A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction

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I. INTRODUCTION

In 1894 in *McKane v. Durston*,[1] a unanimous United States Supreme Court concluded that no matter how grave the offense, a criminal defendant has no constitutional right to appeal.[2] Since the common law failed to recognize an absolute right to appeal, it followed that review by an appellate court was "not a necessary element of due process of law."[3] Justice Harlan found this principle to be so self-evident that "[a] citation of authorities upon the point is unnecessary."[4]

Nearly ninety years later, a majority of the Court appeared to reaffirm the holding of *McKane* by stating bluntly: "There is, of course, no constitutional right to an appeal . . . ."[5] This statement did not pass unchallenged, however. Justice Blackmun in a concurring opinion found it unnecessary to decide "whether there is or is not a constitutional right to a first appeal of a criminal conviction."[6] Justice Brennan, in his dissenting opinion, observed that the majority's statement rejecting the concept of a constitutional right to an appeal was not only unnecessary to the decision but was also arguably wrong.[7] If the

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This Article is dedicated to my colleagues at the Washington Appellate Defender Association.

1. 153 U.S. 684 (1894).

2. *Id.* at 687.

3. *Id.*

4. *Id.*

5. Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983). *See also* Abney v. United States, 431 U.S. 651, 656 (1977) (Supreme Court allowed plaintiff to appeal the denial of a pretrial motion solely on the ground that such an appeal met statutory requirements, not because of a right to appeal).

6. Jones v. Barnes, 103 S. Ct. 3308, 3314 (1983) (Blackmun, J., concurring).

7. *Id.* at 3315 n.1 (Brennan, J., dissenting).

issue were to come directly before the Supreme Court, Brennan concluded, *McKane* would probably be overruled, and the Court "would decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding."[8]

Since today virtually every state recognizes a right to appeal in "significant criminal cases," premised upon either a statute or a court rule, a case presenting the issue of whether the right to appeal is guaranteed by the federal Constitution is, as Justice Brennan observed, "unlikely to arise."[9] Thus, one may ask, "What difference does it make whether the right to appeal a criminal conviction is of constitutional magnitude?" In this Article, I will demonstrate that it makes a significant difference.

The framers of the Washington State Constitution believed that it made a difference, for they expressly included the right to appeal from a criminal conviction in article I, section 22 of the Declaration of Rights.[10] In 1889 Washington thus became the first state in the nation to constitutionalize explicitly the right to appeal in criminal cases. Since that time six more states have amended their constitutions to include a specific guarantee of the right to appeal in criminal cases. Utah[11] and Arizona[12] adopted provisions nearly identical to article I, section 22 of the Washington Constitution. The constitutional provisions of Michigan,[13] Louisiana,[14] Nebraska,[15] and New Mexico[16] are worded

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8. *Id.*

9. *Id.*

10. WASH. CONST. art. I, § 22 provides in part: "In criminal prosecutions, the accused shall have . . . the right to appeal in all cases . . . ." The Washington Constitution became effective on Nov. 11, 1889, the date of Washington's admission to the Union.

11. UTAH CONST. art. I, § 12 provides in part: "In criminal prosecutions, the accused shall have the right . . . to appeal in all cases."

12. ARIZ. CONST. art. II, § 24 provides: "In criminal prosecutions, the accused shall have . . . the right to appeal in all cases . . . ."

13. MICH. CONST. of 1908, art. II, § 19 provided: "In every criminal prosecution, the accused shall have the right . . . to have such reasonable assistance as may be necessary to perfect and prosecute an appeal." The Michigan Constitution adopted in 1963 contains an identically worded guarantee of the right to appeal. MICH. CONST. art. I, § 20.

14. LA. CONST. art. I, § 19 provides:

> No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

15. NEB. CONST. art. I, § 23 provides: "In all cases of felony the defendant shall have the right of appeal to the Supreme Court; and in capital cases such appeal shall operate

somewhat differently. Three other states, Wisconsin,[17] West Virginia,[18] and Florida,[19] have recognized a constitutional right to appeal in criminal cases through the process of judicial interpretation of less explicit clauses of their state constitutions.

The many consequences of "constitutionalizing" the right to appeal become evident only when one answers certain underlying questions about the nature of an appeal. What are the essential elements of an appeal? Why should we view the criminal defendant's right to appeal as an element of due process of law? Part II of this Article seeks to develop a theoretical due process

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as a supersedeas to stay the execution of the sentence of death, until further order of the Supreme Court."

16. N.M. CONST. art. VI, § 2 provides:

> Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal.

17. WIS. CONST. art. I, § 21 provides in part: "[W]rits of error shall never be prohibited, and shall be issued by such courts as the legislature designates by law." *See* Scheid v. State, 60 Wis. 2d 575, 853a [sic], 211 N.W.2d 458, 462 (1973) (per curiam) (the Wisconsin Supreme Court held that under art. I, § 21 of the Wisconsin Constitution there is a constitutional right to appeal in criminal cases that were appealable at the time the original 1848 state constitution was adopted), *overruled on other grounds*, State v. Van Duyse, 66 Wis. 2d 286, 224 N.W.2d 603 (1975).

18. The West Virginia Supreme Court has derived a state constitutional right to appeal from its state constitution's due process clause, W. VA. CONST. art. III, § 10, and from W. VA. CONST. art. III, § 17, which provides: "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial, or delay." *See* Rhodes v. Leverette, 239 S.E.2d 136, 139 (W. Va. 1977) (indigent criminal defendant has a right to appeal conviction); State *ex rel.* Johnson v. McKenzie, 226 S.E.2d 721, 724 (W. Va. 1976) (constitutional due process requires that a convicted defendant be furnished a transcript pursuant to the right of appeal); State *ex rel.* Bratcher v. Cooke, 188 S.E.2d 769, 770 (W. Va. 1972) (denial of an appeal by convicted defendant violates due process clauses of the state and federal constitutions, rendering the sentence void and unenforceable).

19. *Compare* FLA. CONST. art. V, § 4(b)(1) (appeal may be taken as a matter of right from final judgments or orders of trial courts) *with* former FLA. CONST. of 1956, art. V, § 3 (appeals may be taken as a matter of right from judgments imposing the death penalty, judgments passing directly on the validity of state and federal statutes and federal treaties, judgments passing directly on the state or federal constitutions, and from final judgments for validation of bonds and certificates of indebtedness). *See also* Crownover v. Shannon, 170 So. 2d 299, 301 (Fla. 1964) (the right to appeal from final judgments of trial courts has become a part of the Florida Constitution); State v. J.P.W., 433 So. 2d 616, 617 (Fla. Dist. Ct. App. 1983) (state has a constitutional right of appeal from judgments in juvenile cases). The holding in *J.P.W.* was met with disagreement in several subsequent cases. Mays v. State, 450 So. 2d 299 (Fla. Dist. Ct. App. 1984); State v. J.H., 450 So. 2d 232 (Fla. Dist. Ct. App. 1984); State v. A.M., 449 So. 2d 282 (Fla. Dist. Ct. App. 1983); State v. C.C., 449 So. 2d 280 (Fla. Dist. Ct. App. 1983).

framework for use in deciding when the right to appeal under article I, section 22 of the Washington Constitution has been unconstitutionally abridged or denied. Part III contains an analysis of oral argument as an essential element of the right to appeal. Finally, parts IV through VII discuss some of the possible consequences flowing from the constitutionalization of the right to appeal in criminal cases.

II. A Due Process Framework for the Constitutional Right to Appeal in Criminal Cases

A. The Common-Law Background

In *Griffin v. Illinois*,[20] Justice Frankfurter observed that neither the common law nor national historical experience lends any support to the contention that "due process of law" should be construed as including a right to appeal in criminal cases.

> [N]either the unfolding content of "due process" nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy. It is significant that no appeals from convictions in the federal courts were afforded . . . for nearly a hundred years; and, despite the civilized standards of criminal justice in modern England, there was no appeal from convictions . . . until 1907. Thus, it is now settled that due process of law does not require a State to afford review of criminal judgments.[21]

To Frankfurter, the right to appeal failed to qualify as an element of due process because it lacked a common-law pedigree and was only a relatively recent creation of statutory law.[22]

No right of appeal existed at common law.[23] The right, when recognized, was strictly of civil-law origin.[24] At common

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20. 351 U.S. 12 (1955).

21. *Id.* at 21 (Frankfurter, J., concurring).

22. In 1889 Congress first permitted appeals as a matter of right in all federal criminal cases in which a sentence of death had been imposed. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 656. A general right of appeal in federal criminal cases was not statutorily created until 1911. Act of Mar. 3, 1911, ch. 231, § 240, 36 Stat. 1157.

23. *See, e.g.*, Robinson v. Clements, 409 S.W.2d 215, 218 (Mo. 1966) (right of appeal conferred solely by statute); Fromm v. Sutton, 156 Neb. 411, 414, 56 N.W.2d 441, 443 (1953) (appellate jurisdiction can be conferred only in the manner provided by statute); Hager v. Weber, 7 N.J. 201, 206, 81 A.2d 155, 157 (1951) (appeals from judgments at law are unknown to the common law); Warren v. City of Cincinnati, 113 Ohio App. 254, 255, 173 N.E.2d 180, 181 (1959) (at common law the right to appeal was unknown).

