Government Appeals in Criminal Cases: The 1978 Decisions

Edward H. Cooper
University of Michigan Law School

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GOVERNMENT APPEALS IN CRIMINAL CASES: THE 1978 DECISIONS *

by

Edward H. Cooper **

The statute allowing the government to appeal from some forms of trial court defeat in criminal cases, 18 U.S.C.A. § 3731, has a long and tangled history. In its 1970 opinion in United States v. Sisson 96.01 the Supreme Court wrestled mightily with a difficult problem under the statute as it then stood, and invited Congress to amend "this awkward and ancient Act." Soon afterward the act was amended. It now provides in part that the government may appeal in a criminal case from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The Supreme Court has ruled that this provision was intended by Congress "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." This interpretation has forced the Court to move the match to a new arena, putting aside statutory struggles to grapple with constitutional limitations of its own perception. Its first major effort came in three 1975 opinions that are described in detail in 15 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction § 3919. A brief summary of some of the major rules that had seemed to emerge from these decisions is set out below. This preface is followed by a detailed statement of several more recent decisions, drawn from the 1978 pocket part supplementing § 3919. It will be seen that the Court has not yet succeeded in articulating constitutional concepts that are clear enough to resolve many of the important questions.

The most difficult problems of government criminal appeals have involved cases in which jeopardy had attached in the trial court proceedings. In United States v. Wilson 96.02 the jury found the defendant guilty. After the verdict, the trial judge dismissed the indictment on the ground that the defendant had been substantially prejudiced by delay between the completion of the government investigation and the return of the

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96.01 Sisson case

96.02 Wilson case

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*From the 1978 Pocket Part, 15 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction § 3919

**Edward H. Cooper is a 1961 graduate of Dartmouth College and a 1964 graduate of Harvard Law School. He is a contributing author to Federal Practice and Procedure: Jurisdiction (with Wright and Miller) and is currently a Professor of Law at the University of Michigan.
indictment. The Court ruled that the government could appeal from this dismissal. It found that appeal would not violate any of three separate purposes of the Double Jeopardy Clause: to prevent the government from seeking to persuade a second trier of fact of the defendant's guilt; to foreclose the opportunity to revise the government's trial strategy in light of lessons learned at the first trial; and to protect the defendant's interest in the finality of a verdict of acquittal. Although the trial judge had dismissed on grounds that did not go to the factual elements of guilt, the opinion in the Wilson case and the opinions in the contemporary decisions seemed to indicate that the government could appeal if a jury conviction were followed by an acquittal based on the trial judge's evaluation of the evidence. It was clear then, however, and it remains clear today that if a jury has acquitted the government cannot appeal.

United States v. Jenkins was decided the same day as the Wilson case. The Court ruled that the government could not appeal from a judgment dismissing an indictment entered after a trial held to the court without a jury since reversal would have required remand to the trial court for further factfinding. The opinion clearly stated that appeal could not be had even if the further findings could be made without taking additional evidence—it was enough to preclude an appeal that "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required..." On the other hand, the opinion indicated that if the trial judge had made sufficient specific findings of fact to support a judgment of guilt under proper legal rules without the need for any further factfinding, appeal would be proper.

The third 1975 decision, Serfass v. United States, actually dealt with an appeal from a dismissal ordered before jeopardy had attached. The opinion, however, expressly left open the question whether appeals might be permitted in cases in which jeopardy had attached but the trial had not been pushed to a general conclusion of guilt or innocence. The Court was clearly concerned that a defendant might deliberately delay presenting a question that could be raised prior to trial in hopes of securing a nonappealable dismissal after jeopardy had attached.

The double jeopardy tests suggested by these three decisions for appeals by the government in criminal cases in which jeopardy has attached have been changed substantially by a series of subsequent Supreme Court decisions. The important cases have dealt with prosecutions that were in some part tried to a jury but terminated short of a jury verdict. Some of the cases, however, have dealt with judge trials. A few clear new lessons have emerged, and the opinions suggest that many of the lessons that had seemed clear may have to be relearned. It is difficult to believe that the Court has yet charted the course it will ultimately follow.

96.03 Jenkins case
1975, 95 S.Ct. 1006, 420 U.S. 358, 43 L.Ed.2d 250.

96.04 Serfass case
An introductory example may help prepare the way for the exposition that follows. At the close of the government's evidence in a prosecution for armed robbery, the defendant seeks dismissal on two grounds. One is prejudicial preindictment delay. The other is failure to offer any evidence that the hammer was cocked on the loaded automatic pistol the defendant was carrying. If dismissal is granted on the ground of preindictment delay, the government can appeal even though jeopardy had clearly attached and reversal would require a complete retrial. This result appears to follow even though the defendant was astute to raise the question of preindictment delay before jeopardy had attached, and even though no reason is offered for delaying disposition of the question until midtrial. On the other hand, no appeal can be taken from a judgment of dismissal resting on the ground that the government has failed to prove that the hammer was cocked as an essential element of the offense charged, no matter how wrong the trial court may be in concluding that this fact is an essential element of the offense. This result, emphasizing the importance of fact-based judgments as "acquittals," might be expanded in future decisions to preclude appeal even though a jury has already convicted, or even though the trial court sitting without a jury has specifically found sufficient facts to support conviction on the correct view of the law. Accurate statement of the changes of law that underlie this illustration and of the ambiguities that remain requires extensive exploration of the major cases.

The first case that fits into the major sequence is United States v. Martin Linen Supply Co. 96.1 The Court ruled that the government could not appeal from a judgment of acquittal entered on a motion made under Criminal Rule 29(c) after the jury had become "hopelessly deadlocked" in a criminal contempt trial. The motions were made, at the suggestion of the trial court, six days after discharge of the jury. They were granted on the ground that the government had not proved facts constituting criminal contempt. It was noted that the judgment clearly rested on an evaluation of the government's evidence, 96.2 a matter that has come to have great importance in subsequent opinions. 96.3 It was pointed out that a successful appeal would require further trial court proceedings, a test that has been modified in the later cases. Finally, and most important, it was concluded that a ruling on a timely motion for judgment of acquittal made after a jury has proved unable to reach a verdict occurs during the period of jeopardy commenced by the initial trial; the ruling cannot be

96.1 Martin Linen Supply case

96.2 Evaluation of evidence
"[W]e must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. * * * [I]t is plain that the District Court in this case evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction." 97 S.Ct. at 1354-1355 (per Brennan, J.).

96.3 Fact determinations
The proposition that earlier cases did not turn on the presence or absence of factual determinations is discussed in 15 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction § 3919, pp. 664-665 (hereafter cited as main volume).
treated simply as if it were a pretrial matter arising before jeopardy had attached at the second trial that otherwise might follow.

