sets forth a procedure for establishing lack of guilt by reason of insanity where the individual is found not competent to stand trial. In *State v. Krol*, 68 N.J. 236 (1975), the Supreme Court recently held these commitment provisions to be unconstitutional. In the process, it overruled its holding only three years earlier in *State v. Maik*, 60 N.J. 203 (1972), which had extensively defined and discussed the standards to be utilized in the commitment and release of the criminally insane.

This article traces the development of the many changes in the commitment and release procedures which have occurred since *Maik* through two recent cases, *State v. Krol, supra* and *State v. Carter*, 64 N.J. 382 (1974). In addition, it attempts to demonstrate how most of these changes and developments had their antecedents in preceding cases: that the conditional release concept established in *Carter* had been alluded to in *Maik*, and that *Carter* (through the concurring and dissenting opinion of Justice Clifford) had signified the need to examine the statutory provisions of *N.J.S.A.* 2:A:163-2 and *N.J.S.A.* 2A:163-3 and the continued viability of *Maik* in conjunction with the constitutional principles of equal protection and due process.

Prior to *Krol*, under the above-mentioned statutes a jury verdict of not guilty by reason of insanity in New Jersey had to specify whether or not the defendant's insanity continued. *State v. Conforti*, 53 N.J. 239, 244-245 (1969); *State v. Vigliano*, 43 N.J.

1 These statutes read, in pertinent part, as follows:

2A:163-2. Finding of insanity; disposition

If any person in confinement under commitment, indictment or under any process, shall appear to be insane, the assignment judge, or judge of the county court of the county in which such person is confined, may, upon presentation to him of the application and certificates as provided in Title 30, chapter 4 of the Revised Statutes, institute an inquiry and take proofs as to the mental condition of such person. *** It shall be competent for the judge if sitting without a jury, or the jury, if one is impanelled, to determine not only the sanity of the accused at the time the offense charged against him is alleged to have been committed.

* * *

If it shall be determined after hearing as aforesaid, that the accused was insane at the time the offense charged against him is alleged to have been committed, the charge against him shall be dismissed on this ground and the records of the proceedings so noted. In this event, the judge or jury, as the case may be, shall also find separately whether his insanity in any degree continues, and, if it does, shall order him into safe custody and direct him to be sent to the New Jersey state hospital at Trenton, to be confined as otherwise provided by law, and maintained as to expense as is otherwise provided for the maintenance of the criminal insane, until such time as he may be restored to reason, and no person so confined shall be released from such confinement except upon the order of the court by which he was committed.

2A:163-3. Acquittal on ground of insanity; findings; confinement

If, upon the trial of any indictment, the defense of insanity is pleaded and it shall be given in evidence that the person charged therein was insane at the time of the commission of the offense charged in such indictment and such person shall be acquitted, the jury shall be required to find specially by their verdict whether or not such person was insane at the time of the commission of such offense and to declare whether or not such person was acquitted by them by reason of the insanity of such person at the time of the commission of such offense, and to find specially by their verdict also whether or not such insanity does continue, the court shall order such person into safe custody and commit him to the New Jersey state hospital at Trenton until such time as he may be restored to reason.

44, 61-62 (1964). Upon an affirmative finding, the trial court had to commit such individual to the Trenton Psychiatric Hospital, who had to remain hospitalized until "restored to reason." This cryptic phrase was interpreted and discussed at length for the first time in *State v. Maik, supra*. There, the defendant had experimented with hallucinogenic drugs over a period of time, and the drugs either produced or triggered an underlying psychotic condition. During a schizophrenic attack, he killed a friend by stabbing him 66 times. Among the questions at issue concerning the insanity defense was the interpretation to be given the "restored to reason" release standard.[2] More specifically, the Court was confronted with the related question of whether an individual whose illness is in a state of remission may be unconditionally released even though his underlying personality disorder remained uncured. Chief Justice Weintraub, writing for the Court, noted that all of the doctrines which excuse an offender from criminal responsibility due to insanity have the common characteristic of attempting to distinguish between the sick and the bad. This distinction is made despite the absence of scientific evidence which would separate the ill from the criminally culpable in terms of personal blameworthiness. As stated by the former Chief Justice:

> "The point to be stressed is that in drawing a line between the sick and the bad, there is no purpose to subject others to harm at the hands of the mentally ill. On the contrary, the aim of the law is to protect the innocent from injury by the sick as well as the bad. The distinction bears only upon whether the stigma of criminal shall be imposed and upon the measures to be employed to guard against further transgressions." *Id.* at 213.

By drawing on the common law concept distinguishing between the ill and the criminal, the Court developed the central theme of the decision - - a balance between a defendant's right to an insanity defense and the demands of public security. It went on to define the phrase "restored to reason" contained in *N.J.S.A.*2A:163-2 and *N.J.S.A.*2A:163-3, enunciating the test to be utilized in determining whether a patient can be released. Initially, it noted that while the phrase was not statutorily defined, "its meaning emerges from the common sense of the subject." *Id.* at 217. The Court reiterated its prior statement that the law's distinction between the sick and the bad was not designed to loose upon others a continuing threat of harm merely because the threat resided in illness. As a result,

> ". . . when the Legislature spoke of restoration to 'reason,' it must have had in view *M'Naughten's* concept that legal insanity resides in a 'defect of reason,' and the legislative intent must have been that a defendant found not guilty because of such an impairment of reason shall be confined until there is assurance that the threat of that defect of reason has been eliminated.