24. *See* Buessel v. United States, 258 F.2d 811, 814 (2d Cir. 1919) (an appeal is a process of civil-law origin and was used to review errors of fact and law, as opposed to a

law, review of a trial court judgment of conviction could be obtained only if a defendant successfully petitioned for a "writ of error."[25] The critical difference between the civil-law right to an appeal and a common-law writ of error was that review was discretionary under the common-law procedure, but mandatory under the civil law. At the Washington State Constitutional Convention of 1889, the seven members of the Committee on the Constitutional Preamble and Bill of Rights, who drafted the Declaration of Rights, presumably were aware that there was no existing common-law right to appeal.[26] Perhaps they knew that earlier that year Congress had, for the first time, created a statutory right to appeal in federal criminal cases when a sentence of death was imposed.[27]

The committee submitted a draft Declaration of Rights to the convention on July 25, 1889, which contained the provision in article I, section 22 guaranteeing all criminal defendants an absolute right to appeal.[28] Although the committee studied three proposed constitutional models when drafting article I, section 22, the right to appeal in criminal cases did not devolve from any of them.[29] Thus, it can be inferred that the idea of constitutionalizing the right to appeal in criminal cases originated in the United States with this committee of seven, charged with the task of defining the inalienable natural rights of citizens of their state.

The Washington Supreme Court has suggested that an examination of "[t]he central principles of the common law" is an appropriate aid to state constitutional interpretation.[30] By

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writ of error, the common-law counterpart, which was used only to remedy errors of law).

25. *See, e.g.*, A. CARTER, A HISTORY OF THE ENGLISH COURTS 58 (7th ed. 1944); G. CRABB, A HISTORY OF ENGLISH LAW 185 (1929); 1 S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 244-45 (7th ed. 1956); L. ORFIELD, CRIMINAL APPEALS IN AMERICA 22-31 (1939); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 202-03 (4th ed. 1948); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 668 (2d ed. 1959).

26. *See* THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 at 491 (B. Rosenow ed. 1962) [hereinafter cited as JOURNAL]. The committee members were C.H. Warner (Chair), Gwin Hicks (Secretary), George Comegys, Francis Henry, Lewis Sohns, J.C. Kellog, and Frank M. Dallam. Of the seven, only Francis Henry had served previously as a delegate to the Walla Walla Constitutional Convention of 1878.

27. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 656.

28. JOURNAL, *supra* note 26, at 155-56.

29. The committee studied the Oregon Constitution of 1857, art. I, § 11; the Indiana Constitution of 1851, art. I, § 13; and the Hill Proposed Washington Constitution, art. I, § 11. *See* JOURNAL, *supra* note 26, at 511 n.37. None of these proposed constitutional provisions mentioned a right to appeal from a judgment of conviction.

30. State v. Ringer, 100 Wash. 2d 686, 691, 674 P.2d 1240, 1243 (1983).

interpreting our state constitutional provisions in a manner "consistent with their common law beginnings," the courts can best achieve the intentions of the framers.[31] But with respect to the right to appeal, there are no "common law beginnings" and no applicable "central principles of common law." The provision in article I, section 22 granting a constitutional right to appeal in all criminal cases marks a sharp break with the common-law past. Consequently, proper judicial interpretation of the scope of the constitutional right to appeal must reflect the framers' intention to transform a discretionary privilege into an absolute right.[32] Recognition of the historical background of the right to appeal, therefore, leads to the conclusion that the framers would have been vigorously opposed to any attempt, either legislative or judicial, to restrict a convicted defendant's right to appeal or to diminish the scope of appellate review.

B. Modern Procedural Due Process and the Right to Appeal in Criminal Cases

The modern judicial test for assessing the requirements of procedural due process, imposed upon the states by the fourteenth amendment, calls for a balancing of three distinct factors: (1) the private interest affected by the government's action; (2) the risk of erroneous deprivation of the interest if the procedural safeguard were absent; and (3) the fiscal and administrative burdens that the procedural safeguard would impose upon the government.[33] This formulation of the test of procedural due process necessarily implies that procedural due process "is not a technical conception with a fixed content unrelated to time, place and circumstances."[34] "[D]ue process is flexible," the Supreme Court tells us, "and calls for such procedural protections as the particular situation demands."[35]

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31. *Id.* at 699, 674 P.2d at 1247.

32. *See* State v. Schoel, 54 Wash. 2d 388, 392, 341 P.2d 481, 483 (1959) ("It is true that under the Federal constitution, appellate review is a privilege; however, the tenth amendment of the constitution of this state guarantees a 'right to [sic] appeal in all cases.' *In re* Woods v. Rhay, [54 Wash. 2d 36, 41], 338 P.2d 332, 336 (1959).").

33. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See also* Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981); Little v. Streater, 452 U.S. 1, 6 (1981); Ingraham v. Wright, 430 U.S. 651, 675 (1977).

34. Cafeteria & Restaurant Workers Union Local 493 v. McElroy, 367 U.S. 886, 895 (1961) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)).

35. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Applying the three-factor test of procedural due process to the "particular situation" of a convicted criminal defendant, one must first ask: What is the nature of the "private interests" at stake? In *In re Winship*,[36] the Supreme Court recognized that "[t]he accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[37] The key question, then, is whether the risk of erroneously incarcerating and stigmatizing the innocent justifies the administrative and financial burdens imposed on government by recognizing an absolute right to appeal in all criminal cases.

In *Winship*, although the three-part procedural due process test of *Mathews v. Eldridge*[38] had yet to be articulated, the risk of erroneous deprivation was the key to the Court's decision to require proof beyond a reasonable doubt in juvenile delinquency adjudications. Justice Harlan's concurrence in *Winship* is a clear harbinger of the *Mathews* procedural due process test. As Justice Harlan wrote, the procedural safeguard of proof beyond a reasonable doubt is required by the due process clause because a lesser standard would pose "a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent."[39] In the context of a criminal case, courts "do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty."[40] Harlan concluded that the procedural due process requirement of proof beyond a reasonable doubt was "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[41]

When one applies the three-factor *Mathews* procedural due process test to the safeguard of appellate review, the same interests of "immense importance" that were at stake in *Winship* argue heavily in favor of the conclusion that procedural due process requires recognition of an absolute right to an appeal. In assessing the risk of erroneous deprivation, however, it should be

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36. 397 U.S. 358 (1970).
37. *Id.* at 363.
38. 424 U.S. 319, 335 (1976). *See supra* text accompanying note 33.
39. 397 U.S. at 371 (Harlan, J., concurring).
40. *Id.* at 372 (Harlan, J., concurring).
41. *Id.*

noted that the procedural safeguard of a right to an appeal is qualitatively different from most other procedural safeguards. While the United States Supreme Court has held consistently that "some kind of hearing is required" before a citizen is finally deprived of a protected liberty or property interest,[42] a claim to a constitutional right to an appeal is premised upon the notion that procedural due process mandates that there be some kind of a *second* hearing.[43] A due process right to an appeal in a criminal case must necessarily rest on the premise that the first hearing—the trial—is not a sufficient procedural protection, even though the trial itself contains procedural protections such as notice of the charge against the defendant, representation by counsel, trial by jury, the right to confront and cross-examine all witnesses against the accused, and the requirement of proof beyond a reasonable doubt.

The trial judge is the only actor in the criminal justice system who has the power to ensure that the accused actually receives all of the other procedural due process safeguards guaranteed by the federal Bill of Rights and the rules of evidence. If the trial judge fails to protect the defendant's rights adequately, then unless the defendant has recourse to appellate review, all of the theoretically guaranteed constitutional rights may prove worthless. Unless the concentrated powers of the trial judge are to go unchecked, some type of a second hearing—an appeal—is constitutionally required by the due process clause of the fourteenth amendment.

An absolute right to appeal functions as a check against the erroneous judgment, or the intentional despotism, of the solitary trial judge. As Justice Brennan recently observed:

> There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.[44]

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42. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16 (1977) (citing Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974)).

43. *See generally* Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267 (1975).

44. Jones v. Barnes, 103 S. Ct. 3308, 3315 n.1 (1983) (Brennan, J., dissenting). *See*

Appeal as a matter of right in criminal cases should be a guaranteed element of procedural due process simply because two heads, or three, or more, are better than one. Or as the American Bar Association Section on Judicial Administration stated: "The principal reason for having appellate courts is to provide an opportunity for several minds to check the trial decisions made by one mind."[45] In addition, the trial judge's perception of a criminal trial is very different from the perspective of an appellate court.

The trial judge is on the front line and, consequently, his decisions must be made rapidly. The appellate court is not under any pressure to decide an appeal quickly.

> [The] trial judge receives evidence serially over a period of time as testimony and exhibits are presented, [but] an appellate court begins with a completed record that presents at once all relevant factual materials. The legal issues tend to come into focus in a trial as the evidence unfolds. An appeal begins with a shaped set of legal questions.[46]

These factors, which tend to increase the risk of error in the trial court, are mitigated by the requirement that every defendant be afforded the right to appellate review by a court with more minds, more time, and a comprehensive and focused picture of a completed trial.

