CRIMINAL PROCEDURE—STATE MAY SEEK LEAVE TO APPEAL ALL NEW TRIAL ORDERS GRANTED TO A CRIMINAL DEFENDANT—*State v. Sims*, 65 N.J. 359, 322 A.2d 809 (1974).

Defendants Curtis Sims and Ronald Ward were each charged in a two count indictment with working for a lottery business and with possession of lottery slips.[1] At trial, the jury found both defendants guilty of the "working for" offense but not guilty of "possession."[2] The trial judge granted the defendants' motion for a new trial on the grounds that the evidence admissible at trial on the "working for" charge was insufficient to support a conviction, and "that as a matter of law the verdicts were inconsistent."[3] The

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[1] State v. Sims, 65 N.J. 359, 363, 322 A.2d 809, 811 (1974). Defendants were indicted under N.J. STAT. ANN. § 2A:121-3 (1969), which states in pertinent part:

> Any person who:
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> a. Knowingly engages as a messenger, clerk or copyist, or in any other capacity . . . where lottery slips . . . or lists of drawings of a lottery . . . are printed, kept or used in connection with the business of lottery . . . or
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> b. Knowingly possesses any paper, document, slip or memorandum that pertains in any way to the business of lottery . . . except . . . [as] authorized, sponsored and operated by any State of the United States, . . .
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> . . . is guilty of a misdemeanor.

[2] State v. Sims, 65 N.J. 359, 363, 322 A.2d 809, 811 (1974).

[3] *Id.* At trial, testimony of two police officers was admitted concerning surveillance they had made of the defendants' activities on four occasions prior to the date of arrest. *See* Brief of the State of New Jersey at 3, State v. Sims, 65 N.J. 359, 322 A.2d 809 (1974) [hereinafter cited as State's Brief]. Defense counsel objected to the admission of this testimony on the ground that the indictment charged the defendants with criminal activity on a particular date, and testimony concerning defendants' activity on other dates was irrelevant and only served to prejudice their case. *Id.* at 4. The judge held that pursuant to the doctrine of State v. Gattling, 95 N.J. Super. 103, 110, 230 A.2d 157, 161 (App. Div. 1967), surveillance evidence procured on days other than the date in the indictment was admissible, but only for the purpose of showing criminal knowledge on the part of the defendants. 65 N.J. at 365, 322 A.2d at 812. Under N.J. STAT. ANN. § 2A:121-3 (1969), participation in lottery activities and possession of lottery materials are both "knowledge" offenses. *See* note 1 *supra*. The judge instructed the jury that surveillance evidence could not be used to corroborate the commission of a crime, but only to determine " 'whether or not the acts, if . . . they were done by the defendants . . . were a knowing one [*sic*].' " State's Brief, *supra* at 8-9 (quoting from the Record at T235-2 to -6). While the judge's discussion of the surveillance evidence was contained in his charge to the jury concerning only the "possession" count, the judge did instruct the jury that knowledge was an element of both the "possession" offense and the "working for" offense. 65 N.J. at 365, 322 A.2d at 812.

Following conviction, the defendants moved for a new trial. During argument on that motion, the court reversed its earlier position and stated that knowledge was not an element of the "working for" offense. State's Brief, *supra* at 10. The court therefore held that the admission of the surveillance evidence served to prejudice the defendants with respect to that count. *Id.* The court further concluded that having found the defendants innocent of possession of lottery materials, the jury could have based its verdict of guilt on the "working for" charge only on the surveillance evidence, which, in the court's opinion, was inadmissible on that charge. *Id.* at 10-11. The court thus found the record void of sufficient evidence to

Superior Court of New Jersey, Appellate Division, granted the state's motion for leave to appeal the new trial order.[4] Prior to argument before the appellate division, the state petitioned the Supreme Court of New Jersey to certify the case. Certification was granted at the same time the highest court denied a defense motion to dismiss the appeal.[5]

The Supreme Court of New Jersey, in *State v. Sims,*[6] concluded that the order granting the defendants a new trial should be reversed because "it [was] erroneous for easily reviewable reasons of law."[7] More significantly, however, in reaching this decision the court had to deal with the question of the right of the state to appeal an order granting a new trial in a criminal case. At the time of the court's deliberation, that right was limited by the rule established in *State v. LaFera*[8] that the state could seek leave to appeal the granting of a new trial to a criminal defendant only if that grant were based on an issue collateral to the main case and arising outside the record.[9] The supreme court rejected the *LaFera* distinction between new trials based on errors arising outside of the record and errors of law or fact arising from the merits of the case

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support the jury's verdict. The court would not enter a judgment of acquittal, but it granted the defendants a new trial. *Id.* at 11.

[4] State's Brief, *supra* note 3, at 1.

[5] State v. Sims, 65 N.J. 359, 363, 322 A.2d 809, 811 (1974). The state's petition was made pursuant to N.J.R. 2:12-2, which authorizes a motion for certification of unheard appeals pending in the appellate division.

[6] 65 N.J. 359, 322 A.2d 809 (1974).

[7] *Id.* at 374, 322 A.2d at 816. In arriving at this conclusion, the court first rejected defendants' argument that the new trial had been granted on the basis of unarticulated factors solely within the discretion of the trial court. *Id.* The court held that there was "little doubt" that the new trial had been granted because of an excessively narrow reading of State v. Gattling, 95 N.J. Super. 103, 230 A.2d 157 (App. Div. 1967), and a misreading of N.J. STAT. ANN. § 2A:121-3a (1969) with respect to the element of knowledge in the offense of working for a lottery. 65 N.J. at 374, 322 A.2d at 816. N.J.R. EVID. 55 provides that "evidence that a person committed a crime . . . on a specified occasion . . . is admissible to prove some . . . fact in issue including . . . knowledge" with respect to a crime committed on another occasion. By virtue of *Gattling* and the aforementioned rule, the court concluded that the surveillance evidence was admissible with respect to the "working for" charge. 65 N.J. at 374, 322 A.2d at 816-17. It could find no reason to believe that the evidence had not been properly considered by the jury in arriving at its guilty verdict on the "working for" count. *Id.* at 374-75, 322 A.2d at 817. In addition, the court saw no inconsistency in finding the defendants guilty of working for a lottery and innocent of possession of lottery slips. *Id.* at 375, 322 A.2d at 817. The court stated that

> evidence of furtive conduct or scanty records, which might not be sufficient to demonstrate possession, could legitimately support the inference that a defendant did use slips while working for a lottery.

Id.

[8] 42 N.J. 97, 199 A.2d 630 (1964).