A distinction was thus made between the psychotic episode of a defendant which manifested itself in the criminal act, and the underlying or latent mental illness. The Court stated:

> "It would depart from the justification for the recognition of insanity as a defense to view the psychotic explosion in isolation from the underlying illness. To do so would fail to protect the citizens from further acute episodes. The protection must be equal to the risk of further violence. An offender is not 'restored to reason' unless he is so freed of the underlying illness that his 'reason' can be expected to prevail. Hence the underlying or latent personality disorder and not merely the psychotic episode which emerged from it, is the relevant illness, and the statutory requirement for restoration to reason as a pre-condition for release from custody is not met so long as that underlying illness continues." *Id.* at 217, 218.

The Court then set forth its definition of the term "restored to reason":

> "Hence, while a psychotic episode, though temporary in the sense that a defendant may be relieved of its grip and thereupon be in 'remission,' will be accepted as a state of insanity which may excuse under *M'Naughten*, insanity continues notwithstanding remission so long as the underlying latent condition remains, and the defendant will not be 'restored to reason' within the meaning of the statute unless the condition is removed or effectively neutralized if it can be." *Id.* at 218.

The Court in *Maik* was not unaware of the broad ramifications of its holding. Quite obviously, the cruel dilemma of a patient whose illness is incurable but in a state of remission was considered. But it was felt that such a person posed a potential threat to the community and that public protection required indefinite confinement. It noted that it was not confronted in the case before it with the issue of whether a court could order a release conditioned upon the individual's return to custody if signs of an oncoming acute mental illness should appear. However, the Court specifically alluded to the desirability of conditional release under such circumstances, stating that "[i]f adequate medical assurance could be given that supervision is reasonably feasible, that course would be humane." *Id.* at 220-221. The conditional release concept had first been suggested as a desirable release procedure in *State v. Lucas*, 30 N.J. 37 (1959). In *Lucas*, the Court reviewed the social utility of the insanity defense when it rejected the liberal "Durham" test[3] and retained the *M'Naughten* standard of mental responsibility. Though rejecting the "*Durham* rule," Chief Justice Weintraub, speaking for the Court, noted that "a release from custody would be something else if (1) it depended upon an affirmative medical opinion that a recurrence of illness is highly unlikely; (2) there was parole supervision; (3) there was a firm grip upon the man to the end that he would be returned to custody upon signs of possible recurrence without awaiting the commision of another anti-social act; and (4) the heads of mental institutions were oriented to the added responsibility which would be theirs." *Id.* at 86

In once again alluding to the desirability of a conditional release concept, the Supreme Court in *Maik* appeared to indicate its intention and willingness to adopt such a procedure if faced with a more appropriate factual situation, to accomodate the societal goals of treatment for the mentally ill and protection for the innocent. In addition, in defining "restored to reason", the Court, in essence, stated that commitment of one acquitted by reason of insanity would hinge upon a finding of continuing insanity according to *M'Naughten* standards. Release of such an individual was to be based on a more demanding test, requiring that the underlying mental illness,

2 Although the Court in *Maik* construed the term "restored to reason" within the context of *N.J.S.A.*2A;163-3, it is clear that the phrase in question carries the same meaning whether under *N.J.S.A.*2A:163-3 or *N.J.S.A.*2A:163-2 *State v. Carter*, 64 N.J. 382, 398-399 (1974). See generally "Commitment – Court Authorizes Conditional Release of the Criminally Committed", 28 Rutgers L.Rev. 414 (1974).

3 *Durham* itself was overruled in favor of the *Model Penal Code* provisions by *United States v. Brawner*, 471 F.2d 969 (D.C.Cir. 1972).

constituting the defect of reason, be restored prior to release. Neither standard, as defined above, was to remain after *Krol.*

In *State v. Carter*, 64 N.J. 382 (1974), the Supreme Court considered and resolved the issue initially noted in *Lucas* and further discussed in *Maik*: the propriety of a conditional release concept under *N.J.S.A.* 2A:163-2 in the absence of express statutory authority.[4] In *Carter*, the defendant walked into police headquarters armed with a revolver and, for no apparent reason, shot and wounded a police officer. The Union County Court found Carter both legally insane under the *M'Naughten* test at the time of the offense and incapable of standing trial. The indictment against him was dismissed and, since the insanity continued, he was committed to the state hospital in Trenton "until such time as he may be restored to reason." Carter was subsequently released without court approval, and a hearing was thus conducted to determine his mental status. The court found that Carter's underlying personality disorder, schizophrenia, was incurable, and that he was still not "restored to reason." Consequently, the court ordered the rehospitalization of Carter.

Initially, the Court in *Carter*, per Justice Pashman, observed that since *Maik*,

> "release is based on a test more demanding than the *M'Naughten* standard required for initial commitment. Confinement to a state institution is to continue not only until manifestations of the illness have abated and the offender can once again distinguish right from wrong, but until the underlying illness from which psychotic episodes emerge is cured. Given an individual's demonstrated capacity to violate the law, coupled with his susceptibility to psychotic episodes depriving him of reason, anything short of confinement would 'fail to protect the citizens from further acute episodes.' *State v. Maik, supra*, at 217." *State v. Carter, supra,* 64 N.J. at 388-389.