It would have been easy to reach an opposite result. It is clear that double jeopardy principles permit a second trial after a mistrial resulting from failure of the jury to agree.\textsuperscript{964} It had at least seemed equally clear that the government could appeal if the jury had returned a guilty verdict, followed by entry of a judgment of acquittal.\textsuperscript{965} These rules could easily be combined in the proposition that a judgment of acquittal based on an evaluation of trial evidence does not preclude appeal, and that the need for a second trial does not preclude appeal if the need arises from failure of the jury to agree. One way of expressing this proposition would be that jeopardy attached at the beginning of the first jury trial, and was released at the time the jury was discharged for failure to agree.

The Court's contrary conclusion was that jeopardy continued its hold through the time of the ruling on the timely motion for judgment of acquittal. This conclusion was explained in part on the ground that the trial judge's authority to enter a judgment of acquittal is an additional protection for filtering out deficient prosecutions. This explanation does not explain why appeal may be taken from a judgment of acquittal entered after a jury verdict of guilty. In addition, the Court explained that it would be anomalous to allow appealability to turn on the timing of the judgment of acquittal. It was accepted on all sides that if judgment of acquittal were entered at the close of the government's case, or at the close of all the evidence without submission to the jury, no appeal could be taken. The same rule should follow, according to the Court, if the trial court prefers to consider the motion more deliberately. If anything, such deliberate consideration gives the government more protection against improvident action by the trial court.

If no more were at stake than construction of the appeal statute, it would be difficult to disagree with the Court's choice between these conflicting arguments. The opinion, however, is faithful to the rule that the statute is intended to remove all statutory barriers, and to permit

\textbf{96.4 Retrial after hung jury}

"The normal policy granting the Government the right to retry a defendant after a mistrial that does not determine the outcome of a trial \* \* \* is not applicable since valid judgments of acquittal were entered \* \* \*." 97 S.Ct. at 1354.

So too, government appeal is allowed if a mistrial resulting from a hung jury is followed by an order of dismissal rather than a judgment of acquittal. See U. S. v. Sanford, 1976, 97 S.Ct. 20, 429 U.S. 14, 50 L.Ed.2d 17, described at note 75 below in this supplement.

\textbf{96.5 Guilty verdict}

See pages 664–665 in the main volume and the new text at notes 96.38 to 96.43 below.

\textbf{96.6 In U. S. v. Allison, C.A.7th, 1977, 535 F.2d 1385, 1386–1387, it is concluded that the decision in the Martin Linen Supply Company case does not preclude government appeal from a judgment of acquittal entered after a jury verdict of guilt. The guilty verdict means that no further trial proceedings would be required in the event of reversal. The government could appeal from a judgment of acquittal entered after a jury guilty verdict, since success on appeal would not lead to a retrial. The Martin Linen Supply Company decision did not require a contrary conclusion. U. S. v. Boyd, C.A.5th, 1978, 566 F.2d 929, 931–932.}
appeal whenever it would be constitutional to do so. The Court's rule is thus apparently binding on state courts, so long as state procedure on motions for acquittal is sufficiently similar to federal procedure. Given the initial premise that double jeopardy permits a new trial after failure of the jury to agree, the present rule makes little sense as a matter of constitutional compulsion. The strongest argument would be that the trial judge's factual determination that the evidence was insufficient to support conviction should protect the defendant against the risks that otherwise attend a proper mistrial. In the face of one clear ruling against the sufficiency of the evidence, the government should not be allowed to harass the defendant, seek a more favorable factfinder in a second jury, or improve its presentation in light of lessons learned at the first trial. This argument, however, loses its force when set against the ruling a few months earlier that the government may appeal a dismissal resting on the insufficiency of the evidence presented at a first trial resulting in a hung jury if the dismissal occurs after the close of the jeopardy period that attached at the first trial and before jeopardy has attached at the second trial. It is difficult to attach constitutional significance to the number of days that have elapsed between discharge of the hung jury and the motion to dismiss for insufficient evidence. Unless there is to be an absolute protection against further proceedings whenever dismissal rests on an evaluation of the evidence presented at the first trial, it would be better to rule that as a matter of constitutional doctrine jeopardy is released upon proper discharge of the jury for failure to agree.

Although no government appeal was actually involved, the next case to change the nature of the uncertainty surrounding post-jeopardy appeals by the government is Lee v. United States. Immediately before the start of trial to the court, and before jeopardy had attached, defense counsel moved to dismiss the information charging theft for failure to include charges of knowledge and of intent to deprive the victim of his property. The court denied the motion, but made it clear that the motion would be reconsidered. At the end of the trial, the court observed that the defendant was obviously guilty, but granted the motion to dismiss.

96.6 Remove statutory barriers
See page 664 in the main volume.

96.7 Dismissal between jeopardy periods

96.8 Days elapsed
Criminal Rule 29(c) allows a motion for judgment of acquittal to be made within seven days after discharge of the jury, or within such further time as the court may direct during the seven day period. It does not seem probable that practice in the various states follows the very same time limit.

96.9 Discharge of jury
At the time the Martin Linen Supply Company case was decided the ruling that jeopardy continued through the period for making a post-trial motion for acquittal carried greater consequences than it does today. Until the decision in U. S. v. Scott, 1978, 98 S.Ct. 2187, 437 U.S. 82, 57 L.Ed.2d 65, an appeal that would require further trial court proceedings would apparently have been blocked even though the judgment rested on matters apart from factual innocence. See text at notes 96.13 to 96.18 below.

96.10 Lee case
No appeal was taken. Instead, an improved information was filed and the defendant was convicted after a second trial. The court ruled that the conviction did not violate the Double Jeopardy Clause.

Initially, it was accepted that the dismissal was not an acquittal, since it did not rest on any resolution of factual issues in favor of the defendant. Next, it was concluded that the "dismissal" was functionally equivalent to a mistrial, since it clearly rested solely on the insufficiency of the information, and was granted in apparent contemplation of a second trial. Turning thus to the standards regulating second jeopardy after a mistrial, the Court found that further prosecution was permissible because the first prosecution was terminated at the defendant's request, and had not resulted from any intentional overreaching by the government.