[9] *Id.* at 103, 199 A.2d at 633-34.

itself as no longer logical, and thus held that the scope of the state's right to seek leave to appeal should be expanded to include all orders granting new trials in criminal cases.[10] This decision represents less of an attempt to broadly enlarge the state's right of appeal in criminal cases than an attempt by the New Jersey supreme court to bring state case law into conformity with the rules governing appellate practice adopted in 1969.[11]

The right of the state to appeal in criminal cases is an issue in which society's interest in efficient and effective criminal procedure conflicts with the right of the accused to be free from oppressive governmental prosecution. The fact that opposing interests are involved, as well as an absence of a clear historical mandate,[12] has promoted confusion and a lack of uniformity among the jurisdictions as to whether the state may appeal in criminal cases, and, where such a right exists, what the scope of that right is.

The "overwhelming weight of American authority" holds that the state may appeal a judgment of acquittal, whether that judgment rests upon a jury verdict or a question of law, only if such an appeal is expressly authorized by statute.[13] The state jurisdictions

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[10] 65 N.J. at 363, 322 A.2d at 810-11.

[11] In 1969, the rules governing practice and procedure in the state's courts underwent an entire revision and reorganization. Among the newly adopted rules was N.J.R. 2:3-lb(5) which permitted the state to ask leave to appeal any interlocutory order granted after trial. The scope of the right to appeal granted by this rule was broader than that granted by *LaFera*. Thus, there existed a conflict between the state's decisional law and court rules. For further discussion of this conflict see notes 79-80 *infra* and accompanying text.

[12] Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 490-91 (1927); Comment, *State Appeals in Criminal Cases*, 32 TENN. L. REV. 449, 449-50 (1965). There is some division of opinion as to whether there existed in early English common law a right of the sovereign to appeal in criminal cases. Professor Miller, in his oft-cited article, states that "[p]rior to 1700 there was no right to an appeal or writ of error, even upon the part of a defendant, except as a matter of grace." Miller, *supra* at 490. However, it has been observed that certain remarks by Lord Coke strongly implied the right of the King to re-indict an accused in cases of an erroneous judgment of acquittal. Note, *Right of State to Appeal*, 45 KY. L.J. 628, 628-29 (1957).

[13] United States v. Sanges, 144 U.S. 310, 312 (1892). The right of the United States to appeal in federal criminal cases is statutory and limited. It was not until 1889 that a defendant in a federal court was afforded an appeal as of right in a criminal case. Carroll v. United States, 354 U.S. 394, 400-01 (1957). The Act of February 6, 1889, ch. 113, § 6, 25 Stat. 656, authorized review by the Supreme Court on a writ of error of all convictions in the federal courts involving capital offenses. Two years later the right to review was extended to infamous crimes as well. Act of March 3, 1891, ch. 517, § 5, 26 Stat. 827. By 1897, appellate jurisdiction for noncapital infamous crimes was withdrawn from the Supreme Court and conferred on the courts of appeals. Act of January 20, 1897, ch. 68, 29 Stat. 492.

The Supreme Court would not concede any right of appeal to the Government in criminal cases until Congress passed the Criminal Appeals Act of 1907. Carroll v. United States, *supra* at 401-02. Pursuant to that act, the Government could take a writ of error in a criminal case from (1) a judgment which either quashed an indictment or arrested a

take a wide range of positions on the right of the state to appeal. One extreme absolutely prohibits all state appeals in criminal cases,[14] while the other extreme allows the state to seek leave to appeal on all questions of law arising at trial in the same manner and to the same extent as the defendant.[15] This wide diversity evidences the freedom of the states to experiment in formulating criminal appellate procedure. Underlying much of this legislative experimentation has been a recognition of the need to safeguard the individual liberties of defendants,[16] with the notable consequence that the right to appeal has generally been extended far more generously to the criminal defendant than to the prosecution.

The primary argument for barring state appeals in criminal cases subsequent to an acquittal of the defendant has been based on the constitutional protection from double jeopardy.[17] Other rationales include the protection from undue hardship of the defendant whose resources are invariably meager compared to those of the state,[18] and the desire not to diminish the significance of jury verdicts.[19] It has also been suggested that our present one-sided system of appellate review in criminal cases has persisted because defense attorneys, who often exert much influence on legislative

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conviction for insufficiency of an indictment, where such judgment was "based upon the invalidity or construction of the statute upon which the indictment [was] founded," or (2) a judgment which sustained a special plea in bar where the defendant had not yet been put into jeopardy. Act of March 2, 1907, ch. 2564, 34 Stat. 1246. Appeals by the United States in criminal cases are now limited to those taken from orders dismissing an indictment or information as long as the defendant is not threatened with double jeopardy, and from suppression orders affecting important evidence as long as "the defendant has [not] been put in jeopardy" and before there has been a "verdict or finding on an indictment or information." 18 U.S.C. § 3731 (1970).

[14] For example, the Texas state constitution provides: "The State shall have no right of appeal in criminal cases." TEX. CONST. art. 5, § 26.

[15] Connecticut is perhaps the most liberal jurisdiction in permitting the state to appeal in criminal cases:

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

CONN. GEN. STAT. ANN. § 54-96 (Supp. 1974-75).

[16] Miller, *supra* note 12, at 491; Note, *supra* note 12, at 629.

[17] Miller, *supra* note 12, at 491. For general discussions of double jeopardy as it applies to state appeals in criminal cases see *id.* at 491-96; Comment, *The State Right to Appeal: Has Maine Been Too Cautious?*, 21 ME. L. REV. 221, 221-25 (1969); Comment, *supra* note 12, at 458-62; Note, *supra* note 12, at 631-36; Note, *The Right of State Appeal in Criminal Cases*, 9 RUTGERS L. REV. 545 (1955).

[18] Orfield, *Appeal by the State in Criminal Cases*, 15 ORE. L. REV. 306, 310-11 (1936); Comment, *supra* note 12, at 462-65.