However, while recognizing the overriding concern for public safety involved in the commitment of those individuals acquitted due to insanity, the Court acknowledged that such individuals' actions were not *carte blanche* justification for a lifetime commitment where the underlying mental condition is incurable. There was found no legislative intent to confine individuals for a period of time during which they were capable of functioning in society with reasonable assurances that no harm would come to the public. *Id.* at 389.

The Court noted that although *N.J.S.A.* 2A:163-2 failed to expressly provide for conditional release, such an omission was not dispositive of the issue, since "the spirit of legislative direction prevails over its general terms." *Id.* at 390. In this respect, the legislative intent behind *N.J.S.A.* 2A:163-2 and *N.J.S.A.* 2A:163-3 was the protection of the innocent from injury. Thus, when the possibility of harm to the public is eliminated or so reduced as to enable the prediction of episodes possible under appropriate supervision, such a situation weakens the continued justification for confinement. *Id.* at 391. Since the individual so committed is not a criminal but an individual requiring medical attention, the basis underlying confinement is rehabilitation and confinement. Consequently, any standard governing release must be based upon these considerations, given the overriding concern for public safety. *Id.* at 401. As a result, the Court stated that,

4 Although the issue arose under the commitment provision of *N.J.S.A.* 2A:163-2, the Court's treatment of the issue was equally applicable to the commitment provision of *N.J.S.A.* 2A:163-3.

> "When a patient is in a state of remission and there are sufficient medical assurances that he will not pose a threat to the public safety if at large, prolonged confinement can serve no therapeutic purpose. Retribution is inapposite, since the mentally ill, by definition, are not criminally responsible for their behavior. So too, the concept of deterrence has no applicability. Prolonged detention under 'a total recovery' standard, in these circumstances, equates institutionalization with a prison sentence and thereby defeats the very purpose for which *N.J.S.A.* 2A:163-2 was enacted. The value of conditional release as a therapeutic measure is to be considered against the background of the Legislature's intent to provide 'humane care and treatment.' Surely there is a point reached where a patient can no longer benefit from confinement in the artificial and protected environment afforded by a mental institution." *Id.* at 394-395.

The Court then concluded that conditional release could accommodate society's goals of treatment for the mentally ill and protection of the innocent. *Id.* at 397. However, such releases had to be accompanied by judicial and psychiatric supervision under appropriate circumstances to guard against possibly inaccurate and divergent psychiatric prediction. "The alternative is to condemn all those who are not utterly free of an underlying mental illness to lifelong commitment in a mental hospital, regardless of the degree to which they can function and exercise control over themselves in society and regardless of the therapeutic effect of exposure to the outside world." *Id.* at 397-398. The decision to determine when an individual could safely be released was to be made by the court; the court, it was noted, is in a position to balance the concern of the doctor for his patient's mental health with the concern of the community to determine the extent of a threat to public tranquility posed by a particular patient. *Id.* at 398.

Significantly, in discussing the standard to be utilized to govern conditional releases, the Court further clarified the "restored to reason" standard initially defined in *Maik*, noting that the *Maik* decision indicated that something less than a complete cure was acceptable for compliance with the standards; thus, one's condition had only to be "effectively neutralized." As the Court stated,

> "At some point or range beyond the scope of what is considered either acceptable or normal behavior, we begin to delineate a class of people who, having committed an unlawful act, do not know right from wrong and require psychiatric attention. 'Restored to reason' indicates that the patient not only knows right from wrong and is once again within the normal or acceptable range on the behavior continuum, but that the patient also is free of his underlying condition which could be triggered and catapult him once again into the realm of those considered insane for commitment purposes. Neutralization then, could be a state of recovery more permanent than that brought about by a mere remission of symptoms or control of the patient's environment. It could be something less than a complete 'cure' allowing for the limited possibility of relapses. The individual whose condition is 'neutralized' can cope with the world as it is, without supervision and guidance. At this juncture, all that can be said is that while neutralization is not an outright cure of the illness, it is a state which the patient has achieved where there is no danger to those around him of injury from a psychotic episode arising from the illness." *Id.* at 399-400.

In recognizing conditional release as a third alternative for release, the Court observed that while danger which the patient poses to himself and others is clearly a relevant factor in a release proceeding, dangerousness was not the sole criterion for release. Consequently,

> "If the patient is in a state of remission and there are sufficient medical assurances that he will pose no threat to society, there may be no danger to be feared from his conditional release. There may, however, be a rehabilitative purpose in retaining the patient in the hospital if further progress can be made in 'curing' his underlying condition. Public protection may demand prolonged confinement in hopes of eventual recovery and release." *Id.* at 404.

At the hearing to determine the appropriateness of conditional release, the Court concluded that the patient had the burden of demonstrating by clear and convincing evidence that such a release is warranted. A burden greater than mere preponderance was necessary because of the State's concern with public safety, and because the patient would have already been found to be insane under the special verdict provision of *N.J.S.A.* 2A:163-2 or *N.J.S.A.* 2A:163-3. *Id.* at 407-408. Furthermore, the Court stated that it was vital that the trial court retain jurisdiction over the proceeding; "[t]he ability of the trial judge to immediately recall the patient in a summary fashion is crucial to the court's ability to protect the public from harm. It also necessarily implies some territorial restrictions on the patient's right to travel while under supervision." *Id.* at 408-409.