In summary, a modern due process analysis of the procedural safeguards afforded by an absolute right to appeal in all criminal cases leads to the conclusion that the risk of convicting the innocent, even when compared to the considerable financial and administrative burdens of maintaining the appellate courts, more than justifies the imposition of a requirement that every defendant be guaranteed the right to meaningful appellate review. This conclusion is in accord with the recommendations

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also Young v. Konz, 88 Wash. 2d 276, 558 P.2d 791 (1977):

> Due process of the law requires a fair trial for each defendant; the fair trial guaranty is protected *through the appeals process.* It is conceded that a fair trial may in certain cases not be afforded by a nonlawyer judge; but we may properly point out that it is also true that a lawyer judge may commit error and thereby deny a fair trial. The due process safeguard in both cases is appeal
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Id. at 280, 558 P.2d at 793 (emphasis in original).

45. ABA, Section of Judicial Administration, *Internal Operating Procedures of Appellate Courts* 14 (1961).

46. STANDARDS FOR CRIMINAL JUSTICE, Criminal Appeals, Standard 21-1.2, commentary (Aug. 9, 1978).

made by the ABA Task Force on Criminal Appeals: "The possibility of appellate review of trial court judgments should exist for every criminal conviction. It is undesirable to have any class of cases in which trial court determinations are unreviewable."[47] The Task Force observed that today there is "no dissent from the principle that every convicted defendant should be afforded the opportunity to obtain one judicial review of the conviction by a tribunal other than the one in which the defendant was tried."[48] However, just as Justice Brennan noted in a recent dissenting opinion,[49] the Task Force recognized that "[s]o long as there is no change in the universal recognition of a right to appeal, there will be no occasion to obtain any authoritative judicial determination" whether there is a federal constitutional right to an appeal in a criminal case.[50]

In Washington State, however, we need not be concerned with this federal issue, for article I, section 22 of the Washington Constitution expressly guarantees the right to appeal in all criminal cases. Bearing in mind that the essential function served by the right to appeal is to reduce the risk of erroneously convicting the innocent, we may now examine some of the consequences of constitutionalizing the right to appeal in criminal cases.

III. A Constitutional Right to Present Oral Argument

What are the essential attributes of an appeal? At the very least, they should include the right to submit a written brief to an appellate court and the right to make oral argument before an appellate tribunal. In recent years, however, there has been a growing trend towards elimination of oral argument in selected cases. In Washington State, where the right to appeal in criminal cases is of constitutional magnitude, the question arises whether the elimination of oral argument in criminal cases would be unconstitutional.

On June 14, 1984, the Washington Supreme Court promulgated a new Rule of Appellate Procedure, which created a

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47. Standards for Criminal Justice, Criminal Appeals, Standard 21-1.1 (Aug. 9, 1978).

48. Standards for Criminal Justice, Criminal Appeals, Standard 21-1.1, commentary (Aug. 9, 1978).

49. Jones v. Barnes, 103 S. Ct. 3308, 3315 n.1 (1983) (Brennan, J., dissenting). *See supra* text accompanying note 44.

50. Standards for Criminal Justice, Criminal Appeals, Standard 21-1.1, commentary (Aug. 9, 1978).

"Motion on the Merits."[51] If granted, a motion pursuant to new

51. WASH. R. APP. P. 18.14 provides as follows:
MOTION ON THE MERITS
(a) *Generally.* The appellate court may, on its own motion or on motion of a party, affirm a decision or any part thereof on the merits in accordance with the procedures defined in this rule. A motion by a party pursuant to this rule should be denominated a "motion on the merits." The general motion procedures defined in Title 17 apply to a motion on the merits only to the extent provided in this rule.
(b) *Time.* A party may submit a motion on the merits any time after the appellant's brief has been filed. The appellate court on its own motion may, at any time, set a case on the motion calendar for disposition and enter orders the court deems appropriate to facilitate the hearing and disposition of the case. The clerk will notify the parties of the setting and of any orders entered by the court.
(c) *Content, Filing, and Service; Response.* A motion on the merits should be a separate document and should not be included within a party's brief on the merits. The motion should comply with rule 17.3(a), except that material contained in a brief may be incorporated by reference and need not be repeated in the motion. The motion should be filed and served as provided in rule 17.4. A response may be filed and served as provided in rule 17.4(e) and may incorporate material in a brief by reference.
(d) *Who Decides Motion.* A motion on the merits shall be determined initially by a judge or commissioner of the appellate court.
(e) *Considerations Governing Decision on Motion.* A motion on the merits will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (1) are clearly controlled by settled law, (2) are factual and supported by the evidence, or (3) are matters of judicial discretion and the decision was clearly within the discretion of the trial court.
(f) *Oral Argument.* A motion on the merits may be denied without oral argument if the case obviously requires full appellate review. In all other instances rule 17.5 applies to a motion on the merits, except that oral argument will ordinarily be granted for a motion on the merits that is to be decided initially by the judge or judges. If the appellate court initiates the motion on the merits, the parties will be given an opportunity to submit briefs on the motion before the date set for oral argument on the motion.
(g) *Form of Decision Denying Motion.* Rule 17.6 is applicable to a decision denying a motion on the merits.
(h) *Form of Decision Granting Motion.* A ruling or decision granting a motion on the merits will be concise and will include a description of the facts sufficient to place the issues in context, a statement of the issues, and a resolution of the issues with supportive reasons.
(i) *Review of Ruling.* A ruling or decision denying a motion on the merits or referring the motion to the judges for decision pursuant to rule 17.2(b) is not subject to review by the judges. A ruling or decision granting a motion on the merits by a single judge or commissioner is subject to review as provided in rule 17.7.
(j) *Nondisqualification of Judge.* Participation in a ruling or decision on a motion on the merits does not thereby disqualify a judge from further participation in the case.
(k) *Procedure Optional with Court.* The Supreme Court or any division of the

RAP 18.14 permits an appellate court commissioner to affirm all or part of the decision of the trial court.[52] The rule instructs the commissioner to grant the motion in those appeals found to be "clearly without merit."[53] The commissioner will normally hear oral argument before deciding a motion on the merits.[54] If the commissioner grants the motion, the losing party may move for modification of the commissioner's ruling by a panel of judges.[55] Ordinarily, however, a party is not allowed oral argument on a motion to modify a commissioner's ruling.[56] Consequently, under RAP 18.14, a party can lose an appeal without ever having had an opportunity to present oral argument to a three-judge panel of the court of appeals.

Rule 18.14 purports to apply to both criminal and civil cases. The question remains, however, whether the constitutional guarantee of a right to appeal in all criminal cases renders the new rule unconstitutional as applied to criminal cases. The answer should be yes.

Analytically, the issue is best resolved by applying the procedural due process test of *Mathews v. Eldridge*. Does oral argument reduce the risk of erroneously affirming the convictions of innocent defendants? If it does, does the reduction of risk justify the increased administrative and financial burdens imposed on appellate courts if oral argument is held to be a mandatory element of procedural due process?

Appellate judges have repeatedly attested to the significance of oral argument. Their remarks indicate their clear judgment that a good oral argument can often be the decisive factor in an appeal. Justice Brennan has stated that "oral argument is the absolutely indispensable ingredient of appellate advocacy . . . . [O]ften my whole notion of what a case is about crystallizes at oral argument."[57] Chief Justice Hughes wrote that:

> the desirability . . . of a full exposition by oral argument . . . is not to be gainsaid, for it is a great saving of time of the court

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Court of Appeals may, by general order, decide not to use the procedure defined by this rule.

52. WASH. R. APP. P. 18.14(a).

53. WASH. R. APP. P. 18.14(e).

54. WASH. R. APP. P. 18.14(f). *See also* WASH. R. APP. P. 17.5.

55. WASH. R. APP. P. 18.14(i). *See also* WASH. R. APP. P. 17.7.

56. WASH. R. APP. P. 17.5(b).

57. R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 358 (1981) (quoting HARVARD LAW SCHOOL, OCCASIONAL PAMPHLET No. 9, at 22-23 (1967)).

> in the examination of extended records and briefs, to obtain the grasp of the case that is made possible by oral discussion and to be able more quickly to separate the wheat from the chaff.[58]

Justice Frankfurter believed that "[o]ral argument frequently has a force beyond what the written word conveys."[59] Justice Harlan advised appellate lawyers: "[Y]our oral argument on an appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves."[60] Similarly, the late Arthur T. Vanderbilt, former Chief Justice of the New Jersey Supreme Court opined: "[C]ases that are not argued well are not well decided."[61]

Whenever the elimination of oral argument has been proposed as a means of expediting the appellate process, it has met with fervent opposition. In 1975 the Commission on Revision of the Federal Court Appellate System reported its conclusions on the subject of eliminating oral argument:

> [T]he Commission recognizes the importance of safeguarding the right to oral argument in all cases where it is appropriate. Oral argument is an essential part of the appellate process. It contributes to judicial accountability, it guards against undue reliance upon staff work, and it promotes understanding in ways that cannot be matched by written communication. It assures the litigant that his case has been given consideration by those charged with deciding it. The hearing of argument takes a small proportion of any appellate court's time; the saving of time achieved by discouraging argument is too small to justify routinely dispensing with oral argument.[62]

Recently, in *In re Marriage of Wolfe*,[63] the Washington

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58. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 62-63 (1928).

59. Rosenburg v. Denno, 346 U.S. 271, 272 (1953) (Frankfurter, J., dissenting).

60. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 11 (1955).