[19] Miller, *supra* note 12, at 497-99; Comment, *supra* note 12, at 465-66.

matters and who also enjoy many advantages appurtenant to freedom from appellate review by the state, have sought to maintain the status quo.[20] Notwithstanding these considerations, most state jurisdictions do permit some form of appeal to be taken by the state in criminal cases, at least with respect to lower court rulings, when such appeals do not place the defendant in double jeopardy.[21]

In New Jersey, the state has steadfastly been denied the right to appeal a judgment of acquittal in a criminal case. The first decision to deal squarely with this question was *State v. Hart,*[22] a case in which the trial judge directed a verdict for the defendant and accordingly, the jury found the defendant not guilty.[23] The state then sought to prosecute a writ of error on a point of law.[24] The first appellate court dismissed the writ, finding neither statutory authority allowing a writ of error after an acquittal at trial, nor case law supporting the position that such authority derived from English common law.[25] The court stated that "it has been taken for granted by bench and bar that the state was not entitled to . . . review . . . of an error in law by the trial judge."[26] The highest court in the state affirmed, declaring that it was the "unquestioned practice in this state" that no writ of error should lie to review a judgment of acquittal.[27] The court also observed that the New Jersey Constitution of 1844 provided explicitly that no person could be tried a second time for the same offense after an acquittal.[28] Thus, there could be no statutory authority enacted which could confer any right of review to the state where there had been an acquittal.[29] The clause barring a second prosecution for the same offense after an acquittal was included in the 1947 constitution currently in effect,[30] and underlies the New Jersey courts'

[20] Comment, *supra* note 12, at 466.

[21] *See id.* at 452-56.

[22] 88 N.J.L. 48, 95 A. 756 (Sup. Ct. 1915), *aff'd,* 90 N.J.L. 261, 101 A. 278 (Ct. Err. & App. 1917).

[23] 88 N.J.L. at 48, 95 A. at 757.

[24] *Id.*

[25] *Id.* at 49-50, 95 A. at 757.

[26] *Id.* at 51, 95 A. at 757-58.

[27] 90 N.J.L. at 269, 101 A. at 281. The court noted that the practice of permitting the Attorney General in England to take a writ of error in a criminal case was meant to effect the prerogative of the King to favor or prejudice the case of a defendant. The court felt that such a practice was inconsistent with free government. *Id.*

[28] *Id. See* N.J. CONST. art. 1, ¶ 10 (1844).

[29] 90 N.J.L. at 269, 101 A. at 281.

[30] N.J. CONST. art. 1, ¶ 11, states in pertinent part: "No person shall, after acquittal, be tried for the same offense."

continuing refusal to permit the state to appeal acquittals in criminal cases.[31]

The highest court in New Jersey recognized as early as 1900 that when the defendant was not acquitted at trial, the state should be able to take an appeal. In *State v. Meyer,*[32] the state sought to appeal the reversal of a criminal conviction.[33] The defendant moved to dismiss the state's writ of error on the ground that the state was not entitled to such a writ in a criminal case.[34] In denying the defendant's motion, the court looked to English common law and a state statute as authority for the right of the state to take a writ of error in a criminal case.[35] The court emphasized, however, that where the defendant has been acquitted at trial, a retrial was barred by the state constitution.[36] Thus, the case clearly indicates that whether the defendant was acquitted at trial is dispositive of the state's right to appeal in criminal cases. While an acquittal serves as an absolute bar to subsequent appeals by the state, a decision favorable to the defendant which does not constitute an acquittal is not similarly precluded from appellate review.[37]

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[31] *See, e.g.*, State v. Smith, 21 N.J. 326, 332-33, 121 A.2d 729, 732 (1956); City of Newark v. Pulverman, 12 N.J. 105, 112, 95 A.2d 889, 892 (1953); State v. Sheppard, 125 N.J. Super. 332, 336, 310 A.2d 731, 733 (App. Div. 1973); State v. Fiore, 69 N.J. Super. 122, 124-27, 173 A.2d 561, 562-64 (App. Div. 1961).

[32] 65 N.J.L. 233, 47 A. 485 (Ct. Err. & App. 1900).

[33] *Id.* The defendant in *Meyer* had been convicted of causing the death of a woman following an attempt to abort her pregnancy. State v. Meyer, 64 N.J.L. 382, 383, 45 A. 779, 779 (Sup. Ct. 1900). The conviction was reversed on the ground that dying declarations of the deceased should not have been admitted at the defendant's trial. *Id.* at 386, 45 A. at 780.

[34] 65 N.J.L. at 233, 47 A. at 485.

[35] *Id.* at 236-37, 47 A. at 486.

[36] *Id.* at 236, 47 A. at 486. *See also* note 28 *supra* and accompanying text.

[37] Exactly what constitutes an "acquittal" so as to bar further state action in a criminal case, however, is not a simple question. For example, there seems to be little doubt that a directed verdict in the defendant's favor will serve as an acquittal so as to bar an appeal by the state. State v. Hart, 90 N.J.L. 261, 261, 270, 101 A. 278, 278, 281 (Ct. Err. & App. 1917). *See also* Fong Foo v. United States, 369 U.S. 141, 143 (1962) (even though the granting of a directed verdict was "egregiously erroneous," double jeopardy barred a retrial). The standard to be applied by a trial judge when granting a directed verdict in New Jersey is the same as that to be applied when granting judgment notwithstanding a jury verdict. State v. Kluber, 130 N.J. Super. 336, 341, 327 A.2d 232, 235 (App. Div. 1974). Yet, when a defendant is granted a judgment n.o.v., this is not an acquittal which precludes a subsequent state appeal. In State v. Kluber, the appellate division of the superior court stated:

> [A] judgment of acquittal *n.o.v.* . . . involves no issues of fact . . . . The sole issue . . . is a question of law. We do not conceive that our Constitution contemplated that such a judgment of acquittal should be accorded the same nonappealable status as either a verdict of acquittal entered by a jury or a directed verdict entered by a judge during or at the conclusion of the trial.

Id. at 344, 327 A.2d at 236. Thus, *Kluber* gives some advice as to what the constitution did not intend to serve as a bar to state appeals. Nevertheless, precisely what does constitute an

The question of the state's right to appeal the granting of a new trial in a criminal case has not received extensive discussion in New Jersey case law. In *State v. Hunter*,[38] a 1949 case decided by the appellate division of the superior court, Judge William J. Brennan, Jr. discussed appellate review of trial court action on a motion for a new trial. He noted that the grant or denial of a new trial was discretionary and therefore seldom interfered with on appeal.[39] He observed, however, that "that discretion is a judicial discretion controlled by established rules and may be abused."[40] This language clearly suggests the propriety of appellate review of an alleged abuse of discretion by the trial court in either granting or denying a new trial. However, inasmuch as the decision concerned the denial of a motion for a new trial, Judge Brennan's remarks constituted dictum with respect to the granting of a new trial.[41]

The first step toward permitting the state to appeal the granting of a new trial in criminal cases may have occurred in 1953 in *State v. Tune*,[42] which seemed to erode the general rule that inter-

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"acquittal" under article 1, paragraph 11 of the state constitution remains uncertain. *See* note 30 *supra*.