The result in the Lee case made it clear that the government's right to appeal cannot be controlled by the bare fact that the motion to dismiss was made before jeopardy had attached. It would be absurd to rule that although double jeopardy principles allow institution of a new proceeding, they prevent continuation of the initial proceeding by appeal. After this initial point of departure, however, it remained possible to argue that the result depended on the laxity or possible tactical astuteness of counsel. The motion to dismiss was made by Lee's counsel at the start of trial, although there had been ample opportunity to seek dismissal earlier. The Court suggested that the failure of the trial court to postpone taking evidence until the motion could be considered carefully was reasonable in light of this timing and the failure of defense counsel to request a continuance or otherwise seek to avoid the attachment of jeopardy. Justice Brennan's concurring opinion stressed that an entirely different case would be presented if the petitioner had afforded the trial judge ample opportunity to rule on the motion before trial. 96.11

The facts of the Lee case, then, were at least consistent with a rule that would deny a second prosecution or appeal if the defendant had been careful to provide ample opportunity to dispose of any objections to the prosecution before jeopardy had attached. If such a rule were adopted, it would require difficult factual determinations of the degree of care to be required in each case. On the other hand, it would have two great virtues. First, it would enable a defendant to secure protection against the burdens of a second trial without any need to inquire into the strength of the trial court's reasons for postponing determination of the objections until jeopardy had attached. 96.12 Second, it would prevent

96.11 Justice Brennan
97 S.Ct. at 2148.

96.12 Trial court reasons
The better rule suggested by a test that permits appeal and further trial proceedings only if the defendant has failed to raise issues available before trial until jeopardy has attached is that if the issues have been raised properly, failure of the trial court to reach them until after jeopardy has attached does not justify an appeal. Deliberately distorted action by a trial court, however, could create a strong pressure to permit an appeal even though the defendant had done everything possible to present the matters before trial. Such pressures are demonstrated in a set of cases from the Tenth Circuit. In two cases reported as U. S. v. Appawoo, C.A. 10th, 1977, 553 F.2d 1242, the defendants made similar pretrial motions to dismiss
defendants from deliberately or negligently deferring objections that could be raised before trial, thereby forestalling a second prosecution by waiting until jeopardy had attached. Later decisions, however, may preclude this approach.

The clearest of the new cases is United States v. Scott. 96.13 A defendant charged in a three count indictment moved before trial, and twice during trial, to dismiss two of the counts on grounds of preindictment delay. At the close of all the evidence the trial court granted the motion, and submitted only the third count to the jury. The government sought to appeal as to one of the dismissed counts. The court of appeals, relying on the rule announced in United States v. Jenkins, 96.14 dismissed the appeal since reversal would require further trial court proceedings. The Supreme Court reversed, squarely overruling the further trial proceedings portion of the three-year old decision in the Jenkins case. For purposes of a second trial, it was found that the Lee case “demonstrated that, at least in some cases, the dismissal of an indictment may be treated on the same basis as the declaration of a mistrial.” Two requirements were established for permitting a retrial on this analogy: The trial court must not have relied on insufficiency of the evidence to establish guilt, and the defendant must be responsible for the second prosecution. The requirement that dismissal not be based on insufficiency of the evidence was explained on the ground that a resolution of some or all of the factual elements of the offense charged in favor of the defendant, whether correct or not, is an acquittal. 96.15 If there has been an acquittal, “the law attaches particular significance” to it for fear that a right of appeal on the ground that the statute underlying the prosecution was unconstitutional.

The trial court refused to hear the motions before trial began, and in one case expressly stated that the refusal rested on the desire to prevent appellate review by deferring any ruling until jeopardy had attached. In each case, after the jury was sworn and some government testimony adduced, a judgment of acquittal was entered on the basis of the unconstitutionality of the statute. Appeals were allowed, on the ground that in light of the trial judge’s motivations, “there was in fact no jeopardy.” This conclusion, however, was tied tightly to the observation that the trial court rulings had not been related to any facts developed by the government’s case or any other facts. In U. S. v. Fay, C.A. 10th, 1977, 553 F.2d 1247, on the other hand, pretrial motions to suppress were put off by the same trial judge until after the government had presented nine witnesses. Thereafter the motions were heard, suppression was ordered, and following brief pro forma appearances by a few more government witnesses a verdict of acquittal was directed. Although the court of appeals took it that the procedure followed “obviously aborted a proper consideration of the motions to suppress,” it dismissed the appeal on the ground that the trial judge had rested on consideration of the evidence presented and had not abused his discretion.

Under the more recent Supreme Court decisions discussed below, it seems almost certain that appeal would be denied in the Fay case on the ground that the defendant had been acquitted. Appeal could be allowed in the Appawoo case if it were concluded that the constitutionality of the statute creating the offense does not go to the elements of the crime charged. See text at notes 96.13 to 96.18 below. The prospect of permitting appeal in these circumstances may be one of the advantages of discarding the further trial court proceedings test.

96.13 Scott case

96.14 Jenkins case
1975, 95 S.Ct. 1006, 420 U.S. 358, 43 L.Ed.2d 250, discussed at pages 666-668 in the main volume.

96.15 Acquittal
98 S.Ct. at 2196-2197.
would permit the government to wear down the defendant so that even though innocent he might be found guilty. The requirement that the defendant be responsible for securing the dismissal was imposed to justify the conclusion that the defendant has no substantial claim to have guilt decided by the first jury empaneled to hear the case or to be free from the burdens of a second trial:

We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. We do not thereby adopt the doctrine of "waiver" of double jeopardy. * * * Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice. * * * [I]n the present case, respondent successfully avoided * * * a submission of the first count of the indictment by persuading the trial court to dismiss it on a basis which did not depend on guilt or innocence. He was thus neither acquitted nor convicted, because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been empaneled to try him.96.16

The Court added two final observations. First, it stated that denial of a government right of appeal would mean only that "the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' " Second, it concluded that concern with the defendant's interest in completing the original trial to the original jury could be satisfied in many cases by completing the trial through jury verdict and then ruling on questions that were not decided prior to trial.

The fact that Scott had raised the preindictment delay issue before trial suggests that whatever might have been guessed from the Lee case and earlier decisions the government's right to appeal does not depend on the defendant's failure to provide adequate opportunity to dispose of defenses before jeopardy has attached.96.17 Nothing in the Court's opinion suggests that there had been any neglect or sharp tactical practice. The Court's failure to inquire whether there was any good reason for the trial court to defer ruling on the question may also suggest that the government can

96.16 No cognizable injury
98 S.Ct. at 2197-2198 (per Rehnquist, J.).

96.17 Tardy defense motions
See the discussion at pages 677-684 in the main volume.
The decision in the Scott case provides a new basis for confirming the result in such cases as U. S. v. Wagstaff, C.A.10th, 1978, 572 F.2d 270. The court permitted the government to appeal from an order dismissing the indictment on a motion that apparently was made for the first time immediately after the jury was empaneled and sworn. The court relied on Lee v. U. S., described in the text at notes 96.10 to 96.12 above, for the proposition that "The impaneling and swearing of the jury no longer carries the magic which it once had." Instead, it was found important that the proceeding had terminated at the request of the defendant, and even more important that the dismissal rested on a deficiency in the indictment that "was merely a lack of proper pleading rather than a defect in the case, whereby the accused can never be convicted."
appeal even though there was no good reason to put the question off to trial. On the other hand, it may remain possible to argue in future cases that it is so often important to assess the impact of preindictment delay in light of the case made at trial that the Court must have assumed there was good reason to defer the ruling. A showing that the trial judge deliberately failed to rule on a pretrial motion without good reason may yet enable a defendant to defeat a government appeal by arguing that there was insufficient reason to defeat his interest in completing the original trial before the original jury.