The decision in *Carter* thus further elaborated the principles enunciated in *Maik*, extending them to permit conditional release of those individuals committed pursuant to *N.J.S.A.* 2A:163-2 and *N.J.S.A.* 2A:163-3. However, in concluding its opinion, the Court stated that its resolution of the conditional release issue "renders it unnecessary at this time to reach a claim of unconstitutionality under the equal protection clause." *Id.* at 410.

While the decision in *Krol*, coming 17 months after *Carter*, changed many of the specific holdings in both *Carter* and *Maik*, its impact upon commitment and release procedures was not unanticipated. Many of the constitutional infirmities subsequently found to exist in *N.J.S.A.* 2A:163-2 and *N.J.S.A.* 2A:163-3 were initially noted by the strong dissenting portions of Justice Clifford's opinion in *Carter*, in which he felt it necessary to address the constitutional issue of equal protection as it was applicable to the commitment and release of the "criminally insane." Justice Clifford was persuaded, in his approach, by several cases which had recently been decided by the United States Supreme Court. Most prominent of these cases were *Baxstrom v. Herold*, 383 U.S. 107 (1966) and *Jackson v. Indiana*, 406 U.S. 715 (1972).

Baxstrom had been the first significant United States Supreme Court case to discuss the equal protection concept within this area of the mental health field. There, the Court held that a state prisoner civilly committed at the end of his prison sentence upon the finding of a surrogate was denied equal protection when he was deprived of a jury trial that the State made generally applicable to all other persons subject to institutionalization. It noted that the equal protection clause did not require that all individuals be dealt with identically, only that the distinction made have some relevance to the purpose for which the classification was made. Thus,

> "[c]lassification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatsoever in the context of the opportunity to show whether a person is mentally ill *at all*." *Id.* at 111.

Therefore, there was "no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.* at 111-112. See also *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969), *cert.* denied 396 U.S. 847 (1969); *Bolton v. Harris*, 395 F.2d 642, 648 (D.C. Cir. 1968). In short, the Court found that the legislative classifications made in *Baxstrom* were not reasonably related to any proper governmental goal.

In *Jackson v. Indiana*, 406 U.S. 751 (1972), the Supreme Court again addressed itself to the equal protection issue. In *Jackson*, a mentally defective deaf mute was accused of having committed several robberies. At a pretrial hearing, the defendant was found to be unable to communicate with or assist his attorney. The indictments pending against him, therefore, were held in abeyance and the defendant was committed to a mental institution. All medical experts agreed, however, that the defendant could never reach a mental level which would permit him to consult with his attorney and assist in his defense. Under Indiana law, a defendant who lacks "comprehension sufficient to understand the proceedings and make his defense" is to be institutionalized until "he shall become sane." *Ind. Ann.Stat.* §9-1706 (a) (Supp. 1971). Thus, the practical effect of the defendant's commitment was to institutionalize him for the remainder of his natural life. Defendant argued that his commitment deprived him of equal protection because, absent the criminal charges pending against him, the State would have had to proceed under other statutes generally applicable to all other citizens. Under these other statutes, (1) the decision whether to commit would have been made according to a different standard and (2) if commitment were warranted, applicable standards for release would have been more lenient.

The Supreme Court agreed. Relying on *Baxstrom v. Herold, supra*, the Court held that "by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those applicable to all others not charged with offenses," state officials had deprived the defendant of equal protection of the laws under the Fourteenth Amendment. *Id.* at 725. Moreover, since the effect of Indiana's statutory scheme was to condemn the defendant to confinement for his natural life, this, in effect, deprived him of due process of law. The Court stated that Jackson could not be criminally confined for a period of time longer than that necessary to determine the likelihood of his attaining mental competency in the future. Further, if the defendant could never attain a level of competency necessary to assist in his defense, it was said that the State would be obliged to dismiss the pending charges and, if necessary, civilly commit Jackson under the applicable statutes.

In reaching its conclusion, the Court noted that it had rejected the State's argument in *Baxstrom v. Herold, supra*, that the petitioner's conviction and sentence constituted adequate justification for the difference in procedures. Consequently,

> "[i]f criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice... The *Baxstrom* principle also has

been extended to commitment following an insanity acquittal, *Bolton v. Harris*, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968); *People v. Lally*, 19 N.Y.2d 27, 277 N.Y.S.2d 654, 224 N.E.2d 87 (1966). . . ." *Id.* at 725.

The Court also noted that while *Baxstrom* did not deal with release standards, its rationale was nonetheless applicable:

> "The harm to the individual is just as great if the state, without reasonable justification, can apply standards making his commitment a permanent one when standards generally applicable to all others afford him a substantial opportunity for early release." *Id.* at 729. (Emphasis added).