[38] 4 N.J. Super. 531, 68 A.2d 274 (App. Div. 1949).

[39] *Id.* at 536, 68 A.2d at 276.

[40] *Id.*

[41] At the time *Hunter* was decided in 1949, it seems improbable that the granting of a new trial order could have been appealed by the state in either the appellate division or the supreme court. In 1949, criminal procedure in New Jersey was governed by court rules newly adopted pursuant to the 1947 state constitution which provides in pertinent part:

> The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts.

N.J. CONST. art. 6, § 2, ¶ 3.

Criminal appeals in the appellate division of the superior court were governed by N.J.R. 4:2-3 (1948), which stated that "[a]ppeals may be taken to this court in criminal causes, *on leave granted,* to obtain review, hearing, and relief *in lieu of prerogative writs* . . . ." (emphasis added).

Any time a new trial is granted in a criminal case, the controversy is renewed thereby, and any judgment rendered at the first trial cannot be final. State v. LaFera, 42 N.J. 97, 104-05, 199 A.2d 630, 634 (1964). Inasmuch as the writs of error and certiorari employed to obtain appellate review before 1947 could not issue prior to a final judgment, it is unlikely that the appellate division would have granted the state leave to appeal the granting of a new trial in a criminal case in 1949. *See* State v. Verdon, 94 N.J.L. 375, 377, 110 A. 818, 819 (Sup. Ct. 1920).

State appeals to the supreme court in criminal cases were permitted by N.J.R. 1:2-3 (1948), which stated:

> The Attorney General or any County Prosecutor, as the case may be, on behalf of the State shall have the same right to an appeal to [the supreme court] from any *final judgment* rendered in the Appellate Division as is accorded to a defendant.

(Emphasis added). Thus, it appears that in 1949, the granting of a new trial could not have been appealed in the supreme court.

[42] 13 N.J. 203, 98 A.2d 881 (1953). In *Tune,* the state successfully appealed an inter-

locutory orders could not be appealed except under extraordinary circumstances.[43] In *Tune*, the court recognized that if the state were not permitted to appeal an interlocutory order at the time the order was issued, regardless of the final outcome on the merits, it would be afforded no opportunity to make its argument.[44] This problem is clearly demonstrated when the state is not permitted to appeal the grant of a new trial. If the defendant is granted a new trial, at which he is again convicted, he will not raise the issue of the granting of his new trial if he subsequently appeals. Conversely, if the defendant is acquitted at the new trial, the state would be foreclosed from raising an appeal by the state constitutional bar against retrying an acquitted defendant.

This problem was recognized in 1955 by the Supreme Court's Committee on Appeals by the State in Criminal Cases, and this, in part, prompted its recommendation that the court provide a clear provision in the rules allowing the state to appeal from an adverse interlocutory order.[45] In the same report the Committee also advised that the state be allowed to appeal the granting of a new trial.[46] One year later the Committee's recommendations were still under consideration when the supreme court decided *State v. Haines*.[47]

In *Haines*, the defendant, who was convicted of false swearing before a grand jury, subsequently "moved . . . for a new trial on the

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locutory order "granting the defendant the right to inspect his confession." *Id.* at 209, 98 A.2d at 883-84. The supreme court waived the rule barring such appeals prior to a final judgment in order to "best serve the ends of justice." *Id.* at 209, 98 A.2d at 884 (citing Hendrikson v. Koppers Co., 11 N.J. 600, 605, 95 A.2d 710, 713 (1953), a civil case).

[43] *See* Board of Health v. New York Cent. R.R., 10 N.J. 294, 301, 90 A.2d 729, 732 (1952) (appeal of interlocutory order allowed in order to decide questions "essential to the determination of" appeals taken from another decision); *cf.* State v. Peterman, 29 N.J. Super. 236, 237, 102 A.2d 398, 399 (App. Div. 1953) (appeal from an order denying motion to dismiss indictment allowable only "in a flagrant case or one where the indictment upon its face appears to be clearly defective in substance").

[44] 13 N.J. at 209, 98 A.2d at 884. The defendant, having received the benefit of an interlocutory order, would not appeal the grant of that benefit even if he were subsequently convicted. On the other hand, if he were acquitted, the state would be precluded from appealing that order by the state constitution which bars the retrial of an acquitted defendant. *See* note 30 *supra*.

[45] REPORT OF THE NEW JERSEY SUPREME COURT'S COMMITTEE ON APPEALS BY THE STATE IN CRIMINAL CASES 8-9 (1955).

[46] *Id.* at 9. The Committee reasoned that new trials are generally granted on the grounds that either the verdict was not supported by the evidence, or that reversible legal error had occurred. In the former case the prosecution generally dismisses the indictment voluntarily rather than prosecute a second trial. The Committee believed that the defendant would be in no way prejudiced if the state had the additional option of appealing the grant of the new trial. *Id.*

[47] 20 N.J. 438, 120 A.2d 118 (1956).

ground that newly discovered evidence . . . bore materially on the credibility of" the state's sole witness.[48] When the motion was denied, defendant appealed, and the supreme court granted certification while the case was pending in the appellate division. Chief Justice Vanderbilt, delivering the court's opinion, discussed the power of the trial judge to set aside a jury verdict on the basis of witness credibility. He warned that "this power . . . must be used with utmost discretion," especially in a criminal case where "unlike in a civil case the State has no right of appeal from an order granting a new trial."[49] The Chief Justice's comment clearly constituted dictum since it was the defendant who was appealing the denial of a new trial. Nonetheless, that dictum represents the first words of the highest court in New Jersey to squarely address the right of the state to appeal the granting of a new trial in a criminal case.

Notwithstanding the Chief Justice's remarks in *Haines,* four years later in *State v. Rosania,*[50] the state successfully appealed an order entered by the Essex County Court which set aside the defendant's conviction and granted him a new trial.[51] Although the defendant had sought relief by a motion for a new trial, the judge treated the motion as an application for a state writ of habeas corpus in order to avoid a potential problem of timeliness.[52] When an order granting a new trial was entered, the state appealed. The supreme court reversed the lower court action,[53] but at no time addressed the issue of the right of the state to appeal such an order. As such, it is unclear whether this case represented a step by the supreme court to liberalize the state's right to appeal in criminal cases.[54] In any case, by spring of 1961, the supreme court had not yet made any move to implement the recommendation that the state be permitted to appeal interlocutory orders and grants of new trials, as had been advanced by the 1955 Committee on Appeals by the State in Criminal Cases.[55]

In May 1961, a new report submitted by the Supreme Court's

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[48] *Id.* at 442, 120 A.2d at 120.