The decision in the Scott case was challenged by a vigorous dissent joined by four justices. Much of the dissent rested on a judgment that the constitutional policy against multiple trials requires that the government rely less on appeal and more on the opportunity to dissuade the trial court from committing errors in favor of the accused. In addition, it was argued that the Court had utterly failed to provide any suitable guidance for applying in future cases its distinction between judgments that would qualify as acquittals because resting on factual determinations of such matters of guilt as entrapment or insanity, and judgments that would not qualify as acquittals because resting on factual determinations of such matters as preindictment delay. Finally, the dissenters were willing to admit the possibility of government appeal from dismissals based on defense motions that should have been made before trial. This view may at least prove persuasive when the Court faces the problem of unnecessarily delayed decision of questions properly raised before jeopardy had attached.

In contrast to the relative clarity of the Scott decision, the decision in Sanabria v. United States presents great complexities. Equally great uncertainties arise from the Court's effort to untangle the complexities. Sanabria was one of eleven defendants charged with violating a federal statute that prohibits participation in an illegal gambling business. One of the elements of the offense is that the business violate the law of the state in which it is conducted. The indictment charged involvement with a business that involved betting on horse races and a "numbers" game in violation of §17 of a Massachusetts statute. The evidence offered by the government was sufficient to connect Sanabria with the numbers operation, but not with the horse betting. The numbers operation, however, violated §7 rather than §17 of the Massachusetts statute. The trial court granted a motion to acquit Sanabria at the close of the government's case on the basis of a ruling that the evidence of numbers

### 96.18 Matters of guilt

The dissent added that application of the Court's examples may lead to double jeopardy distinctions that depend upon the substantive law of a particular jurisdiction. If entrapment, for example, is viewed not as a matter of defeating the mens rea element of the offense but as an affirmative defense based on official misconduct, a judgment based on entrapment might permit a government appeal. The dissent urged that "when all is said and done, there will be few instances indeed in which defenses can be deemed unrelated to factual innocence. If so, today's decision may be limited to disfavored doctrines like preaccusation delay." 98 S.Ct. at 2206.

### 96.19 Sanabria case

1978, 98 S.Ct. 2170, 437 U.S. 54, 57 L.Ed.2d 43.
operations must be stricken for failure to allege the proper section of the state statute, and a conclusion that there was not sufficient evidence to connect Sanabria with the horse operation. The Supreme Court decided the case on the assumption that the trial court was twice wrong. Failure to allege the proper section of the state statute was assumed to be harmless error, as found by the court of appeals, on the ground that Sanabria had clear notice of the offense charged. In addition, even if it were assumed that the business could not be found illegal on the basis of the numbers operation, Sanabria could be convicted by showing that he had participated in the numbers operation of a single business that was made unlawful by its horse betting operations, even though he had no connection with the horse betting. Nonetheless, the Court concluded that the government could not appeal. Each of the three major portions of its opinion is difficult to unravel.

The initial problem concerned characterization of the district court's actions. The government argued that the district court had treated the single count of the indictment as involving separate numbers and horse betting charges. It conceded that the horse betting charge was resolved by an acquittal and could not be appealed, but it urged that the numbers charge was dismissed for failure to allege the proper statutory section and that such a dismissal could be appealed. The Court, however, concluded that the form of the indictment and the trial court orders precluded this treatment. Instead, it found that the district court had relied on its erroneous interpretation of the indictment in arriving at a doubly erroneous decision to exclude the numbers evidence; and had then entered a judgment of acquittal as to the entire count for lack of sufficient evidence. There is no more reasoning offered than the conclusion that the order must be treated as a fact-based acquittal, and that no appeal can ever be taken from a fact-based acquittal.

In its own terms, this first portion of the Court's opinion would be more satisfying if the Court had gone beyond talismanic reliance on the acquittal phrase. It is far from self-evident that double jeopardy principles must preclude appeal and retrial as to every judgment that rests upon insufficiency of the evidence, even though the insufficiency ruling results from erroneous legal rulings that lead to complete disregard of sufficient evidence, and even though the government has never even pressed the theory found to lack sufficient factual support. It is even less clear why appeal and retrial must be precluded when the controlling question—the sufficiency of the allegation that a numbers operation violates state law—could easily have been raised by pretrial motion and the defense can neither offer any satisfactory explanation of its failure to raise the question nor even assert any claim of prejudice. Elabo-

96.20 No satisfactory explanation
Defense counsel in the Sanabria case explained to the trial court that the objection to citation of the wrong state statutory section in the indictment had not been made earlier because it had not "ripened" until the court was asked to take judicial notice of the limitations on the section cited in the indictment at the close of the government's case.

96.21 No prejudice
Defense counsel in the Sanabria case responded to the district court's inquiry
rate justifications are possible, but they must be articulated before they can be assessed or their consequences can be predicted.

The most persuasive justification for the Court's concentration on fact-based acquittals by a trial judge may be introduced by repeating the contrast between the Scott and Sanabria decisions. In the Scott case, the Court concluded that if the defendant seeks dismissal on grounds other than factual proof of guilt there is no need to invoke the double jeopardy policies protecting the defendant against harassment and possible mistaken conviction through "improvement" of the government's case. At the same time, faithful to the decisions in Sanabria and the other recent cases, it recognized that the same double jeopardy policies do apply if the dismissal constitutes an acquittal for insufficient proof of some element of the offense. This distinction is puzzling on its face. A defendant who believes the evidence insufficient, but who fears harassment or a less favorable jury or evidence at a second trial, need not seek acquittal prior to submission to the jury. Instead, he may persist to verdict in the expectation that the jury will acquit, and still seek acquittal if by chance the jury should convict. This path would have the great advantage of facilitating appellate review, permitting reinstatement of the jury's verdict if it is concluded that the trial judge erred in directing an acquittal.96.22 It would be easy to conclude that defendants should be put to the choice of finishing the first trial or terminating the first trial only on penalty of exposure to appeal and retrial.

This argument can be rejected most easily by assigning a special protective role to the trial judge. The recent development of government appeals opportunities has created the first real need to reflect on the trial judge's role in directing acquittal. In its most recent statement, the Court has indicated casually that the trial judge "is not to weigh the evidence or assess the credibility of witnesses," and indeed must apparently apply the same standards as an appellate court.96.23 Such a limited role is difficult to reconcile with the heavy emphasis on the significance of fact-based directed judgments of acquittal. The recent government appeal decisions can be justified much more easily if a more important and partly discretionary role is assigned to the trial judge.96.24 Factual control of the jury may be found an integral part of jury trial, a protection against the excesses of prosecution and jury combined that is about prejudice arising from the statutory citation in the indictment by stating that he need not and did not allege actual prejudice.

96.22 Reinstate verdict
The question whether government appeals may still be justified on the ground that they would simply require reinstatement of the jury verdict is discussed in the text at notes 96.38 to 96.43 below.