As Justice Clifford indicated in his dissent, the above cases demonstrated that "equal protection in this area of the mental health field requires that persons committed to a mental hospital upon acquittal of a criminal charge on the basis of insanity, . . . and persons committed because they are incompetent to stand trial must, in important respects, be treated as civilly committed patients." *State v. Carter, supra*, 64 N.J. at 413. Noting that the situations in *Jackson* and *Carter* were essentially the same, and that conditional release was available to civilly committed individuals under *N.J.S.A.*30:4-107, Justice Clifford reasoned that the conditional release of Carter was not merely legislatively permissible, but was constitutionally mandated. *Id.* at 415-16. Furthermore, he indicated that the "clear and convincing" burden of proof was subject to a consititutional challenge because it constituted a higher standard than that imposed on all other civilly committed mental patients. As a result, Justice Clifford concluded that such a standard was violative of equal protection. *Id.* at 424-426. Similarly, he objected to the standard for conditional release to the extent that it required satisfaction of a standard greater than "dangerous to self or others," by mandating continued hospitalization if further progress could not be made in "curing" the individual's underlying mental condition. *Id.* at 423, 427.

A foreshadowing of the demise of *Maik* was indicated by Justice Clifford's discussion of its continued viability in light of *Jackson* and its progeny. As he noted:

> I would point out that *Jackson* which was decided since *Maik*, raises doubts about the constitutionality of *Maik's* holding, both as a matter of due process, and of equal protection. *Jackson* held that 'due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.' (citation omitted). If an underlying illnes cannot be cured, no rehabilitative purpose can be served by continued confinement; if that illness is in remission, such that the patient is no longer dangerous, societal safety is not served either by that confinement. Additionally, because this is a more strict standard than that applied to the other involuntary civilly committed patients, it runs afoul of the equal protection clause of the Fourteenth Amendment." *Id.* at 420.

In addition, the majority opinion's statement which hinged commitment to a mental institution upon a finding of insanity according to *M'Naughten* standards was questioned. Relying upon *State v. Aponte*, 30 N.J. 441 (1959), and the lack of a similar standard in any other jurisdiction in the country, Justice Clifford concluded that the decision as to whether an individual was presently insane so as to warrant commitment depended upon whether he was dangerous to himself or to others:

> "As *Aponte* points out, the standards are not explicitly stated in either New Jersey's criminal or civil commitment statutes, but they should be read in. And again, I believe that equal protection mandates that the same standard be used for someone in Carter's position (not guilty by reason of insanity) as for all other civilly committed persons -- that is, the standard of dangerous to self or others." *Id.* at 421.

In *Maik*, the constitutionality of the relevant commitment provisions in *N.J.S.A.*2A:163-2 and *N.J.S.A.*2A:163-3 was neither challenged by the respective parties nor considered by the Supreme Court. In *Carter*, though the issue was raised, "the majority had no occasion in its opinion to consider possible challenges . . . on constitutional grounds" *State v. Krol*, 68 N.J. 236, 266 (1975), although Justice Clifford noted in his dissent the necessity of dealing with the issue. In *Krol*, the Supreme Court squarely confronted the constitutional validity of the commitment provisions, overruling in the process much of *Maik* as well as specific aspects of the holdings in *Carter*.

In *Krol*, the defendant had stabbed his wife to death, but was found not guilty of murder by reason of insanity. In instructing the jury on the issue of continuing insanity, the trial court instructed them that,

> ". . . when considering the question of whether insanity continues or whether he had presently been restored to reason, the standard is different. Your determination is whether the defendant still suffers from the underlying condition which manifested itself at the time of the alleged crime. It is the underlying or latent mental disease and not merely a psychotic episode which emerged from it or manifested itself which is relevant to this inquiry. An offender is not restored to reason unless he is so freed of the underlying illness that his reason can be expected to prevail. A temporary abatement is not sufficient. A legal requirement for restoration to reason is not met so long as the underlying illness continues. Therefore, if you find that after the commission of the offense the defendant' condition lessens in severity or is free of symptoms of a mental disease but the underlying latent disease remains, then the defendant is not restored to reason within the meaning of the law and you must find that his insanity continues. If, on the other hand, you are satisfied that the defendant no longer suffers from the underlying disease, you are to find specifically that the insanity no longer continues, thus indicating that the defendant has been restored to reason and is to be freed."[5]

After the jury had concluded that Krol's insanity continued ur der the charge given, the trial court ordered him committed to the Forensic Psychiatric Unit at Trenton Psychiatric Hospital. Krol appealed, arguing that the standard for involuntary commitment under *N.J.S.A.* 2A:163-3 violated equal protection and due process.[6]

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5 By virtue of such instructions, commitment of Krol upon a finding of continuing insanity utilized the "restored to reason" standard adopted in *Maik*. Thus, it differed from the statement of the majority in *Carter* that the *M'Naughten* standard was required for initial commitment, 64 N.J. at 388, as well as Justice Clifford's view that "dangerous to self or others" was the proper commitment standard to utilize. 64 N.J. at 420-421.

6 Although the defendant specifically attacked the provisions of *N.J.S.A.*2A:163-3, since the commitment provision was essentially identical to those found in *N.J.S.A.*2A:163-2, the discussion by the Court on the constitutional issue was held to apply to both statutes.