61. Address by Arthur T. Vanderbilt, American Bar Association Conference of Chief Justices (Sept. 1949), *reprinted in* 9 F.R.D. 629, 639 (1950).

62. Commission on Revision of the Federal Court Appellate System, Proposed Revision (June 1975), *reprinted in* 67 F.R.D. 195, 254-55 (1975). The Commission's report led to the subsequent adoption of rule 34 of the Federal Rules of Appellate Procedure. That rule sets up a presumption that oral argument shall be granted in all cases unless a panel of three judges, after examination of the briefs and record, unanimously concludes that oral argument is not needed. Even then, the court must provide the parties with an opportunity to file a statement of reasons why oral argument should be heard.

63. 99 Wash. 2d 531, 663 P.2d 469 (1983).

Supreme Court held that a show cause summary affirmance procedure used by Division Three of the Washington Court of Appeals did not violate the constitutional rights of the appellant.[64] However, the court's ruling was accompanied by a significant caveat: "We approve the show cause procedure in appropriate civil matters; we reserve judgment, however, on the propriety of its use in criminal cases."[65] Thus, the supreme court acknowledged inferentially that the accused's constitutional right to an appeal under article I, section 22 may mandate a different result if the appellate courts attempt to eliminate oral argument in criminal cases. Now that RAP 18.14 has been adopted, the question of whether an appellate court may affirm a criminal conviction without affording the defendant the opportunity to make oral argument before a panel of judges is ripe for adjudication.

It is not enough, however, simply to recognize that the right to an appeal encompasses the right to make an oral argument. Courts must also recognize that the content of that oral argument cannot be unreasonably restricted. Unfortunately, the recently promulgated "motion on the merits" rule restricts the content of the appellant's argument. Even if the appellate court decides to permit the appellant a chance to present oral argument to a panel of judges, the focus of the appellate court's inquiry at that juncture is unreasonably narrowed, and the appellant's attorney is not at liberty to address the merits of the appeal.

Rule of Appellate Procedure 18.14 provides that in deciding whether an appeal is "clearly without merit," the appellate court is to consider all relevant factors, including three specific issues: "[W]hether the issues on review (1) are clearly controlled by settled law, (2) are factual and supported by the evidence, or (3) are matters of judicial discretion and the decision was clearly within the discretion of the trial court."[66] But a limited inquiry into these three areas is not the equivalent of an inquiry into the merits of a criminal appeal. The text of RAP 18.14 concedes this much by differentiating between appellate review of a motion on the merits and "*full* appellate review."[67]

Although the rule appears to be designed to weed out frivolous appeals, the language of RAP 18.14(e) is so broad that it

64. *Id.* at 536, 663 P.2d at 472.
65. *Id.* at 532, 663 P.2d at 469-70.
66. WASH. R. APP. P. 18.14(e).
67. WASH. R. APP. P. 18.14(f) (emphasis added).

encompasses many nonfrivolous appeals. Rule 18.9 provides that the appellate court "will, on motion of a party, dismiss review of a case . . . if the application for review is frivolous, moot, or solely for the purpose of delay."[68] Since the power to dismiss frivolous appeals was already codified in RAP 18.9, the promulgation of the motion on the merits rule reflects a desire to eliminate other nonfrivolous appeals.

Washington courts have generally defined a frivolous appeal as one that presents "no debatable issues upon which reasonable minds might differ, and [that] . . . is so totally devoid of merit that there is no reasonable possibility of reversal."[69] In the context of a civil case, when the right to appeal is not premised upon the state constitution, the Washington Supreme Court has approved a number of factors for courts to consider when deciding whether an appeal is "frivolous":

> (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous . . . .[70]

If all doubts are to be resolved in favor of a civil appellant, then a fortiori, in criminal cases the presumption should be even stronger that the defendant's constitutional right to appeal should not be forfeited on grounds of frivolousness.

A comparison of this definition of "frivolousness" with the criteria set forth in RAP 18.14(e) reveals that the rule permits the summary dismissal of nonfrivolous appeals. For example, according to the rule, a motion on the merits should be granted if the appeal presents issues that are "clearly controlled by settled law."[71] If this rule is routinely applied, the evolution of the law will grind to a halt. It would no longer be possible to overrule past precedents in the light of a reassessment of "settled"

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68. WASH. R. APP. P. 18.9(c).

69. Streater v. White, 26 Wash. App. 430, 435, 613 P.2d 187, 191 (1980). *See also* Estate of Pesterkoff, 37 Wash. App. 418, 680 P.2d 1062 (1984); Langston v. Huffacker, 36 Wash. App. 779, 678 P.2d 1265 (1984); Dearborn Lumber Co. v. Upton Enter., 34 Wash. App. 490, 662 P.2d 76 (1983); Allen v. Seattle Police Guild, 32 Wash. App. 56, 645 P.2d 1113 (1982), *aff'd*, 100 Wash. 2d 361, 670 P.2d 246 (1983); Seattle v. Snoj, 28 Wash. App. 613, 625 P.2d 179 (1981).

70. Millers Casualty Ins. Co. v. Briggs, 100 Wash. 2d 9, 15, 665 P.2d 887, 891 (1983) (quoting Streater v. White, 26 Wash. App. 430, 434-35, 613 P.2d 187, 191 (1980)).

71. WASH. R. APP. P. 18.14(e)(1).

principles.

Imagine what would have happened if the United States Supreme Court had had a "motion on the merits" rule when attorney Abe Fortas filed his certiorari petition in the landmark case of *Gideon v. Wainwright*.[72] The question presented by the certiorari petition was: "Should this Court's holding in *Betts v. Brady* be reconsidered?"[73] The responding attorney general representing the State of Florida would have quickly filed a motion on the merits requesting summary dismissal on the ground that Gideon's case was "clearly controlled by settled law," for, of course, Gideon's case was controlled by *Betts v. Brady*.[74]

The issue was, however, whether the Supreme Court should "unsettle" the issue and change the firmly established principle that an indigent accused is *not* constitutionally entitled to the appointment of counsel in a state court criminal trial. Given the existence of a rule like RAP 18.14(e), "clearly settled law" would be unassailable, and *Betts v. Brady* might still be good law today.

Similarly, in *State v. Ringer*,[75] the Washington Supreme Court re-examined a search and seizure issue that was "clearly controlled by settled law." Yet, the court chose to overrule an entire line of its own decisions and refused to follow United States Supreme Court precedents in order to "return to the protections of [the state] constitution and to interpret them consistent with their common law beginnings."[76] By precluding the appellant from raising the question whether prior settled case law should be overturned, RAP 18.14(e)(1) would have effectively nipped the *Ringer* decision in the bud. Thus, the motion on the merits rule conflicts with Justice Douglas's rosy pronouncement that "happily, all constitutional questions are always open."[77] To the contrary, under RAP 18.14(e)(1), once "clearly settled," a constitutional issue is forever closed to re-examination.

Rule 18.14(e)(2) sanctions the summary dismissal of all appeals in which the issues are "factual and supported by the evidence." This provision of the rule collides head-on with the

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72. 372 U.S. 335 (1963).
73. *Id.* at 338 (citations omitted).
74. *Id.* at 338-39.
75. 100 Wash. 2d 686, 674 P.2d 1240 (1983).
76. *Id.* at 699, 674 P.2d at 1247.
77. *Gideon*, 372 U.S. at 346 (Douglas, J., concurring).

"clearly settled" principle that when constitutional rights are at issue, the appellate court is obligated to make an independent de novo evaluation of the testimony and to reach its own conclusions as to the facts.[78] Moreover, appellate judges frequently reach quite different factual conclusions. For example, in *State v. Imus*,[79] two judges were convinced that "the facts of this case comport with the standards" for honoring a criminal defendant's request that he be allowed to represent himself.[80] In a strongly worded dissent, however, one judge protested that his colleagues had ignored those portions of the record that did not support the majority's factual conclusions.[81]

Faced with the language of RAP 18.14(e)(2), the appellant in *Imus* would have been unable to argue the merits of his appeal. Since the issue on appeal was "factual" and, arguably, was "supported by the evidence," the appeal would have been dismissed without issuance of a decision on the merits, even though appellate courts are obligated to make a de novo determination of the facts that apply to the exercise of constitutional rights. No appellate judge would ever reach the point of deciding whether, in fact, the defendant's sixth amendment right to counsel had been violated. Instead, the appellate court would simply dismiss on the ground that the issue was "factual" and that there was evidence to support the trial judge's determination.

Finally, RAP 18.14(e)(3) requires the dismissal of appeals that concern "matters of judicial discretion" when "the decision was clearly within the discretion of the trial court." But the law libraries are full of reported decisions in which appellate court judges disagreed violently as to whether judicial discretion was abused. Rather than air such disagreement between appellate judges, RAP 18.14(e)(3) opts instead to avoid deciding these cases altogether.

In *State v. Saltarelli*,[82] the Washington Supreme Court

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78. *See, e.g.*, State v. Daugherty, 94 Wash. 2d 263, 269, 616 P.2d 649, 652 (1980); State v. Sweet, 90 Wash. 2d 282, 289, 581 P.2d 579, 583 (1978); State v. Byers, 88 Wash. 2d 1, 11, 559 P.2d 1334, 1339 (1977) (Revelle, J., concurring); State v. Smith, 72 Wash. 2d 479, 481, 434 P.2d 5, 7 (1967).