96.23 Acquittal standard

96.24 Discretionary role
The traditional standard has been cast in terms that do not include any evident measure of discretion. See Vol. 2, § 467. This standard makes evident sense when applied in the traditional setting of appeal by a defendant who claims that it was error to deny a judgment of acquittal after conviction by the jury. It could make sense as well in the setting of appeal by the government from a directed judgment of acquittal entered before or after submission to the jury, but only if appeal by the government were allowed.
as important as the jury's protection against possible excesses by prosecution and court combined. The trial judge's fact-based decision to acquit, based on the entire experience of trial, could well deserve protection against remote appellate control. Just as appeal may not be taken from a general judgment of acquittal entered after trial to the court, appeal may be denied from a general judgment of acquittal entered before a jury verdict.

Acceptance of this role for trial judge acquittal directly explains only the easy case in which the trial judge has identified the correct elements of the offense charged and has found the evidence insufficient to support conviction as to one or more of those elements. It does not explain why appeal should be denied if the acquittal results from legal error. The paradigm situation that presents the strongest justification for government appeal can be presented by embellishing the Sanabria case. The trial judge might have stated explicitly that as a matter of law a horse betting business is illegal in Massachusetts; that there was sufficient evidence to support findings that a single business existed that engaged in both horse betting and a numbers operation, and that Sanabria engaged in the numbers operation; that to support a conviction under the present indictment it must be shown that Sanabria was connected with the horse betting; and that Sanabria must be acquitted for want of sufficient evidence that he was personally involved in the horse betting. The argument in favor of permitting appeal by the government in these circumstances can be drawn straight from the Scott decision. All of the fact rulings of the trial judge would be accepted. No effort need be made to review the ruling as to the sufficiency of the horse betting evidence against the defendant. The only issues to be reviewed would be legal issues going to the sufficiency of the indictment and the substantive requirements of the offense charged. As in the Scott case, the retrial measure of double jeopardy policy can be put aside because the defendant himself sought to terminate the first prosecution short of a jury verdict. Protection against the burdens and hazards of retrial would be required only if the defendant was forced to seek termination of the first trial by official overreaching.

96.25 Official misconduct

The difference between the double jeopardy standards that apply when a mistrial is declared on motion of the court or prosecution and those that apply when a mistrial is declared at the request of the defendant is sketched in U. S. v. Dinitz, 1976, 96 S.Ct. 1075, 424 U.S. 600, 47 L.Ed.2d 267. Bad-faith conduct by judge or prosecutor that threatens to force the defendant to seek a retrial may preclude a second trial after a mistrial. Otherwise the defendant's request ordinarily means that the mistrial itself serves the same purposes of protecting the defendant that are often served by the protection against double jeopardy; if double jeopardy principles precluded retrial, defense motions for a mistrial would commonly be denied in favor of completing the trial and requiring reversal on appeal, thereby increasing the burdens borne by the defendant. A government appeal was dismissed because the defendant had been forced to seek a mistrial because of government overreaching in U. S. v. Kessler, C.A.5th, 1976, 530 F.2d 1246. A very important test of the overreaching standard could be presented by the setting of U. S. v. Kehoe, C.A.5th, 1978, 573 F.2d 335. The defendants, directors of a savings and loan association, were first prosecuted for embezzlement on account of profits realized by transactions in land belonging to the association. A judgment of acquittal was entered at the close of the
Arguments against a right of government appeal on issues of law following termination of the original trial at the request of the defendant must be drawn largely from practical concerns. Perhaps the most important practical concern is that trial judges cannot be relied upon to provide in every case a detailed set of rulings that carefully separate legal and factual conclusions. In many cases a motion for judgment of acquittal may be granted without any explanation, so that it is impossible to isolate issues of law for appeal. In other cases—and the Sanabria case itself may be one—the statement by the trial judge may be ambiguous, so that even if appellate courts are prepared to undertake a time-consuming effort to separate factual and legal elements the results of the effort will be to leave the right to appeal uncertain and to risk mistaken identification of the factual elements. It would be easy to distrust a system in which the finality of a pre-verdict acquittal depends on the discretionary determination of the trial court whether to make any findings, and on the care and skill exhibited in the findings that are made.

Other practical concerns as well may weigh against a right of government appeal, but they seem less important. It is possible that findings adverse to the defendant may not be considered carefully when acquittal is ordered on other grounds, but the findings need not bind later proceedings and it seems unimportant to speculate that a fact-based acquittal might have been ordered if the trial court had viewed the law differently. A right of government appeal might encourage defendants to avoid pre-verdict acquittals, on the view that the jury is apt to acquit and thereby foreclose any appeal if it is instructed on the legal views that would lead the court to direct acquittal. This possible reaction does not impose such costs on the judicial system or on defendants as to merit much concern.

One final difficulty remains with this first portion of the Sanabria opinion. For whatever reasons, it is established—at least for the time being—that the government may not appeal if a pre-verdict judgment of acquittal rests on a trial court assessment of the sufficiency of the government's case on the ground that the embezzlement statute did not apply to real property. The defendants were then convicted under a second indictment charging that the same transactions violated a statute prohibiting receipt of property through any act of the association with intent to defraud it. In an opinion rendered a bare few weeks before the Scott and Sanabria decisions, the court overruled its own prior decision in the same case, C.A.5th, 1975, 516 F.2d 78, certiorari denied 96 S.Ct. 1103, 424 U.S. 909, 47 L.Ed.2d 313, and held that double jeopardy precluded the second prosecution. A major portion of its reasoning was that dismissal of the first case could not be treated as a mistrial since the determination that the indictment did not state an offense clearly meant that the trial judge did not contemplate a second prosecution for violation of the embezzlement statute that was the sole statute charged in the first indictment. It was further found unimportant that the defendant had requested termination of the first proceeding by dismissal, and that the motion had been made only after conclusion of the government's case. In light of the decision in the Scott case, it would be easy to conclude that the government could appeal, or alternatively could proceed by a second indictment, because the defendant had requested a termination of the first proceeding on grounds that presumably were available well before jeopardy had attached. It would be even better to permit an appeal from the dismissal of the first indictment but prohibit a second indictment for the reasons suggested at page 683 of the main volume, but nothing in the Court's opinions yet supports that result.
evidence, no matter how clearly mistaken the trial court may have been in requiring any proof whatever of the matters involved. The trial court action in such circumstances, however, need not be framed as a judgment of acquittal for failure to prove the offense charged. Instead, the court may state that the government clearly has proved an offense but has failed to charge it. The apparent lesson of the Lee decision 96.26 is that if the trial court acts by dismissing the indictment, the judgment may be treated as a mistrial and an appeal may be available. If this conclusion is correct, it means that the trial court has discretion to control the double jeopardy consequences of its ruling by choosing the form employed. It also means that the government must be astute to argue for a disposition that leaves it free to appeal or start over. Although it is troubling that trial judges should be left with discretion to determine whether their legal rulings should be free from appellate review, procedural punctilio at least has the advantage of helping the defendant to know whether further proceedings may be possible. Even this virtue may be reduced, however, until the “manifest necessity” standard that limits retrials after a mistrial or dismissal without the defendant’s consent 96.27 is elaborated in the context of defective indictments.