[49] *Id.* at 447, 120 A.2d at 123.

[50] 33 N.J. 267, 163 A.2d 139 (1960).

[51] *Id.* at 268, 277, 163 A.2d at 140, 144.

[52] *Id.* at 273, 163 A.2d at 142. Rosania and two co-defendants had been convicted eight years earlier of first-degree murder. Rosania did not appeal his conviction and did not seek post-conviction relief until his co-defendants had been awarded new trials on constitutional grounds following a federal habeas corpus action. *Id.* at 268-70, 163 A.2d at 140-41. *See* United States *ex rel.* DeVita v. McCorkle, 248 F.2d 1 (3d Cir.), *cert. denied,* 355 U.S. 873 (1957).

[53] 33 N.J. at 277, 163 A.2d at 144.

Committee on Criminal Procedure renewed the recommendation that the state be allowed to appeal from an interlocutory order, not as of right, but on leave of the appellate division.[56] The report did not, however, concur with the opinion of the 1955 Committee with respect to appeals of new trial orders.[57] Rather, it reasoned:

> In the majority of instances such orders are based upon an evaluation of the evidence which is peculiarly for the trial court's determination. In the light of the long history of non-review in such cases and the absence of any pressing condition or circumstance warranting a change, we feel that the present practice [of barring the state from appealing a trial court order granting a new trial] should be continued.[58]

Soon after this report was submitted, the supreme court amended the court rules to allow the state to appeal in criminal cases from an interlocutory order entered prior to trial upon leave of the proper appellate court.[59] Although this rule change served to expand the state's right to appeal in criminal cases, it clearly could not have been intended to permit an appeal of an order granting a new trial since such an order could not be entered prior to trial.[60] Nevertheless, five months after the rule change was adopted, the state, in

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[54] It is possible that the issue was not raised because the proceeding had taken on the characteristics of a habeas corpus proceeding to such an extent that it was no longer regarded as a step in the original criminal action. It has generally been acknowledged that the state may appeal an adverse judgment from a habeas corpus proceeding. *See* note 74 *infra* and accompanying text.

[55] *See* notes 45-46 *supra* and accompanying text.

[56] REPORT OF THE NEW JERSEY SUPREME COURT'S COMMITTEE ON CRIMINAL PROCEDURE 22-23 (1961).

[57] *Id.* at 25.

[58] *Id.*

[59] N.J.R.R. 1:2-4(c) was adopted July 27, 1961. It stated in part:

> (c) In any criminal cause the plaintiff may appeal to the appropriate appellate court:
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> (1) from an interlocutory order entered *before trial,* upon leave granted by the appellate court . . . .

Id. (emphasis added).

[60] The right of the state to appeal an interlocutory order was limited to pretrial orders, apparently to avoid double jeopardy problems. State v. Taylor, 81 N.J. Super. 296, 305, 195 A.2d 485, 490 (App. Div. 1963).

Pretrial interlocutory orders in criminal cases appealable by the state under N.J.R.R. 1:2-4(c) (1961) have included: (1) orders permitting the defendant to withdraw a plea of non vult and stand trial, State v. Daniels, 38 N.J. 242, 246-48, 183 A.2d 648, 650-51 (1962); (2) orders declaring a confession inadmissible at trial, State v. Yough, 49 N.J. 587, 590, 231 A.2d 598, 599 (1967); (3) orders suppressing state's evidence as the fruit of an unreasonable search, State v. Taylor, *supra* at 299, 195 A.2d at 486-87. Courts have exhibited some flexibility in construing the "pretrial" requirement in the interest of justice. *See, e.g., id.* at 299, 195 A.2d at 487, where the state was permitted to appeal a suppression order entered after the jury had been impanelled.

State v. Levitt,[61] appealed an order of the Burlington County Court granting a new trial in a criminal case. The issue of whether the state had the authority to appeal that order, however, was never confronted.

State v. LaFera[62] was the first decision of the New Jersey supreme court to explicitly discuss the right of the state to appeal an order granting a new trial in a criminal case. In *LaFera,* the defendants appealed after being convicted of conspiracy to rig bids on a public project.[63] Before argument, a remand was obtained in order to apply to the trial court for a new trial on the ground that a biased juror had prejudiced the defendants.[64] The trial court subsequently ordered a new trial, and the state was granted leave to appeal that order. The appeals of both the state and the defendants were certified by the supreme court before argument in the appellate division. The supreme court, per Chief Justice Weintraub, found it unnecessary to decide the state's appeal because it reversed the defendant's convictions.[65] However, the court felt the need to "express some views" on the appealability of new trial orders.[66] Recalling that it had recently amended the New Jersey court rules in order to establish "a single all-embracing procedure for post-conviction review,"[67] the court realized that "the question as to the scope of the State's right of appeal" had been overlooked.[68] The court apparently sought to repair the oversight in part by generating a rule concerning the right of the state to appeal a new trial order.

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[61] 36 N.J. 266, 176 A.2d 465 (1961). The defendant in *Levitt* was convicted following a jury verdict of guilty. The day after the jury returned its verdict, one of the jurors telephoned the trial judge and related to him certain allegedly prejudicial statements made by various jurors during their deliberation. The judge relayed this information to both the prosecutor and defense counsel, and when the latter moved for a new trial on the ground of jury misconduct, the judge granted the motion. *Id.* at 268-69, 176 A.2d at 466. The state appealed, arguing that the comments of the jurors were not prejudicial to the defendant. *Id.* at 270, 176 A.2d at 467. The order granting the new trial was subsequently affirmed. *Id.* at 275, 176 A.2d at 470.

[62] 42 N.J. 97, 199 A.2d 630 (1964).

[63] *Id.* at 99, 199 A.2d at 632.

[64] *Id.* at 100, 199 A.2d at 632.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 102, 199 A.2d at 633. N.J.R.R. 3:10A-1 to -13 were adopted on December 9, 1963, four months before *LaFera* was decided. These rules provided for the use of a petition, directed to the same court in which a defendant was convicted, for the purpose of obtaining post-conviction relief where appellate review was not available. These provisions mentioned the state only with respect to the right to file an answer to such a petition, or to move for its dismissal. *See* N.J.R.R. 3:10A-9 (1963).

[68] 42 N.J. at 102, 199 A.2d at 633.