While the present matter was pending before the Court, Krol obtained a conditional release pursuant to *State v.*

Justice Pashman, again writing for the majority, reiterated the Court's prior holdings in *Carter* and *Maik* that the rationale for involuntarily committing those acquitted by reason of insanity was to protect society from individuals who, through no culpable fault of their own, pose a danger to public safety. However, the statutory provisions did not provide for inquiry, either by a judge or a jury, as to whether the particular defendant posed such a risk. Rather, the standard was simply whether the defendant's insanity continued. As the Court aptly observed:

> "The anomaly of the procedure established by *N.J.S.A.* 2A:163-3 is that although its ultimate object is to protect society against certain individuals who may pose special risk of danger, it does not at any point provide for inquiry by judge or jury into the question of whether the particular defendant involved in fact poses such a risk. The standard for commitment is simply that defendant's insanity continues." The fact that defendant is presently suffering from some degree of mental illness and that at some point in the past mental illness caused him to commit a criminal act, while certainly sufficient to give probable cause to inquire into whether he is dangerous, does not, in and of itself, warrant the inference that he presently poses a significant threat of harm, either to himself or to others. (footnote omitted).
>
> The consequence of this procedure is that a defendant who, despite the fact he still suffers some degree of mental illness, poses no significant danger to society, may nevertheless be deprived of his liberty for an indefinite period of time because dangerousness is, in effect, presumed from continuing insanity. The problem is most acute when the offense which defendant has committed is one which, although violating social norms, did not itself involve dangerous behavior. But even where, as in this case, the crime is a violent one, the procedure contains great potential for individual injustice."

The commitment procedures were found to be violative of equal protection as well as due process. The due process principle required that any state action bears a reasonable relationship to some legitimate state purpose. Since the purpose of *N.J.S.A.* 2A:163-3 was to protect the public from future dangerous behavior by individuals acquitted due to insanity who are still suffering from mental illness, the due process principle enunciated in *Jackson v. Indiana, supra*, and its progeny required that the commitment standard dealing with continuing mental illness and dangerousness to self or others, rather than utilizing continuing insanity alone. The failure to provide such a standard denied those individuals so committed of due process of law.

Under the equal protection holdings expressed in *Jackson* and *Baxstrom v. Herold, supra*, the Court noted an attempt to enunciate a broad principle *i.e.*, the fact that an individual had previously engaged in criminal acts did not constitute a constitutionally acceptable basis for imposing upon him a substantially different

6 (Cont.)
Carter, supra. However, because the Camden County Court had imposed a number of restrictive conditions substantially restraining his liberty, the Supreme Court held that the appeal had not been rendered moot by the release since Krol still had "a real and substantial interest in the validity of the original commitment order." 68 N.J. at 245.

standard or procedure for involuntary commitment. Noting that the standard for civil commitment was "dangerous to self or to society", the Court in *Krol* stated that,

> "... if equal protection requires the standard for involuntary commitment of persons acquitted by reason of insanity to be identical to that applicable to civil commitment proceedings generally, defendant may be committed only if he had been determined to be both mentally ill and dangerous to himself or to society."

It was noted, however, that equal protection did not require the identical treatment of all individuals, only that any differences in treatment be justified by "an appropriately strong state interest." Nevertheless, equal protection was violated in the present situation since the distinction between the standard for involuntary commitment for those individuals acquitted by reason of insanity and other individuals was found to lack even a rational basis.

Having concluded that the commitment provisions of *N.J.S.A.* 2A:163-3 and *N.J.S.A.* 2A:163-2 were unconstitutional by authorizing involuntary commitment without a showing of dangerousness, the Court went on to formulate a constitutional procedure. However, it noted that revision of the relevant statutes was ultimately a matter for the Legislature, and that the procedure it was adopting was "to enable the machinery of justice to continue to function pending action by the Legislature." *Id.* at 255-256.

During this interim period, following an acquittal by reason of insanity, at the State's request the individual may be confined in an appropriate mental institution for a period of 60 days for observation and examination. While such a procedure for automatic temporary commitment differed from procedures applicable to civil commitment, the Court indicated that proof that the individual's criminal conduct resulted from his mental illness provided sufficient justification for holding him in custody for a reasonable period of time to determine if he should be indefinitely committed. During this period, the State could move for an indefinite commitment upon the grounds that (1) he is mentally ill and (2) if permitted to remain at large without restraints, is likely to pose a danger to himself or to society. This determination is to be made by the trial judge, who is to ascertain from the evidence presented, whether the State has shown by a preponderance of the evidence that the requisite grounds for commitment are present. While the majority noted that the recent trend had been to require a burden of proof in civil commitment cases greater than a simple preponderance of the evidence, this standard was nevertheless found to be sufficient for commitment of individuals acquitted by reason of insanity.

Upon a determination that the requisite grounds for commitment exist, the judge is then to order suitable restraints upon the individual by ordering either complete hospitalization or a conditional release pursuant to *Carter*. "The order should be molded so as to protect society's very strong interest in public safety but to do so in a fashion that reasonably minimizes infringements upon defendant's liberty and autonomy and gives him the best opportunity to receive appropriate care and treatment." *Id.* at 257-58.

The Court in *Krol* discussed at some length the difficulties inherent in utilizing a standard for commitment which involves determining the dangerous conduct of an individual. In so doing, the Court noted, at length, that:

> "Dangerous conduct is not identical with criminal conduct. Dangerous conduct involves not merely violation of social norms enforced by criminal

sanctions, but significant physical or psychological injury to persons or substantial destruction of property. Persons are not to be indefinitely incarcerated because they present a risk of future conduct which is merely socially undesirable. Personal liberty and automony are of too great value to be sacrificed to protect society against the possibility of future behavior which some may find odd, disagreeable, or offensive, or even against the possibility of future non-dangerous acts which would be grounds for criminal prosecution if actually committed. Unlike inanimate objects, people cannot be suppressed simply because they may become public nuisances. (citations omitted).