The second portion of the Sanabria opinion states that the government could not have appealed even if the Court had accepted its argument that the numbers charge had been merely “dismissed.” The point of departure is a ruling that connection with a single gambling business is a single federal offense for double jeopardy purposes, no matter how many discrete violations of state law the business has committed. Sanabria was “truly acquitted” of connection with this single business, according to the Court, by the conclusion that he was not connected with its horse betting operations. The Court twice referred to the district court statement as if it had been found that Sanabria was not connected with any part of the overall single business, but it also recognized in separate passages that in fact it was only found that Sanabria was not connected with the horse betting aspects of the single business. These two perceptions were never reconciled. More important, no effort was made to explain why a “true acquittal” should be found in a judgment that did not in any way purport to conclude that Sanabria was not connected with the single business, and that became important only because of the erroneous premise that Sanabria could be convicted under the indictment only if proved to have been connected with the horse betting. If the Court meant the “true acquittal” phrase to characterize a decision based on failure to prove guilt

96.26 Lee case
It is not entirely clear that a government appeal could be taken in the circumstances suggested in the text. A judgment of acquittal was found, and the appeal dismissed, in U. S. v. Hospital Monteflores, Inc., C.A.1st, 1978, 575 F.2d 332, 333 & n. 1, where the judgment dismissing the indictment at the end of the prosecution’s case rested on an evaluation of the facts and a conclusion that whether or not they might prove some illegality they did not prove the crime charged.

96.27 Manifest necessity
of any offense, rather than failure to prove guilt of the offense as the district court mistakenly found it to have been charged, this portion of the opinion could make sense only if there had been a finding that Sanabria was not connected with any aspect of the single business. On the other hand, if the Court meant only that the judgment was a true acquittal because it would bar a second prosecution for any part of the single offense charged, the effect of the decision is diminished by the Court's prompt recognition that a new prosecution could be brought—or an appeal could be taken—if it had been charged that there were two separate gambling businesses, one for horse betting and one for numbers betting. It further admitted that "it is not always easy to ascertain whether one or more gambling businesses has been proven." The difficulty was avoided in this case only because the government had chosen throughout to treat it as a single business. If indeed Sanabria was connected only with the numbers operation, it might have been easy to assert that two or more businesses were involved. It is easily conceivable that the scope of double jeopardy protection will come to depend on the array of tactical considerations that lead to government efforts to characterize a loosely organized enterprise as one or more businesses, and on the extent to which courts can give greater definition to the contours of a single business.

The final portion of the Sanabria opinion rejects two theories urged by the government to show that double jeopardy claims had been waived. A theory that protection had been waived by moving to dismiss the numbers allegation, in reliance on the mistrial analogy adopted in the Lee case, was rejected because there had been a fact-found acquittal and because the trial court did not contemplate further prosecution. A theory that the defendant should have objected before trial to the failure to allege the proper section of the state statute was rejected because the sufficiency of the proof that may be presented at trial is not a legal defense required to be raised before trial. The only problem presented by this portion of the opinion stems from the first two portions. The critical shortcoming was the failure of the indictment to specify the proper section of the state statute violated by a numbers operation. This failure was apparent on the face of the indictment before trial, and could be raised without any need to anticipate the course of the trial evidence. The most that can be said is that if Sanabria had expected that evidence would be offered to connect him with the horse betting operation as well,

96.28 Number of businesses
98 S.Ct. at 2184 n. 33.

96.29 Government charges
The prospect that indictments may be framed in multiple counts in order to avoid the impact of the Sanabria decision may underlie the dissenting suggestion of Justice Blackmun that the case was "an odd and an unusual one," that "will afford little guidance as precedent in the Court's continuing struggle to create order and understanding out of the confusion of the lengthening list of its decisions on the Double Jeopardy Clause." 98 S.Ct. at 2187.

The Court itself recognized that in light of the frequently arbitrary choice between charging an offense in one or more counts, the government may appeal a genuine "dismissal" that embraces only part of a single count. 98 S.Ct. at 2181 n. 23.

96.30 Mistrial analogy
See text at note 96.10 above.
there would not have been as much incentive to raise the question prior to trial. Even that argument rests on the assumption that there is any incentive to raise such easily corrected matters prior to trial; whatever force there may have been to that assumption, the result of the Sanabria case is to encourage delay.

One final case must be summarized. In Finch v. United States \[^{96.31}\] it was taken that the case had been submitted to the district court for a determination of guilt or innocence upon a stipulation of facts. \[^{96.32}\] The district court dismissed the information for failure to state an offense. The court of appeals permitted an appeal by the government, concluding that although jeopardy had attached, there would be no need for further factfinding upon reversal; all that was required on appeal was a determination of law upon the stipulated facts. \[^{96.33}\] The Supreme Court reversed, ruling that absent a plea of guilty or nolo contendere, a verdict or general finding of guilt by the trial court "is a necessary predicate to conviction." A dismissal prior to any declaration of guilt or innocence precludes appeal.

If indeed the Finch case was submitted for final judgment on a stipulation of all the facts relevant to guilt, and dismissal rested solely on a ruling of law as to the statutory elements of the offense charged, it stands in a contrasting but complementary position to the Scott decision as a qualification of the "further proceedings" test that had seemed to be established by earlier decisions. \[^{96.34}\] Under the Scott decision, appeal is permitted even though the result may be to require a complete new trial; under the Finch decision, appeal is denied even though reversal could be accomplished without any need for further trial court proceedings. As the opinion is written, it appears to contemplate an appeal if the trial court goes through the ritual of stating that upon the stipulated facts the defendant is guilty if the law is as claimed by the government, but is not guilty because the law is otherwise as understood by the trial court. Absent such a ritual statement, the fact that the court of appeals is in a position to dispose of the case without further factfinding proceedings below is irrelevant. It is difficult to perceive the constitutional significance of such an exercise, but there is no apparent room in the terse and summary disposition of the Finch case to avoid it. Once again, the result seems to depend on a highly technical but as yet undefined concept of acquittal. In this setting, however, it is difficult to support the result by relying on the factfinding protective role of the trial judge. Indeed the Finch case may have been tacitly overruled by the subsequent decision in

\[^{96.31}\] Finch case

\[^{96.32}\] Submission on stipulation
Justice Rehnquist, dissenting, found it far from clear whether the submission amounted to a waiver of the right to jury trial and consent that the issue of guilt or innocence be decided on the basis of the stipulation by the district judge. 97 S.Ct. at 2910-2911.

\[^{96.33}\] Court of appeals

\[^{96.34}\] Further proceedings test
See the discussion at pages 666-668 in the main volume.
Swisher v. Brady \textsuperscript{96.35} that double jeopardy principles do not prevent a state from permitting exceptions by the government to reports of juvenile court masters that recommend dismissal of charges. It could be argued that just as double jeopardy permits a state to split the original factfinding chore between master and judge, so it should permit a division between trial court and appellate court on a stipulated record. The Swisher opinion, however, was careful to suggest that there is a substantial difference between the structure of the tribunal that is responsible for reaching the first final factfinding and a system in which a second appellate tribunal reviews conclusions reached by a first tribunal that is designed to accomplish final disposition of most cases. The best reason for doubting the status of the Finch decision remains its own intrinsic weakness.