79. 37 Wash. App. 170, 679 P.2d 376 (1984).

80. *Id.* at 177, 679 P.2d at 381.

81. *Id.* at 181, 679 P.2d at 383 (Ringold, J., dissenting). *Compare id.* at 190, 679 P.2d at 388 (Ringold, J., dissenting) ("I cannot find in the record before us an unequivocal request to proceed to trial without counsel . . . .") *with id.* at 181, 679 P.2d at 382 ("We are convinced that Imus' request to represent himself was unequivocal . . . .").

82. 98 Wash. 2d 358, 655 P.2d 697 (1982).

reversed a unanimous decision of the court of appeals[83] and held that the trial judge abused his discretion in admitting evidence of a prior offense committed by the defendant. The supreme court justices were not unanimous in their judgment, however, for three of the nine justices dissented. Thus, a total of twelve appellate judges examined the issue in this case: six found an abuse of discretion; six found no abuse of discretion. Under RAP 18.14(e)(3), however, the case might never have been decided at all, had a commissioner viewed the matter as "clearly within the discretion of the trial court."[84]

This overview of the provisions of RAP 18.14(e) demonstrates that even if an appellate court permits oral argument to a panel of judges when deciding a motion on the merits, the appellant's attorney will not have an opportunity to argue the true merits of the case. Instead, counsel will be constrained to argue that the appeal is being improperly classified. Argument on a motion on the merits will focus merely upon whether the instant appeal falls within the purview of RAP 18.14(e).

If appellant's counsel concedes that the issues raised are clearly controlled by settled law, or largely factual, or governed by an abuse of discretion standard, the attorney will risk losing the opportunity to obtain "full appellate review" on the merits of the case. In responding to a motion on the merits, the appellant cannot effectively argue, "Even if it does fall within subsection (e), we should still win." The appellant is foreclosed from arguing that settled case law should be overturned, that the facts were incorrectly determined, or that judicial discretion was abused. The appellant's oral argument on a motion on the merits is confined to an attempt to rebut the assertion that the case may be pigeonholed into one of the three categories of appeals described by RAP 18.14(e).

Rule 18.14(e) insidiously restricts the scope of appellate review. Even if the appellant is afforded oral argument on the motion, this argument does not reach the merits of the case because the appellant is not yet entitled to address the merits. The rule thus threatens to destroy the defendant's constitu-

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83. 29 Wash. App. 565, 629 P.2d 1344 (1981), *rev'd*, 98 Wash. 2d 358, 655 P.2d 697 (1982).

84. For another example of radically different views on the subject of abuse of judicial discretion, see State v. Adams, 76 Wash. 2d 650, 458 P.2d 558 (1969) (court split 5-4 on the issue of whether the trial judge erred in admitting gruesome autopsy photographs of a murder victim), *rev'd on other grounds*, 403 U.S. 947 (1971).

tional right to an appeal. The rule demands that the appellant prove that the appeal should not be categorized as a member of one of three classes of appeals. These classes are so broadly defined that they include a host of nonfrivolous appeals. But until this threshold barrier is surmounted, the right to appeal is held hostage. Failure to meet the test of RAP 18.14 deprives the appellant of any opportunity to argue the merits of the appeal—to argue that he did not receive a fair trial.

IV. Waiver and Abandonment of the Right to Appeal

Because the right to appeal in criminal cases is of constitutional magnitude, the Washington Supreme Court has taken a very strict view of waivers of the right to appeal.[85] The right to appeal "is to be accorded the highest respect," and is not to be diluted by any lax application of the doctrine of waiver.[86] The court has placed the burden expressly on the state to prove "that a convicted defendant has made a voluntary, knowing, and intelligent waiver of the right to appeal."[87]

The fact that the sentencing judge advised the defendant of the right to appeal, as required by Criminal Rule 7.1(b), will not, standing alone, be sufficient to prove that the defendant waived the constitutional right to appeal by failing to file timely notice of appeal.[88] In *State v. Sweet*,[89] the defendant was erroneously advised by a jailer that he could get legal assistance in filing his appeal from legal services lawyers after his transfer from county jail to prison. By the time he arrived at the prison, the thirty-day period for filing notice of appeal[90] had expired. Legal services lawyers then filed a post-conviction relief petition on behalf of the defendant, seeking reinstatement of his right to

85. *See, e.g.*, State v. Ashbaugh, 90 Wash. 2d 432, 583 P.2d 1206 (1978); State v. Sweet, 90 Wash. 2d 282, 581 P.2d 579 (1978).

86. State v. Sweet, 90 Wash. 2d 282, 286-87, 581 P.2d 579, 581-82 (1978).

87. *Id.* at 286, 581 P.2d at 581. *See* State v. Ashbaugh, 90 Wash. 2d 432, 439, 583 P.2d 1206, 1210 (1978).

88. "[I]n addition to showing strict compliance with CrR 7.1(b) by reading appeal rights to a defendant, the circumstances must at least reasonably give rise to an inference the defendant understood the import of the court rule and did in fact willingly and intentionally relinquish a known right." State v. Sweet, 90 Wash. 2d 282, 287, 581 P.2d 579, 582 (1978). "[T]here is no presumption in favor of waiver of the right to appeal, and the reading of CrR 7.1(b) to a convicted defendant may not in itself give rise to such a presumption." *Id.* at 288, 581 P.2d at 582.

89. 90 Wash. 2d 282, 581 P.2d 579 (1978).

90. *See* Wash. R. App. P. 5.2.

appeal. At an evidentiary hearing, the superior court denied the relief requested. The supreme court reversed the superior court and reinstated the defendant's right to appeal, more than three years after the original date of conviction.[91] The court noted that the defendant's trial counsel had withdrawn following sentencing, without filing notice of appeal.[92] This fact, coupled with the fact that the defendant was advised by a jailer to wait until he arrived at prison to file his appeal, led the Washington Supreme Court to conclude that "he did not knowingly and willingly relinquish his right to appeal."[93]

In *State v. Ashbaugh*,[94] the defendant's attorney filed a notice of appeal on the last day of the thirty-day filing period, but failed to post the required $25 filing fee on that day. The superior court clerk returned the notice of appeal with a letter stating that the required filing fee had not been paid. Counsel then refiled the notice of appeal with the filing fee, one day past the deadline for filing notice of appeal.[95] The court of appeals dismissed the defendant's appeal on the ground that it was filed one day late. The Washington Supreme Court reversed, stressing that the right to appeal a criminal conviction is a constitutional right and noting that a criminal defendant should not be penalized for the oversight of his attorney.[96] The case was remanded to the court of appeals for a determination of whether the defendant's alleged "abandonment" of his appeal was "knowing, intelligent and voluntary."[97]

Although the prosecution bears a heavy burden of proof to show waiver of the right of appeal, the Washington Supreme Court has held, on one occasion, that a valid waiver was proved.[98] Furthermore, a plea of guilty ordinarily constitutes a waiver of the right to appeal.[99] On the other hand, a plea of

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91. 90 Wash. 2d at 290, 581 P.2d at 584.

92. *Id.* at 284, 581 P.2d at 580.

93. *Id.* at 290, 581 P.2d at 584.

94. 90 Wash. 2d 432, 583 P.2d 1206 (1978).

95. *Id.* at 433, 583 P.2d at 1207.

96. *Id.* at 439, 583 P.2d at 1210.

97. *Id.*

98. *In re* Hanson, 94 Wash. 2d 798, 620 P.2d 95 (1980) (trial court twice led defendant through information about his right to appeal, defendant indicated an unequivocal understanding of his rights, and defendant was at all times effectively represented by counsel).

99. State v. Majors, 94 Wash. 2d 354, 356, 616 P.2d 1237, 1237 (1980); Young v. Konz, 88 Wash. 2d 276, 283, 558 P.2d 791, 794 (1977); State v. Eckert, 123 Wash. 403, 404, 212 P. 551, 552 (1923).

guilty does not preclude an appeal when collateral issues are raised, such as the validity of the charging statute, the sufficiency of the information, the jurisdiction of the court, or the circumstances under which the plea was made.[100]

The Washington Supreme Court's zealous defense of the right to appeal against "waiver" is in conflict, however, with the court's traditional approach towards defendants who escape from custody while their appeals are pending. In *State v. Mosley*,[101] the court endorsed the "well settled" rule that "where the defendant flees from the jurisdiction pending the appeal, he thereby waives his right to prosecute the appeal, unless within a time fixed he returns and surrenders himself into the custody of the proper officer or gives bail for his appearance."[102]

Oddly enough, the decision in *Mosley* is pure dictum in at least one sense. The defendant in *Mosley* did receive direct appellate review of his conviction by the court of appeals, which affirmed his conviction.[103] Mosley then petitioned for review in the Washington Supreme Court, but after the petition was granted, Mosley escaped from the custody of the Department of Social and Health Services.[104] The Washington Supreme Court concluded that it would not review the merits of Mosley's petition and entered an order conditionally dismissing the case unless Mosley surrendered himself before the court's opinion was filed.[105] Consequently, Mosley was denied a second level of appellate review by the supreme court, but he was not denied an appeal altogether.