Commitment requires that there be a substantial risk of dangerous conduct within the reasonably forseeable future. Evaluation of the magnitude of the risk involves consideration both of the likelihood of dangerous conduct and the seriousness of the harm which may ensue if such conduct takes place. (citations omitted).

It is not sufficient that the state establish a possibility that defendant might commit some dangerous acts at some time in the indefinite future. The risk of danger, a product of the likelihood of such conduct and the degree of harm which may ensue, must be substantial within the reasonably foreseeable future. On the other hand, certainty of prediction is not required and cannot reasonably be expected.

A defendant may be dangerous in only certain types of situations or in connection with relationships with certain individuals. An evaluation of dangerousness in such cases must take into account the likelihood that defendant will be exposed to such situations or come into contact with such individuals." *Id.* at 259-260.

The order subsequently fashioned by the court, either requiring institutionalization or imposing lesser restraints, is subject to (1) modification, upon the ground that the individual has become more or less dangerous than he was previously, or (2) termination, upon the ground that he is no longer mentally ill and dangerous. Where the court has probable cause to believe that a non-institutionalized individual poses an immediate danger to himself or to others, it may order such individual temporarily institutionalized for observation and evaluation pending the hearing on the modification of the prior order. Probable cause in such case may result if the original restraints have proven to be inadequate, if the individual has not complied with the terms of the order, or if his mental condition has changed. However, when temporary institutionalization is ordered under such circumstances, the Court noted that the hearing "should be conducted as promptly as is practical." The motion may be made by either the State or the individual institutionalized; at the hearing the burden of proof is by a preponderance of the evidence to be borne by the party seeking the modification or termination. The Court in *Krol* thus deviated from its holding in *Carter*, in which a conditional release could be granted only upon a showing of clear and convincing evidence that the patient was a fit candidate for such treatment. However, as the Court explained,

> "Under the law prevailing at the time *State v. Carter* was decided, a person involuntarily committed following acquittal by reason of insanity could be finally released upon proof by him by a preponderance of the evidence that he had been 'restored to reason,' a stringent standard that could not be met by a simple showing of lack of dangerousness. *State v. Carter* introduced an entirely different standard that could not be met by a simple showing of lack of dangerousness. *State v. Carter* introduced an entirely different standard for conditional release, one in which lack of dangerousness was a critical factor; and we found no inconsistency in requiring proof of lack of dangerousness by clear and convincing evidence for conditional release while requiring proof of 'restoration to reason' by only a preponderance of the evidence for final release. A consequence of today's decision is that lack of dangerouness is now also a ground for final release. To retain the burden of proof by clear and convincing evidence would create a logically anomalous situation in which a patient might be able to meet the burden of proof to establish himself fit for final release, but be unable to meet the burden of proof to modify the commitment order so as to reduce the restraints imposed upon him, *i.e.*, to obtain a conditional release." *Id.* at 263.

The Court in *Krol* predicated its decision to separate the determination of whether the defendant may be involuntarily committed from the jury's determination of guilt or innocence, leaving the former issue for the trial court's determination after the trial upon two reasons. Initially, the Court indicated that introducing evidence pertaining to the propensity of future harmful conduct by the defendant "creates a significant risk that the jury may be confused or may be distracted from proper consideration of guilt or innocence, the principal question before it." In addition, defense counsel is placed in the unfair tactical position of arguing to the jury both that his client was insane during the commisssion of the crime and that he is no longer mentally ill or dangerous. "Separating the issues frees defendant from this potential unfairness." Consequently, the jury is no longer to be instructed as to the defendant's "continuing insanity." However, significantly the Court added that the trial court should instruct them "as to the consequences of a verdict of not guilty by reason of insanity so that the jury does not act under the mistaken impression that defendant will necessarily be freed or be indefinitely committed to a mental institution." *Id.* at 264-65.

As a result of its holding, the Court in *Krol* concluded that the defendant was entitled to a hearing within 60 days as to whether he was mentally ill and a danger to society or to himself. Moreover, since the effect of its decision was "not to cast doubt merely upon the adequacy of procedural safeguards surrounding the decision to commit, . . . but upon the correctness of the very decision itself," the Court stated that its holding should be applied retroactively to all individuals presently confined to a mental institution (or conditionally released pursuant to *Carter*) following acquittal by reason of insanity. *Id.* at 267.