The court recognized the conflict between the *Haines* dictum[69] and the appeals taken by the state in *Rosania*[70] and *Levitt*,[71] and noted what it termed the "general proposition" that new trial orders were not appealable by the state.[72] It then analogized a motion for a new trial to a habeas corpus proceeding, stating that the distinction between the two had become somewhat obscured.[73] Observing that the state had the right to appeal from a judgment in a habeas corpus proceeding,[74] the court saw no rationale for allowing the state's right to appeal to turn on whether the defendant's vehicle for relief was "given one tag rather than another."[75] The court was convinced that the right to appeal should depend upon the nature of the issue, *i.e.*, if the new trial were based on "fundamental unfairness" at trial or lack of jurisdiction of the court, the new trial order should be appealable, while if the new trial were granted on an issue going to the merits of the case itself, an appeal should not be permitted.[76] Thus the court stated:

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[69] *See* notes 48-49 *supra* and accompanying text.

[70] *See* notes 50-54 *supra* and accompanying text.

[71] *See* note 61 *supra* and accompanying text.

[72] 42 N.J. at 100-01, 199 A.2d at 632.

[73] *Id.* at 101, 199 A.2d at 633. The writ of habeas corpus had traditionally been limited to challenging the jurisdiction of the court whose judgment is questioned. *See* Knewel v. Egan, 268 U.S. 442, 445 (1925); Bergemann v. Backer, 157 U.S. 655, 659 (1895); Andrews v. Swartz, 156 U.S. 272, 276 (1895). This restricted use of the writ has been expanded in recent times to the extent that the writ now serves as a vehicle for challenging almost any sort of unlawful governmental restraint. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 402 (1963); Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 CANADIAN B. REV. 92, 93 (1938). The expansion of habeas corpus inevitably resulted in an overlapping between the remedies available to a defendant by means of a new trial motion and a habeas corpus proceeding, as demonstrated in State v. Grillo, 16 N.J. 103, 106 A.2d 294 (1954). In *Grillo*, the defendant employed a new trial motion in order to assert a denial of due process on the ground that a juror was biased. *Id.* at 106, 106 A.2d at 295. The motion was denied, but that denial was based on the merits, not because a new trial motion was an improper vehicle for asserting such a claim. *Id.* at 115, 106 A.2d at 300. Later, Grillo asserted the same claim in a federal habeas corpus proceeding where he eventually prevailed on appeal. United States *ex rel.* DeVita v. McCorkle, 248 F.2d 1 (3d Cir.), *cert. denied*, 355 U.S. 873 (1957).

[74] 42 N.J. at 101, 199 A.2d at 633 (citing State v. Daniels, 38 N.J. 242, 246, 183 A.2d 648, 650 (1962)). *See also* Knewel v. Egan, 268 U.S. 442, 442-43 (1925).

[75] 42 N.J. at 102, 199 A.2d at 633.

[76] *Id.* at 103, 199 A.2d at 633-34. The distinction *LaFera* drew was based on what the court perceived to be the difference between issues remediable by the traditional new trial motion and the expanded habeas corpus proceeding. *Id.* at 103, 199 A.2d at 634. The essence of the court's reasoning appeared to be that the state should have the right to appeal an order granting a new trial where that order rests on an issue from which the defendant might have sought his remedy by a habeas corpus proceeding. The court recognized that had the defendant prevailed at a habeas corpus proceeding, the state would have the right to appeal the judgment. *Id.* at 101, 199 A.2d at 633. In order that the state's right to appeal not be predicated upon the vehicle of relief chosen by the defendant, where the defendant could have later sought habeas corpus relief but rather moved for a new trial, and that

> It seems to us that the correct rule is this: the State may not appeal from a trial court's order for a new trial based upon the record of the trial itself (including newly discovered evidence which must be weighed in the light of the existing record). On the other hand, if the attack is collateral in nature and involves issues not litigated in the main case, the order should be reviewable on the State's behalf.[77]

It was determined, in addition, that new trial orders, granted for whatever reason, should be deemed interlocutory, and therefore appeals of such orders should stand not as of right, but by leave of the appellate court.[78] The *LaFera* court, then, attempted to resolve the confusion and apparent contradictions in the law with respect to the state's right to appeal an order granting a new trial by establishing a guiding rule.

Nevertheless, within five years the issue was again beclouded when in 1969 the New Jersey court rules were completely revised. At that time N.J.R.R. 1:2-4(a), (c)(1)-(2), 3:2A-10, and 3:5-5(b)(7), which governed the right of the state to appeal in criminal cases, were all assimilated into the new N.J.R. 2:3-1 which states in part:

> In any criminal action the State may appeal or, where appropriate, seek leave to appeal . . .
>
> . . . .
>
> b. to the appropriate appellate court from: . . . (5) an interlocutory order entered before *or after* trial.[79]

A post-conviction order granting a new trial is clearly within the scope of the rule. As such, the new rule conflicted with *LaFera* in

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motion was granted, the state should have the right to appeal that order. Thus, under *LaFera,* whether a particular new trial order was appealable reduced to whether the order was based on an issue reachable by habeas corpus.

Habeas corpus, even with its modern expanded scope, "cannot be used as a substitute for an appeal to attack trial errors." *In re* Garofone, 80 N.J. Super. 259, 281, 193 A.2d 398, 411 (L. Div. 1963), *aff'd,* 42 N.J. 244, 200 A.2d 101 (1964). Issues subject to appeal, then, should not be reachable by a habeas corpus proceeding.

The scope of appeal in New Jersey is determined by the rules of court. At the time *LaFera* was decided, the rule governing the scope of appeal was N.J.R.R. 1:5-1 (1958). That rule extended the right of appeal "[i]n criminal causes [to] *errors apparent on the face of the judgment record.*" *Id.* (emphasis added). Since errors on the face of the judgment record were appealable and hence not subject to habeas corpus review, the state could at no time appeal an adverse judgment on such an issue. Thus, there was no reason to allow the state to appeal new trial orders based on such an issue apparent on the face of the trial record.

Collateral issues, however, were not appealable, although they were reviewable on certification to the supreme court. *See* N.J.R.R. 1:10-1A (1967), -3 (1963). Thus, these issues were reachable by habeas corpus. As such, *LaFera* reasoned that new trials based on such issues should be appealable because habeas corpus relief granted to a defendant would be appealable.

[77] 42 N.J. at 103, 199 A.2d at 633-34.

[78] *Id.* at 103-04, 199 A.2d at 634.

[79] N.J.R. 2:3-1 (emphasis added).

that it expanded the scope of the state's right of appeal to include new trial orders grounded on the trial record itself. The rules revision coordinating committee was fully cognizant of this conflict when they submitted the proposed rules revision in November 1966, and advised that the question be submitted to the supreme court for further consideration.[80] Nonetheless, the rule, as finally adopted in 1969, did not provide for the rule established by the *LaFera* dictum. Thus, N.J.R. 2:3-1b(5) arguably supplanted *LaFera*. Until *State v. Sims*, however, there was no attempt by the courts to resolve the apparent contradiction.