Furthermore, Mosley's appellate counsel acknowledged to the Washington Supreme Court that dismissal of the appeal of an escaped convict was the "prevailing practice," and counsel

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100. *See* State v. Majors, 94 Wash. 2d 354, 356, 616 P.2d 1237, 1238 (1980); Young v. Konz, 88 Wash. 2d 276, 283, 558 P.2d 791, 794 (1977); State *ex rel.* Fisher v. Bowman, 57 Wash. 2d 535, 536, 358 P.2d 316, 317 (1961); State v. Rose, 42 Wash. 2d 509, 514, 256 P.2d 493, 497 (1953).

101. 84 Wash. 2d 608, 528 P.2d 986 (1974).

102. *Id.* at 609, 528 P.2d at 986-87. *Accord* State *ex rel.* Soudas v. Brinker, 128 Wash. 319, 323, 222 P. 615, 616 (1924); State v. Handy, 27 Wash. 469, 470, 67 P. 1094, 1094 (1902); State v. Nason, 20 Wash. App. 433, 434, 579 P.2d 366, 366 (1978). *Cf.* State v. Beck, 23 Wash. App. 640, 641-42, 598 P.2d 400, 401 (1979) (defendant was convicted in district court, appealed, but did not show up for trial de novo in superior court; his appeal from the district court was dismissed).

103. 84 Wash. 2d at 608, 528 P.2d at 986.

104. *Id.* at 609, 528 P.2d at 986.

105. *Id.* at 611, 528 P.2d at 988.

did not question the constitutionality of that practice.[106] The issue of whether a convicted defendant forfeits the right to one direct appeal when he escapes from custody, therefore, was not decided in *Mosley*, and no constitutional argument premised upon article I, section 22 was raised before the court. The court of appeals, however, subsequently applied the *Mosley* dismissal rule to a direct appeal in *State v. Nason*.[107] The constitutionality of the result in *Nason* is now cast in doubt by the Washington Supreme Court's recent comments in *State v. Koloske*.[108]

In *Koloske*, the supreme court again dismissed the case of a convicted defendant on escape status. The court took pains, however, to differentiate between the position of a defendant whose case was on direct appeal in the court of appeals and a defendant who had already obtained review in the court of appeals and who sought further discretionary review in the Washington Supreme Court:

> Koloske's counsel argues that because a defendant has a constitutional right to an appeal in this state, an appeal cannot be dismissed unless the State proves a knowing and voluntary waiver of the right. In Koloske's case, however, he has already completed his appeal by obtaining review as a matter of right in the Court of Appeals. He is now seeking, in this court, discretionary review of the Court of Appeals decision. Our refusal to proceed with discretionary review in the absence of defendant does not raise the constitutional issue.[109]

By recognizing the distinction between direct appeal as a matter of constitutional right and discretionary review, the *Koloske* decision seems to imply that the applicability of *Mosley* to cases pending on direct appeal may be re-examined in a later case where the constitutional issue is squarely presented. Should such a re-examination occur, it would be useful for the Washington Supreme Court to note that Washington case law was derived from older decisions of the United States Supreme Court. *State v. Handy*,[110] the first Washington case to address this issue, relied principally upon *Smith v. United States*.[111]

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106. *Id.* at 611, 528 P.2d at 987.

107. 20 Wash. App. 433, 434, 579 P.2d 366, 366 (1978) (direct appeal dismissed on prosecutor's motion because of defendant's escape from work release facility).

108. 100 Wash. 2d 889, 676 P.2d 456 (1984).

109. *Id.* at 892, 676 P.2d at 458-59 (footnote and citations omitted).

110. 27 Wash. 469, 67 P. 1094 (1902).

111. 94 U.S. 97 (1876).

Smith is distinguishable, however, because there is no federal constitutional right to appeal equivalent to article I, section 22 of the Washington Constitution.

The cases that support the rule of dismissal for appellants who escape rely primarily on three rationales: waiver, mootness, and contempt.[112] The "waiver" rationale is the least defensible, for it is ludicrous to assert that the escaping defendant is making a conscious, voluntary, and intelligent decision to forfeit the right to an appeal. If every incarcerated convict were specifically advised that an escape would result in the loss of the right to appeal, then it might be said that every escapee made a voluntary decision to give up the right to appellate review of the conviction. But such advisements are not made, and it is nonsensical to claim that a convict going over the wall is pondering the legal consequences of the action on a pending appeal.

The "mootness" rationale was first advanced by the United States Supreme Court in *Smith v. United States*,[113] when Chief Justice Waite explained why the Court would not decide a case in which the defendant had escaped from custody:

> If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.[114]

The United States Supreme Court reiterated the mootness rationale in *Eisler v. United States*.[115] A majority of the *Eisler*

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112. See Estelle v. Dorrough, 420 U.S. 534 (1975), for a discussion of the dubious deterrent against escape created by art. 44.09 of the Texas Code of Criminal Procedure, which provided:

> If the defendant, pending an appeal in the felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the court shall, on motion of the State's attorney, dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped; and in cases where the punishment inflicted by the jury is death or confinement in an institution operated by the Department of Corrections for life, the court may in its discretion reinstate the appeal if the defendant is recaptured or voluntarily surrenders within thirty days after such escape.

Estelle, 420 U.S. at 535 n.1 (quoting TEX. CODE CRIM. PROC. ANN. art. 44.09).

113. 94 U.S. 97 (1876).

114. *Id.*

115. 338 U.S. 189 (1949) (per curiam).

Court decided that because the petitioner's flight from the country might render any judgment on the merits moot, it was necessary to remove the case from the Court's docket indefinitely, pending Eisler's return to the United States.[116] However, the Court did not dismiss the case. Instead, the Court directed that "after this term the cause will be left off the docket until a direction to the contrary shall issue."[117]

Justice Frankfurter dissented, arguing that Eisler's case should be permanently dismissed and not simply placed in limbo pending Eisler's possible return.[118] Frankfurter insisted that Eisler's flight deprived the Court of jurisdiction to decide the case because the judgment of the Court was unenforceable:

> If legal questions brought by a litigant are to remain here, the litigant must stay with them. When he withdraws himself from the power of the Court to enforce its judgment, he also withdraws the questions which he had submitted to the Court's adjudication. The questions brought by Eisler have evaporated so far as the Court's power to deal with them is concerned because the rights and obligations of a litigant no longer depend on their answer. The Court therefore lacks jurisdiction . . . .[119]

Frankfurter distinguished prior cases in which the Court had postponed action indefinitely until the defendants were recaptured because those cases involved "local jailbreaks" and not international flight.[120]

Justices Murphy and Jackson also wrote separate dissenting opinions, criticizing the majority's mootness rationale and contending that the case should be decided notwithstanding Eisler's flight. Justice Murphy agreed that moot cases should not be decided, but disagreed that Eisler's case was moot: "[A] moot case is one in which the particular controversy confronting the Court has ended. That is not true when a prisoner has simply escaped. We are not at liberty to assume that all escaped defendants will never return to the jurisdiction."[121] Furthermore, Justice Murphy recognized that the fact that a case may become

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116. *Id.* at 190.

117. *Id.*

118. *Id.* at 192-93 (Frankfurter, J., dissenting).

119. *Id.* at 192.

120. *Id.* at 193 (distinguishing Bonahan v. Nebraska, 125 U.S. 692 (1887); Smith v. United States, 94 U.S. 97 (1876)).

121. *Eisler*, 338 U.S. at 194 (Murphy, J., dissenting).

moot is not enough to justify treating the case as one that is moot: "That the case may become moot if a defendant does not return does not distinguish it from any other case we decide. For subsequent events may render any decision nugatory."[122]

Finally, Justices Murphy and Jackson recognized that it was the importance of the legal issues posed by the *Eisler* case, not the importance of the defendant Eisler's conviction for contempt of Congress, that had caused the Supreme Court to grant certiorari. "Those issues did not leave when Eisler did. They remain here for decision," Justice Murphy declared.[123] Similarly, Justice Jackson insisted that the importance of rendering a decision to guide Congress justified proceeding with Eisler's case: "[I]t is due to Congress and to future witnesses before its committees that we hand down a final decision . . . . I do not think we can run away from the case just because Eisler has."[124]

Although the Washington Supreme Court decided to dismiss the defendant's petition for review in *Koloske*, the court was in the unique position of being able, nevertheless, to decide the issues posed by the *Koloske* case, which was consolidated for argument with another case involving the same issues.[125] Thus, unlike the *Eisler* Court, the *Koloske* court did not "run away from" the issue.