The dramatic changes in the commitment procedures for the criminally insane occasioned by the *Krol* decision were not unexpected, however, when viewed in relation to Justice Clifford's concurring and dissenting opinion in *Carter*. As Justice Clifford had argued in *Carter*, the majority in *Krol* recognized that *Jackson v. Indiana, supra* and its companion cases provided controlling constitutional principles in the mental health field; that *Maik* and its definition and application of the "restored to reason" standard was unconstitutional as violative of due process and equal protection; that the proper standard for commitment was "dangerous to self or others," the same as that utilized in civil commitment proceedings; and that the burden of proof for a

conditional release was a preponderance of the evidence (although the majority in *Krol* did not premise this issue upon constitutional principles, as Justice Clifford had done). However, Justice Clifford felt constrained again to dissent from that part of the majority's opinion in *Krol* which had applied as "inappropriate burden of proof ... by overruling *sub silentio* those New Jersey cases which have called for a reasonable doubt standard in involuntary commitments." *Id.* at 268. Requiring such a standard, he indicated in essence, "would permit involuntary committees to be 'taken from their families and deprived of their constitutionally protected liberty under the same standard of proof applicable to run-of-the-mill automobile negligence cases." (citation and footnote omitted). *Id.* at 277

PROPOSED LEGISLATION

Although the Court in *Krol* fashioned a "constitutional and workable procedure" applicable in involuntary commitments, the need was recognized for legislative reform. Utilizing *Krol* as a guide, the following represents a revision of *N.J.S.A.* 2A:163-2 and *N.J.S.A.* 2A:163-3 to conform with due process and equal protection principles:

2A:163-2 Finding of insanity; dispostion

If any person in confinement under commitment, indictment or any process, shall appear to be insane, the assignment judge or judge of the county court of the county in which such person is confined, may, upon presentation to him of the application and certificates as provided in Title 30, chapter 4 of the Revised Statutes, institute an inquiry and take proofs as to the mental condition of such person. The proofs herein referred to may include testimony of qualified psychiatrists to be taken in open court by the judge alone. It shall be competent for the judge to determine not only the sanity of the accused at the time of the hearing, but as well the sanity of the accused at the time the offense charged against him is alleged to have been committed.

If it shall be determined after the hearing as aforesaid, that the accused was sane at the time the offense charged against him is alleged to have been committed, but is insane at the time of the hearing, the judge shall order such person removed from imprisonment and to be confined in an institution as provided by section 30:4-82 of the Revised Statutes, and his custody and release from such institution shall be governed by the provisions of said section.

If it shall be determined after hearing as aforesaid, that the accused was insane at the time the offense charged against him is alleged to have been committed, the charge against him shall be dismissed on this ground and the records of the proceedings so noted. In this event, such person may, at the request of the State, be confined in an appropriate mental institution for observation and examination. Such confinement shall be for a period of not longer than 60 days, except for good cause shown, in order to determine and evaluate the present mental condition of such person. Following such confinement a hearing may be held, pursuant to the State's request, to determine whether such person is mentally ill and, if permitted to remain at large without some restraints, is likely to pose a danger to himself or to society.

Proof as to the mental condition of such person shall be heard solely by the court, which shall determine whether the State has demonstrated by a preponderance of the evidence that such person is mentally ill and is likely to pose such a danger. If the court determines that the aforesaid conditions have been shown to exist by the State, it shall formulate an appropriate order either imposing complete institutionalization or imposing lesser restraints upon such person's liberty. Upon the motion of either the State or such person, such order may be modified upon the ground that such person has become more or less dangerous than he was previously, or may be terminated upon the ground that such person is no longer mentally ill and dangerous. The burden of proof upon such a motion, which shall be borne by the party seeking the modification or termination of such order, shall be by a preponderance of the evidence. Where the court has probable cause to believe that any such person who is non-institutionalized poses an imminent danger to himself or to society, it may order such person temporarily institutionalized for further observation and evaluation pending a proceeding for modification of such prior order. Such hearing on the modification of such order shall be conducted as promptly as is practical. This section shall not be construed to prevent the use of the writ of habeas corpus.

A finding of sanity at the time of the commission of the offense charged against such person in this proceeding shall not preclude the accused from interposing the defense of insanity at any subsequent trial of the offense charged.

2A:163-3 Acquittal on ground of insanity; findings, confinement.

If, upon the trial of any indictment, the defense of insanity is pleaded and it shall be given in evidence that the person charged therein was insane at the time of the commission of the offense charged in such indictment and such person shall be acquitted, the jury shall be required to find specially by their verdict whether or not such person was insane at the time of the commission of such offense and to declare whether or not such person was acquitted by them by reason of the insanity of such person at the time of the commission of such offense. Upon such an acquittal by the jury, such person may, at the request of the State be confined in an appropriate mental institution for observation and examination.

Such confinement shall be for a period of not longer than 60 days, except for good cause shown, in order to determine and evaluate the present mental condition of such person. Following such confinement, a hearing may be held, pursuant to the State's request, to determine whether such person is mentally ill and, if permitted to remain at large without some restraints, is likely to pose a danger to himself or to society. Proof as to the mental condition of such person shall be heard solely by the court, which shall determine whether the State has demonstrated by a preponderance of the evidence that such person is mentally ill and is likely to pose such a danger. If the court determines that the aforesaid conditions have been shown to exist by the State, it shall formulate an appropriate order either imposing complete institutionalization or imposing lesser restraints upon such person's liberty. Upon the motion of either the State or such person, such order may be modified upon the ground that such person is no longer mentally ill and dangerous. The burden of proof upon such a motion, which shall be borne by the party seeking the modification or termination of such order, shall be by a preponderance of the

evidence. Where the court has probable cause to believe that any such person who is non-institutionalized poses an imminent danger to himself or to society, it may order such person temporarily institutionalized for further observation and evaluation pending a proceeding for modification of such order. Such hearing on the modification of such order shall be conducted as promptly as is practical.

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