One lesson is clearly taught by all these decisions. For all its troubles, the Court is not yet prepared to accept the increasingly cogent argument that the double jeopardy clause should not be read to bar government appeals that rest only on matters of law. \textsuperscript{96.36} Beyond this point, the balance has shifted between the two main double jeopardy tests. Many of the questions that would have had to be framed by focusing on the need for further trial proceedings must now be redirected, often in terms of the increasingly important but still vague concept of acquittal.

The most important applications of the acquittal concept are found in the Finch and Sanabria cases. Together, they seem to stand for the proposition that there is a final acquittal whenever the trial court judgment has mingled findings or assumptions of fact as to elements of the crime, even though the judgment was clearly controlled by mistaken rulings of law and the facts found or assumed would not preclude conviction on a proper view of the law. The absence of any explanation for this proposition makes it a very uncertain task to speculate about its reach. It may still be possible to adopt different tests for appeals than for second prosecutions and to consider the defendant's failure to raise before trial matters that clearly could have been raised. \textsuperscript{96.37} The tone of the opinions, however, appears to attach critical importance to the fact-based nature of any judgment characterized as an acquittal. If so, defendants will have every incentive to postpone matters until jeopardy has attached, and then to frame them in terms of factual sufficiency rather than legal oversight. Even in face of these strange consequences, the focus on acquittal might make sense if it could be explained by an

\textsuperscript{96.35} Swisher case
1978, 98 S.Ct. 2699, 438 U.S. 204, 57 L.Ed.2d 705.

\textsuperscript{96.36} No appeal bar
See p. 678 and n. 84 in the main volume.

\textsuperscript{96.37} Defendant's failure
See the discussion at pages 677-684 in the main volume.
One possible area in which the defendant's failure to raise matters before trial may still count in the balance could be the suppression of evidence. A post-jeopardy motion to suppress on grounds that were clearly available and known to the defendant prior to trial might easily lead to a directed judgment of acquittal for insufficiency of the evidence as reduced by the suppression ruling. The opinion in the Sanabria case does not speak directly to this problem, and the setting is one in which the policies underlying the Court's emphasis on fact-based acquittals may be found inapplicable.
overriding concern to protect defendants against the burden of repeated trial proceedings. The changed direction of the retrial test forecloses even this explanation. All that remains is reliance on the role of the trial judge as a supplemental protection against ill-advised factfinding or law distortion by the jury.

The cumulative impact of these opinions and their ambiguities raises new doubts about the rights of government appeal in other settings not immediately before the Court. It is now doubtful whether the government can appeal from a fact-based judgment of acquittal entered after a jury has returned a guilty verdict, or can appeal to raise questions of law presented by the detailed factfindings prepared in a nonjury trial that has resulted in dismissal or acquittal. Once again, the nature of the doubts requires detailed statement.

The decision in United States v. Wilson 96.38 clearly establishes the right of the government to appeal from a judgment of acquittal that rests on a ruling of law made after a jury has returned a guilty verdict. The most natural reading of the opinion was that the Court also intended to permit an appeal if the judgment of acquittal rested on an evaluation of the evidence. 96.39 Reversal would not require further proceedings on the question of guilt or innocence, but merely reinstatement of the verdict and sentencing. Although there is a strange cautionary footnote in the Scott case, 96.40 it would be very easy to extend the Court's heavy emphasis

96.38 Wilson case
1975, 95 S.Ct. 1013, 420 U.S. 332, 43 L.Ed.2d 232, discussed at pages 663-666 in the main volume.

96.39 Assessment of evidence
See the discussion at page 665 in the main volume.

Shortly before the most recent Supreme Court decisions, the Court of Appeals for the Third Circuit ruled squarely that the Wilson decision permits a government appeal from a judgment of acquittal entered for insufficiency of the evidence to support the jury's conviction. U. S. v. Schoenhut, C.A.3d, 1978, 576 F.2d 1010, 1018 n. 7.

96.40 Cautionary note
98 S.Ct. at 2193-2194 n. 7. The Court notes that it had assumed in an earlier opinion that a judgment of acquittal could be appealed where no retrial would be needed on remand, and that “[d]espite the Court’s heavy emphasis on the finality of an acquittal in Martin Linen and Sanabria v. United States, * * * neither decision explicitly repudiates this assumption.”

Since no further trial proceedings would be required, the decision in the Wilson case established the right of the government to appeal from a judgment of acquittal entered on issues of law notwithstanding a jury verdict of guilty. U. S. v. Hannah, C.A.3d, 1978, 584 F.2d 27, 28.

In U. S. v. Blasco, C.A.7th, 1978, 581 F.2d 681, the court permitted the government to appeal from a judgment of acquittal entered on the ground that the evidence in support of the count on which the jury had convicted was no more credible than the evidence on the counts on which the jury had acquitted. The court examined the 1978 decisions of the Supreme Court, and concluded that appeal is not precluded by the fact that the trial court rested acquittal on evidentiary factual considerations, so long as reversal will not require further trial court proceedings.

The government could appeal from a judgment of acquittal entered on the defendant's motion for new trial following conviction by the jury. “Where the jury returns a verdict of guilty, but the trial court thereafter enters a judgment of acquittal for insufficiency of the evidence, the government may appeal, and reinstatement of the jury verdict thereafter would not offend the Double Jeopardy Clause.” U. S. v. Jones, C.A.6th, 1978, 580 F.2d 219, 221 n. 3.

The Fifth Circuit has found support in the Scott decision to renew its ruling that the government can appeal from a judgment of acquittal entered for insufficiency of the evidence following conviction by a jury.
on fact-based acquittals in the more recent decisions to this setting, and to conclude that the trial court’s evaluation of the evidence should protect the defendant against jury and appellate court alike.