Twenty-one years after *Eisler*, the United States Supreme Court again dismissed a criminal case due to the appellant's escape, but the Court did not base the dismissal on mootness.[126] On the contrary, the Court conceded that "an escape does not strip the case of its character as an adjudicable case or controversy."[127] Instead, the Court premised the dismissal upon the theory that an escape "disentitles the defendant to call upon the resources of the Court for determination of his claims."[128]

This "disentitlement" theory is essentially a renamed variant of the "contempt" theory advanced nearly a century earlier in *Allen v. Georgia*.[129] The contempt theory rests upon the notion that if a convicted felon is going to insult the appellate

122. *Id.*
123. *Id.*
124. *Id.* at 196 (Jackson, J., dissenting).
125. State v. Austin, 100 Wash. 2d 889, 676 P.2d 456 (1984).
126. Molinaro v. New Jersey, 396 U.S. 365 (1970).
127. *Id.* at 366.
128. *Id.*
129. 166 U.S. 138 (1897).

courts by taking matters into his own hands and escaping, then the defendant has no right to expect the appellate courts to hear the case. The appellate courts assume the power to punish the escapee, as if the escape were a contempt of court committed in the court's presence, by refusing to decide the escapee's appeal. The United States Supreme Court's opinion in *Allen v. Georgia* is the best articulation of the contempt theory:

> We cannot say that the dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. By escaping from legal custody he has, by the laws of most, if not all of the States, committed a distinct criminal offence; and it seems but a light punishment for such offence to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction. Otherwise he is put in a position of saying to the court: 'Sustain my writ and I will surrender myself, and take my chances upon a second trial; deny me a new trial and I will leave the State, or forever remain in hiding.' We consider this as practically a declaration of the terms upon which he is willing to surrender, and a contempt of its authority, to which no court is bound to submit. It is much more becoming to its dignity that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ, than that the latter should dictate the terms upon which he will consent to surrender himself to its custody.[130]

The passage quoted above is a sound example of judicial childishness. A court that descends to the level of the convicted criminal says, in effect: "If you don't play by our rules, we won't play at all." The contempt rationale justifies the dismissal of appeals, including some that may be clearly meritorious, with the idea that judicial pride must be maintained by showing criminal defendants that courts will not tolerate the "insult" of escape. Is it wise to leave unconstitutional, erroneous convictions intact, and to risk incarcerating innocent defendants, simply to punish them for escaping? Or is it wiser to decide their appeals anyway, leaving the punishment for escape to prosecutors, who can bring escape charges in the trial courts?[131]

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130. *Id.* at 141.

131. Justice Stewart pointed out the inequities caused by a Texas statute that required dismissal of the appeal of an escaped convict:

> The statute imposes totally irrational punishments upon those subject to its application. If an escaped felon has been convicted in violation of law, the loss

Justice Murphy's answer to this question is the appropriate one, and certainly is more suited to a jurisdiction, such as Washington, where the right to appeal is of constitutional magnitude:

> Law is at its loftiest when it examines claimed injustice even at the instance of one to whom the public is bitterly hostile. We should be loath to shirk our obligations, whatever the creed of the particular petitioner. Our country takes pride in requiring of its institutions the examination, and correction of alleged injustice whenever it occurs. We should not permit an affront of this sort to distract us from the performance of our constitutional duties.[132]

In conclusion, the doctrines of waiver, mootness, and contempt are inadequate to justify the practice of dismissing criminal appeals of escaped defendants. Though automatic dismissal may have been the "prevailing practice" at the time *State v. Mosley* was decided, recent decisions indicate that the tide may be turning. The Alaska Supreme Court rejected the rule of dismissal in *White v. State*,[133] recognizing that even though the right to appeal was only a statutory right in Alaska, it should be protected by the same strict waiver standards applicable to constitutional rights.[134] The *White* court also recognized that there were "adequate criminal sanctions to deter"[135] escapes, without the additional judicially imposed sanction of loss of an appeal:

> We fail to find any reason why this court by judicial decree, should add withdrawal of the right of appeal to the statutory punishments prescribed for the crime of escape. In addition to bordering on judicial legislation, such additional punishment would have no relation to the crime involved. A convicted

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> of his right to appeal results in his serving a sentence that under law was erroneously imposed. If, on the other hand, his trial was free of reversible error, the loss of his right to appeal results in no punishment at all. And those whose convictions would have been reversed if their appeals had not been dismissed serve totally disparate sentences, dependent not upon the circumstances of their escape, but upon whatever sentences may have been meted out under their invalid convictions. In my view, this random pattern of punishment cannot be considered a rational means of enforcing the State's interest in deterring and punishing escape.

Estelle v. Dorrough, 420 U.S. 534, 544-45 (1975) (Stewart, J., dissenting).

132. *Eisler*, 338 U.S. at 194-95 (Murphy, J., dissenting).

133. 514 P.2d 814 (Alaska 1973).

134. *Id.* at 815 ("To find a waiver of such a right we must be convinced that there was 'an intentional relinquishment or abandonment of a known right or privilege.' There has been no showing that White, by his escape, intended to waive his right of appeal.").

135. *Id.* at 815-16.

> defendant with a meritorious appeal from a sentence of life imprisonment would suffer a totally unrelated severe penalty as compared with a defendant sentenced to thirty days in jail.[136]

Appellate courts of three other states have also rejected the traditional approach of dismissing the appeals of escapees, relying in part upon the existence of a state constitutional right to an appeal.[137] The reasoning of the Supreme Court of New Mexico is of particular relevance to Washington State:

> The Constitution of New Mexico provides that an aggrieved party shall have an absolute right to one appeal. N.M. Const. Art. VI, § 2. A person convicted of a crime does not forfeit his right to appeal simply because he has escaped from confinement. He still has a right to have his conviction reversed if he was erroneously convicted or if his constitutional rights were violated. If he is granted a new trial, that trial can always be held when he is recaptured. If his conviction is affirmed, he stands in the same position as before the appeal, but his rights have been protected by the New Mexico Constitution.[138]

The article I, section 22 right to appeal in the Washington Constitution should not be judicially nullified as a reprisal for an escape. The punishment for escape in Washington is prescribed by statute.[139] The Washington courts should not add loss of a constitutional right to the legislatively authorized punishment.[140] The Washington Supreme Court's decision in *State v. Mosley* should be overruled. At the very least, *Mosley* should be confined to a rule of dismissal of petitions for review (as intimated in *Koloske*) and held inapplicable to the first level of appellate review in the court of appeals.

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136. *Id.*

137. State v. Goldsmith, 112 Ariz. 399, 542 P.2d 1098 (1976); Marshall v. State, 344 So. 2d 646 (Fla. Dist. Ct. App.), *cert. denied*, 353 So. 2d 679 (Fla. 1977); Mascarenas v. State, 94 N.M. 506, 612 P.2d 1317 (1980). *But see* State v. Brady, 655 P.2d 1132 (Utah 1982) (appeal of escapee that was dismissed prior to his recapture will not be reinstated).

138. Mascarenas v. State, 94 N.M. 506, 507, 612 P.2d 1317, 1318 (1980).

139. WASH. REV. CODE § 9A.76.110 (1983).

140. Some states have legislatively overturned the practice of dismissing the appeals of escapees. *See, e.g.*, Sprouse v. State, 242 Ga. 831, 252 S.E.2d 173 (1979); State v. Falcone, 383 So. 2d 1243 (La. 1980).

V. Lost Transcripts and the Right to Meaningful Appellate Review

A constitutional right of appeal is of little value to a defendant if the loss of the transcript or of the trial court record prevents the appellate court from reviewing the case. Several jurisdictions have recognized that in order to preserve the right to appeal, the judicial remedy for loss of the trial court record must be reversal and a new trial.[141]

Louisiana, like Washington, affords defendants a constitutional right to appeal.[142] Article I, section 19 of the Louisiana Constitution provides:

> No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

In the seminal case of *State v. Ford*,[143] the Louisiana Supreme Court reversed a second degree murder conviction because "[f]or reasons which are unexplained, the court reporter did not record the entire trial through mechanical or other means."[144] The reporter failed to record the testimony of four prosecution witnesses, voir dire, and the prosecutor's opening statement. The court flatly rejected the prosecution's contention that the defendant should be required to make a showing of prejudice before a reversal could be obtained.[145]

The Louisiana Supreme Court recognized that in the federal court system, Congress had enacted a law providing that a court reporter "shall record verbatim . . . all proceedings in criminal cases held in open court."[146] Federal courts have consistently held that failure to abide by this statutory requirement requires reversal of any criminal conviction.[147] Since automatic reversal is

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141. *See, e.g.*, Delap v. State, 350 So. 2d 462 (Fla. 1977), *cert. denied*, 104 S. Ct. 3559 (1984); State v. Robinson, 387 So. 2d 1143 (La. 1980); State v. Jones, 351 So. 2d 1194 (La. 1977); State v. Ford, 338 So. 2d 107 (La. 1976); State v. Bizette, 334 So. 2d 392 (La. 1976); State v. Moore, 87 N.M. 412, 534 P.2d 1124 (N.M. Ct. App. 1975); Varney v. Superintendent W. Va. Penitentiary, 264 S.E.2d 472 (W. Va. 1980).

142. La. Const. art. I, § 19.

143. 338 So. 2d 107 (La. 1976).

144. *Id.* at 108 (footnotes omitted).

145. *Id.* at 109-10.

146. *Id.* at 109 (quoting 28 U.S.C. § 753(b)).