The *Sims* court, noting that "[t]his case calls upon the Court to clarify the law in New Jersey" regarding the state's right to appeal an order granting a new trial to a criminal defendant,[81] proceeded to abolish the *LaFera* ban on appeals of new trial orders not based on collateral matters arising outside the trial record.[82] The court thereby enlarged the scope of the state's right to appeal to include all new trial orders, and eliminated the apparent conflict between the state's decisional law and court rules.

The *Sims* court based its decision in part on its opinion that the distinction *LaFera* made between the two classes of new trial orders[83] had grown unworkable.[84] The court observed that habeas corpus had continued to expand since *LaFera* to the extent that its reach now seemed infinite, and particularly significant, that

> [t]he record of the trial, once considered immune from collateral attack . . . may now be scrutinized to insure that a *habeas* petitioner has had a full and fair hearing.[85]

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[80] The committee noted in the tentative draft comment to rule 2:3-1:

> A further problem concerning the State's right to appeal from an interlocutory order entered after trial is raised by State v. LaFera, 42 N.J. 97, 100-105, 199 A.2d 630 (1964) and its intended scope. Reading that case literally, several members of the Committee recommend that R. 2:3-1 (b) (5) provide that the State may appeal "an interlocutory order entered before or after trial, except an order granting a new trial based upon the record of the trial itself." Other members doubt that the Court in LaFera intended to preclude a State's interlocutory appeal from an order granting a new trial if the trial judge, e.g., is persuaded that he erred in allowing or excluding certain evidence or in giving or denying a certain charge to the jury. Such grounds for a new trial would be, of course, "based on the record of the trial itself." The tentative conclusion of the Committee was to omit the exception based on LaFera from the rule, but to submit the question to the Court's further consideration.

PROPOSED REVISION OF THE RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, RULE 2:3-1, Comment 7 (1966).

[81] 65 N.J. at 362, 322 A.2d at 810.

[82] *Id.* at 363, 322 A.2d at 810-11.

[83] *See* note 76 *supra* and accompanying text.

[84] 65 N.J. at 369, 322 A.2d at 814.

[85] *Id.* at 368, 322 A.2d at 813 (emphasis by court) (citation omitted). In recent years trial court records have been inspected at habeas corpus proceedings (1) in order to

As such, consistent with the *LaFera* analogy between new trial motions and habeas corpus proceedings, the state should have the right to appeal new trials grounded on noncollateral issues.[86] The court then analyzed the traditional justifications for limiting the state's right to appeal in criminal cases and stated that to permit the state to appeal a new trial order was not to place a defendant in double jeopardy.[87] Nor would such appeals be unconscionably burdensome to an indigent defendant, because of the availability of free legal assistance[88] and a free transcript on first appeal.[89] Furthermore, because such appeals rested on the discretion of the appellate court, the defendant would be effectively protected against bad-faith prosecution by the state.[90] Finally, the court found that N.J.R. 2:3-1b(5), a court rule adopted by the state supreme court pursuant to the state's constitution,[91] constituted

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determine whether there was any evidence presented at trial on which a conviction might rest, United States *ex rel.* Victor v. Yeager, 330 F. Supp. 802, 806 (D.N.J. 1971); United States *ex rel.* Mallory v. Myers, 240 F. Supp. 373, 374 (E.D. Pa. 1964), *aff'd,* 343 F.2d 912 (3d Cir.), *cert. denied,* 381 U.S. 943 (1965), and (2) in order to review the admissibility of evidence at trial, United States *ex rel.* Mayberry v. Yeager, 321 F. Supp. 199, 206 (D.N.J. 1971). The United States Supreme Court has held that it is the duty of a federal district court in a habeas corpus proceeding to scrutinize a state court record whenever fundamental rights are claimed to have been infringed. Townsend v. Sain, 372 U.S. 293, 316 (1963).

[86] 65 N.J. at 363, 368, 322 A.2d at 810-11, 813-14. The *Sims* court was critical of *LaFera's* characterization of habeas corpus as a civil proceeding, a characterization which justified the state's right to appeal in such an action. *Id.* at 369, 322 A.2d at 814. The court observed that many of the rights accorded a criminal defendant had been extended to a habeas petitioner. It cited an opinion of the United States Supreme Court to the effect that a habeas proceeding is essentially unique, and that to characterize it as civil is " 'gross and inexact.' " *Id.* (quoting from Harris v. Nelson, 394 U.S. 286, 293-94 (1969)).

[87] 65 N.J. at 370-71, 322 A.2d at 814-15. This conclusion is supportable by two lines of reasoning. First, it is arguable that there can be no second jeopardy until the first jeopardy is culminated by a final judgment. *Id.* at 370, 322 A.2d at 814. *But see* United States v. Jorn, 400 U.S. 470, 486-87 (1971) (reprosecution barred by double jeopardy where mistrial was declared to benefit Government's witnesses). For example, it has been established that there is no double jeopardy if the state seeks to retry one whose conviction has been set aside because of reversible trial error. United States v. Tateo, 377 U.S. 463, 463-64 (1964). *See also* Kepner v. United States, 195 U.S. 100, 134-35 (1904) (Holmes, J., dissenting). Second, it may be reasoned that when a defendant asks for a new trial following conviction, he thereby waives any right to claim double jeopardy if the state seeks to prosecute that new trial. Trono v. United States, 199 U.S. 521, 533-34 (1905). Thus, if the state seeks to appeal the order granting a new trial, and thereby terminate the prosecution without subjecting defendant to a new trial, it is difficult to see how the defendant may contend double jeopardy.

[88] 65 N.J. at 371, 322 A.2d at 815. *See* Douglas v. California, 372 U.S. 353, 357-58 (1963).

[89] 65 N.J. at 371, 322 A.2d at 815. *See* Griffin v. Illinois, 351 U.S. 12, 18-19 (1956).

[90] 65 N.J. at 371, 322 A.2d at 815.