A second and more convoluted line of argument is also available to support the conclusion that the government may not appeal from a fact-based judgment of acquittal entered after a jury verdict of guilt. In Burks v. United States, the court ruled that a defendant may not be retried after a court of appeals has reversed a conviction for insufficiency of the evidence. One of the reasons advanced was that the trial court “had erred in failing to grant a judgment of acquittal” and retrial should no more be permitted after acquittal on appeal than after a “correct decision” by the trial court. By the same reasoning, it could be argued that so long as the defendant had made a motion for acquittal before the case was submitted to the jury, the judgment of acquittal entered by the court after conviction by the jury represents the court’s own determination that it should have acquitted without submitting the case to the jury. This reasoning would leave room for the argument that the government could appeal if the defendant had not sought a judgment of acquittal before the case was submitted, but it would be easy to respond that the right of appeal should not depend on such procedural trivia. An


In a decision handed down nine days after the Scott and Sanabria decisions but taking no note of them, it was ruled that the government could appeal from a judgment of acquittal entered after conviction by a jury since no further trial proceedings would be required upon reversal, even though the acquittal had rested on appraisal of the factual evidence adduced at trial. U. S. v. Dreitzler, C.A.9th, 1978, 577 F.2d 539, 544 & n. 7.

But see

In U. S. v. Burroughs, C.A.4th, 1977, 564 F.2d 1111, 1116–1119, the court wrote its third opinion on the right of the government to appeal from a judgment of acquittal entered after the jury had found the defendant guilty of intercepting oral communications. Initially the court had dismissed the appeal. Then, following the 1975 decisions of the Supreme Court, it reinstated the appeal on the ground that reversal would not require further proceedings, but could be perfected by entering judgment on the jury’s verdict. Thereafter, it adhered to the decision that the appeal could stand in light of the decision in the Martin Linen Supply case. The third ruling, however, was rested on the conclusion that the judgment of acquittal had not involved any resolution of issues as to the sufficiency of the evidence. Instead, it was found that the trial court had interpreted the controlling statute to require proof of an element as to which no evidence was offered, and as to which the jury was not instructed. The question thus framed was found to present only a question of law on appeal. And it was assumed that if the judgment of acquittal “represents the resolution of a factual rather than a legal question the government cannot appeal.” 564 F.2d at 1118.

Judge Widener, moreover, dissented on the ground that since in his view the acquittal had rested on the insufficiency of the evidence, the appeal must be dismissed.

Since it was clear that the judgments of acquittal entered by the trial court following jury convictions were grounded entirely on technical legal considerations that did not involve any factual determinations, the government could appeal. U. S. v. Quarry, C.A.10th, 1978, 576 F.2d 830, 832–833.

96.41 Burks case

1978, 98 S.Ct. 2141, 437 U.S. 1, 57 L.Ed.2d 1.

96.42 Erroneous denial of acquittal

98 S.Ct. at 2147.

96.43 No pre-verdict motion

Criminal Rule 29(c) was amended in 1966 to delete the former requirement that a motion for judgment of acquittal be made at the close of all the evidence in order to support a post-verdict motion. See 2 Wright, Federal Practice & Procedure: Criminal § 465.
alternative argument is also suggested by the Burks decision. It could be urged that it is anomalous to preclude retrial in the event of appellate reversal for insufficiency of the evidence after both jury and trial judge have found the evidence sufficient, but to permit retrial if the jury convicts but the trial judge who is thoroughly familiar with the trial then acquits.

Every effort should be made to resist the conclusion that appeal is precluded by a trial court judgment of acquittal for insufficiency of the evidence after a jury guilty verdict. As compared to an acquittal entered before a verdict is returned or to appellate reversal after a final judgment, the critical distinction is that appeal can be effective without any need for further trial proceedings. The fact that appeal may now be permitted in some settings despite the need for further trial proceedings does not reduce the importance of this distinction. And any need to preserve the protective factfinding role of the district judge can be implemented through the standards for appellate review. If the need be found, the standard could even be that courts of appeals must accept the trial court’s evaluation of the evidence. Even under that standard, there would be room for appeal to test the legal determinations bound up with the acquittal. Reverting to the example of the Sanabria case, a post-verdict acquittal based on failure to prove that Sanabria was personally connected with the horse betting operation should at least be subject to review of the question whether such proof was required to support a jury conviction.

The problems that arise with respect to nonjury trials may be stated much more quickly. Although no government appeal can be taken from a general judgment of acquittal entered without further explanation, it remains safe to assume that an appeal can be taken if there is first a general finding of guilt that is then followed by a changed view of the law or by suppression of evidence that had supported the original conclusion. It is not safe, however, to assume the continued validity of

96.44 Changed view of law
The Court apparently assumed in the Finch case that a government appeal could be taken if a trial judge first made a general finding of guilt, and then retracted it on the basis of a changed view of the law. See text following note 96.33 above. The government was allowed to appeal in U. S. v. Kopp, 1975, 97 S.Ct. 400, 429 U.S. 121, 50 L.Ed.2d 336, where the trial judge found the defendant guilty, but then dismissed the indictment before sentencing on the basis of a suppression ruling made in light of an intervening Supreme Court decision. The right to appeal was rested on the ground that success would simply result in reinstatement of the finding of guilt rather than further proceedings on the question of guilt. A like result was reached in U. S. v. Ceccolini, 1978, 98 S.Ct. 1054, 1057, 435 U.S. 268, 55 L.Ed.2d 268. The trial court found the defendant guilty after a bench trial, but immediately after the finding of guilt granted a motion to suppress specified testimony, and set aside the guilty “verdict” on the ground that without the suppressed testimony there was insufficient evidence of guilt. “The District Court * * * sensibly first made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceedings in the District Court, but merely a reinstatement of the finding of guilt.”

96.45 Suppression of evidence
Within the period allowed for government appeal from an order suppressing evidence and dismissing an indictment the district court has power to vacate the order. U. S. v. Emens, C.A.9th, 1977, 565 F.2d 1142.
the conclusion that appeal should also be available to test a government claim that special findings of fact against the defendant establish all of the elements legally required for conviction. The Court's unexplained reliance on the preemptive effect of judgments that are characterized as fact-based acquittals and the absence of any general finding of guilt may be extended to defeat any right to appeal. Once again, this extension should not be accepted. Here as in jury tried cases appeal should be available to resolve questions of law so long as reversal can be had without further trial proceedings.

The uncertainties opened up by these current decisions may be alleviated if the government anticipates an issue and raises it before jeopardy has attached. In United States v. Abraham, the government moved before trial for a ruling on the adequacy of the procedure that had been used in sealing recordings made pursuant to a court interception order. The district court responded with an order that finally suppressed and excluded the intercepted evidence from trial. The defendants sought dismissal of the government appeal on the ground that the government could not seek such a ruling in the absence of a pretrial motion to suppress by the defense. The court of appeals ruled that the procedure chosen by the government was proper, and that an appeal was available. The court of appeals ruled that the procedure chosen by the government was proper, and that an appeal was available. This device may be seized upon by the government to explore and attempt to expand its right to raise matters before trial whenever there is a risk that an issue may be disposed of after jeopardy has attached in a form that might be found on acquittal. It does not seem likely, however, that the government can anticipate many of the arguments that seem wrong to it and that yet may be found persuasive by a trial court.

96.46 Special findings
96.47 Abraham case