[91] Rules of criminal procedure are established in New Jersey by the state supreme court pursuant to N.J. CONST. art. 6, § 2, ¶ 3. *See* note 41 *supra.*

adequate legislative authority for such appeals "in lieu of statutory sanction."[92]

The *Sims* court, in addition, indicated that the argument in favor of permitting the state to appeal new trial orders was supported by a number of practical policy considerations: (1) since errors benefitting the defendant would "be less likely to be perpetuated," the criminal law of the jurisdiction stood to develop "in a fairer way"; (2) trial courts would be apt to proceed with greater caution and diligence because their rulings would be subject to review proceedings instituted by either side; (3) there would be less inclination to lean prejudicially in favor of the defendant at trial; (4) defendants would be less likely to unjustly escape conviction as a result of trial error; and (5) there would seem to be no rationale for preventing the state from raising the same arguments on its own appeal when a new trial is granted which it could raise as respondent on an appeal taken by the defendant if the new trial were denied.[93] The *Sims* decision, then, was based on a combination of factors, including the beliefs that the *LaFera* rule was outdated and unworkable, that permitting the state to ask leave to appeal the granting of a new trial would not subject the criminal defendant to an unconscionable prosecution, and that practical benefits to the criminal law of the state would be promoted thereby.[94]

While *Sims* serves to expose all new trial orders in criminal cases to appellate review, it is reasonable to suggest that only a

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[92] 65 N.J. at 371-72, 322 A.2d at 815-16.

[93] *Id.* at 372-73, 322 A.2d at 816. For a discussion of the fifth consideration see ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS 39 (Approved Draft 1970) [hereinafter cited as ABA STANDARDS].

[94] At least one argument opposing state appeals of new trial orders was not addressed by the *Sims* court. The ABA Advisory Committee on Sentencing and Review has expressed doubt as to whether it is "necessary or sound" to allow post-trial appeals by the state when it is clear that had a trial court "ruled in favor of the defense contentions during trial rather than after trial," only a few states would allow the prosecution to appeal. ABA STANDARDS, *supra* note 93, at 39. In New Jersey, the state may not appeal an interlocutory order issued during the trial. N.J.R. 2:3-1b(5). The ABA argument suggests that by permitting the state to appeal a post-conviction new trial order, the defendant forfeits his immunity from appellate review of a trial ruling in his favor, simply on the basis of his timing in making his contention. ABA STANDARDS, *supra* note 93, at 39. While it is true that the appealability of a court order should not rest on the defendant's timing, the weakness in the ABA argument is that the reason for barring appeals of interlocutory orders granted during the trial is not to grant the defendant the irreversible benefit of court errors in his favor, but rather to avoid the suspension of trials already begun until an appeal is decided, such a delay causing prejudice to the parties and placing an unreasonable burden on the jury. PROPOSED REVISION OF THE RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, RULE 2:3-1, Comment 6 (1966).

small fraction of those orders will be successfully appealed by the state. Trial courts do not grant new trials capriciously; when they grant new trials they are expressing the opinion that the defendant has not had a fair trial and is entitled to another day in court in the interest of justice.[95] A trial judge may fairly conclude that the defendant has been unfairly prejudiced in a myriad of ways imperceptible from the trial record.[96] While there is no problem of unfairness to the defendant if an appellate court should reverse a new trial order granted solely on a question of law,[97] substantial injustice could result if an appellate court were to reinstate a conviction by reversing a new trial order granted on the basis of some factual determination solely within the discretion of the trial court. The *Sims* court, however, rejected the practice of limiting the state's right to appeal new trial orders on a "law-fact" dichotomy as has been adopted in other jurisdictions, stating that such a practice seemed likely to create confusion.[98] The court saw no reason for an appellate court, when considering whether to grant the state an appeal, to give special deference to such factual matters as the trial court's

> determination as to worth of certain evidence, plausibility or consistency of individual testimony, and other tangible considerations apparent from the face of the record . . . .[99]

On the other hand, intangible considerations such as the trial court's views on witness credibility and demeanor are to "be weighed heavily."[100] However, problems must inevitably arise because an appellate court "cannot follow the mental processes of the [trial] judge."[101] Unless the trial judge expressly stipulates his reason for granting the new trial, there stands the risk of an unjust

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[95] *See* N.J.R. 3:20-1 concerning the standards for granting a new trial in a criminal case.

[96] State v. Clark, 171 Kan. 734, 737, 237 P.2d 255, 257 (1951); Commonwealth v. Melton, 402 Pa. 628, 630, 168 A.2d 328, 329 (1961).

[97] *Cf.* State v. Taylor, 60 Wash. 2d 32, 40, 371 P.2d 617, 621 (1962).

[98] 65 N.J. at 367-68 n.2, 322 A.2d at 813. For examples of jurisdictions which employ the law-fact dichotomy see Commonwealth v. Melton, 402 Pa. 628, 629, 168 A.2d 328, 329 (1961); State v. DesChamps, 126 S.C. 416, 418, 120 S.E. 491, 492 (1923); CONN. GEN. STAT. ANN. § 54-96 (Supp. 1974-75); N.C. GEN. STAT. § 15-179 (1965).

[99] 65 N.J. at 373, 322 A.2d at 816. *See* Dolson v. Anastasia, 55 N.J. 2, 7, 258 A.2d 706, 708-09 (1969).

[100] 65 N.J. at 373, 322 A.2d at 816. *See* Dolson v. Anastasia, 55 N.J. 2, 7, 258 A.2d 706, 708 (1969).

[101] People v. Canfield, 173 Cal. 309, 312, 159 P. 1046, 1048 (1916).

preemption of the trial judge's discretion.[102] One solution might be to require the state to ask leave to take its appeal from the trial judge who granted the new trial rather than from the appellate court.[103] In that way the judge would be free to grant the state leave to appeal a new trial order if it were granted on a point of law or on an issue of fact discernible from the trial record and thus his judicial discretion would not be infringed. In the rare case in which a trial court erroneously grants a new trial on a point of law and then refuses to grant the state leave to appeal the new trial order, the state would be injured only to the extent of having to reprosecute the case. Such may be the cost of assuring the defendant's right not to be convicted unjustly.

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[102] There are subtle pressures on a trial judge which may make him reluctant to express his true reasons for granting a new trial. A trial judge may doubt the credibility of important witnesses to such an extent that he sincerely feels a new trial would be in the interest of justice. Yet he may have strong reservations against publicly characterizing the testimony of the witnesses as suspect. There may also be cases where a judge simply has strong but inarticulable feelings that justice has not been accomplished. Again, the judge may be reluctant to state such a nebulous, albeit legitimate, reason for granting a new trial. Brief of Defendants-Respondents at 6-7, State v. Sims, 65 N.J. 359, 322 A.2d 809 (1974).

[103] One commentator has recommended that the state should be able to appeal an acquittal in a criminal case if (1) the appeal were limited to a question of law and (2) the state were granted leave to appeal by the trial judge. Note, *supra* note 12, at 637.