147. *See, e.g.*, Hardy v. United States, 375 U.S. 277 (1964); Herron v. United States,

required to vindicate a defendant's *statutory* right in the federal system, the Louisiana Supreme Court held that, a fortiori, automatic reversal was required in Louisiana state courts when defendants have a constitutional right to an appeal.[148]

The *Ford* court noted that the requirement of a complete record of trial court proceedings is "designed to preserve a correct and authentic record of criminal proceedings free from the infirmities of human error and . . . provide[s] a safeguard to which not only the court but also the defendant is entitled in the preservation of his rights."[149] The *Ford* court followed the approach of the United States Court of Appeals for the Fifth Circuit and ordered convictions reversed "even if no particular prejudice has been alleged, when defendant's counsel on appeal is a different person from trial counsel and a portion of the transcript is unavailable."[150]

Louisiana appellate courts have repeatedly reversed criminal convictions when the record of proceedings below is incomplete and thus impedes appellate review.[151] "Without a complete record from which a transcript for appeal may be prepared, *a defendant's right of appellate review is rendered meaningless.*"[152] This reasoning is equally applicable in Washington State. The Washington Supreme Court has, on one occasion, reversed a conviction on the ground that loss of the court reporter's notes prevented meaningful appellate review.[153] The court did not mention article I, section 22 in its opinion, but based its holding on the fact that appellate counsel was unable to represent the defendant adequately without a complete transcript. This rationale accords with the views expressed by the Louisiana Supreme Court in *State v. Ford*: "[W]here a defendant's attorney is unable, through no fault of his own, to review

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512 F.2d 439 (4th Cir. 1975); Fowler v. United States, 310 F.2d 66 (5th Cir. 1962).

148. *Ford*, 338 So. 2d at 109 n.5.

149. *Id.* at 109 (quoting United States v. Taylor, 303 F.2d 165, 169 (4th Cir. 1962)).

150. *Id.* (citing United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972); United States v. Garcia-Bonifascio, 443 F.2d 914 (5th Cir. 1971)). *See* United States v. Atilus, 425 F.2d 816, 816 (5th Cir. 1970) ("[u]nder these circumstances the court has no choice but to reverse the conviction").

151. *See, e.g.*, State v. Robinson, 387 So. 2d 1143 (La. 1980) (court reporter's failure to transcribe testimony of two expert witnesses prevents meaningful appellate review); State v. Jones, 351 So. 2d 1194 (La. 1977) (tape recording malfunction prevents review of denial of motion for change of venue); State v. Bizette, 334 So. 2d 392 (La. 1976) (tape recording malfunction prevents review of trial court denial of motion for acquittal).

152. *Ford*, 338 So. 2d at 110 (emphasis added).

153. State v. Larson, 62 Wash. 2d 64, 381 P.2d 120 (1963).

a substantial portion of the record for errors so that he may properly perform his duty as appellate counsel, the interest of justice requires that a defendant be afforded a new, fully recorded trial."[154]

The mistakes of court reporters and clerks cannot be permitted to defeat the defendant's constitutional right to an appeal. Consequently, article I, section 22 requires an automatic reversal and a new trial in those cases in which the record of proceedings in the trial court has been lost or destroyed through no fault of the defendant.

VI. Chilling the Exercise of the Right to Appeal by Imposing Harsher Sentences at Retrial

Under some limited circumstances, the United States Supreme Court has held that a defendant who wins an appeal and is subsequently retried and reconvicted may be given a harsher sentence than that which he received at his first trial. In *North Carolina v. Pearce*,[155] the Court held that neither the double jeopardy clause of the fifth amendment nor the equal protection clause of the fourteenth amendment imposed a complete prohibition against more severe sentences upon reconviction.[156] The Court held, however, that it would be a "flagrant violation" of the fourteenth amendment due process clause for trial court judges to impose heavier sentences upon reconvicted defendants "for the explicit purpose of punishing the defendant for having succeeded in getting his original conviction set aside."[157]

The *Pearce* Court also recognized that a defendant's subjective fear of an increased sentence at retrial might "unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction."[158] Thus, even in the absence of actual vindictiveness in sentencing, "due process also requires that a defendant be freed of apprehension of such a

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154. *Ford*, 338 So. 2d at 110.

155. 395 U.S. 711 (1969).

156. *Id.* at 723.

157. *Id.* at 723-24. *Cf.* United States v. Jackson, 390 U.S. 570, 581 (1968) (limiting death penalty to those defendants who plead not guilty violates due process); State v. Frampton, 95 Wash. 2d 469, 479, 627 P.2d 922, 927 (1981) (holding invalid prior death penalty statutes because they "needlessly chill a defendant's constitutional rights to plead not guilty and demand a jury trial and violate due process").

158. 395 U.S. at 725.

retaliatory motivation on the part of the sentencing judge."[159] Therefore, the *Pearce* Court held that in order to uphold an increased sentence following a retrial, the sentencing judge must have affirmatively stated on the record his reasons for increasing the sentence, and those reasons must be based on objective information concerning conduct of the defendant occurring since the time of the original sentencing.[160]

Since *Pearce* was decided, however, a number of state courts have found the due process safeguards adopted in *Pearce* to be inadequate. Relying on state constitutional provisions, these courts have adopted a per se rule that completely forbids an increased sentence following a retrial. Some of these decisions have been premised upon state constitutional double jeopardy provisions, some upon state constitutional due process guarantees, and a few courts have expressly grounded their decision on the existence of a state constitutional right to appeal.[161]

The West Virginia Supreme Court perceived the key flaw in the *Pearce* decision: it is impossible to prove whether the sentencing judge was motivated to increase the original sentence by a desire to retaliate against defendants who successfully appeal.[162] The West Virginia Supreme Court imposed a rule of total prohibition of increased sentences on the ground that the *Pearce* Court's due process remedy was inevitably inadequate:

> It is clear to us that when a defendant refuses to prosecute an

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159. *Id.*

160. *Id.* at 726.

161. *See, e.g.*, Shagloak v. State, 597 P.2d 142, 145 (Alaska 1979) (due process, ALASKA CONST. art. I, § 7); People v. Serrato, 9 Cal. 3d 753, 764, 512 P.2d 289, 297, 109 Cal. Rptr. 65, 73 (1973) (post-*Pearce* decision adhering to *Henderson* but creating exception for cases in which original sentence was illegal), *overruled*, People v. Fosselman, 33 Cal. 3d 572, 659 P.2d 1144, 189 Cal. Rptr. 855 (1983); People v. Henderson, 60 Cal. 2d 482, 495-97, 386 P.2d 677, 685, 35 Cal. Rptr. 77, 85 (1963) (pre-*Pearce* decision based on double jeopardy, CAL. CONST. art. I, § 13) (superseded by statute as stated in People v. Sanders, 154 Cal. App. 3d 487, 201 Cal. Rptr. 411 (1984)); State v. Washington, 380 So. 2d 64, 65 (La. 1980) (state constitutional right to appeal, LA. CONST. art. I, § 16); State v. Wolf, 46 N.J. 301, 309, 216 A.2d 586, 590 (1966) (premised upon statutory right to appeal and "standards of procedural fairness"); Commonwealth v. Story, 497 Pa. 273, 281-82, 440 A.2d 488, 492 (1981) (post-*Pearce* decision based on statutory right to appeal); Commonwealth v. Littlejohn, 433 Pa. 336, 341-48, 250 A.2d 811, 813-15 (1969) (pre-*Pearce* decision based on statutory right to appeal, federal due process, federal equal protection, federal double jeopardy); State v. Eden, 256 S.E.2d 868, 875 n.14 (W. Va. 1979) (state constitutional right to appeal, W. VA. CONST. art. III, § 10). *See also* Roberson v. State, 258 So. 2d 257, 261 nn.1-2 (Fla.) (Drew, J., concurring) (state constitutional right to appeal, FLA. CONST. art. V, §§ 5(3), 4(2)), *cert. denied*, 409 U.S. 885 (1972).

162. State v. Eden, 256 S.E.2d 868, 874 (W. Va. 1979).

> appeal to which he is entitled by law for fear he will receive a heavier sentence on retrial, he has been denied his right to appeal. The decision not to appeal is the defendant's but the necessity of making the decision is forced on him by the State. The State is in effect imposing conditions upon the defendant's right to appeal by telling him that he has the right, but that by exercising it he risks a harsher sentence.
>
> Limiting increased sentencing to those situations where the defendant's conduct after the time of the original sentencing arguably supports the increase reduces the possibility of vindictive motivation and the apprehension of punishment but it does not relieve it altogether. The State is still imposing a condition on the defendant's right to appeal in violation of due process, and the apprehension of punishment for taking an appeal is still lodged in the defendant's mind. Increased sentencing upon reconviction after successful prosecution of an appeal inherently gives rise to a fear of harsher penalties and retribution which burdens or chills the defendant's right to appeal and should not be permitted in any circumstances.[163]

Lest anyone wonder whether there truly is a danger of chilling the exercise of the right to appeal by permitting increased penalties upon reconviction, he should examine the following letter from a prisoner received by a North Carolina trial judge:

> Dear Sir:
>
> I am in the Mecklenburg County jail. Mr. _____ chose to retry me as I knew he would . . . .
>
> Sir, the other defendant in this case was set free after serving 15 months of his sentence. I have served 34 months and *now I am to be tried again and with all probility [sic] I will receive a heavier sentence then [sic] before as you know sir my sentence at the first trile [sic] was 20 to 30 years. I know it is usuelly [sic] the courts [sic] prosedure [sic] to give a larger sentence when a new trile [sic] is granted I guess this is to discourage Petitioners.*
>
> *Your Honor I don't want a new trile [sic] I am afraid of more time . . . .*
>
> Your Honor, I know you have tried to help me and God knows I apreceate [sic] this but *please sir don't let the state retry me if there is any way you can prevent it.*
>
> Very truly yours.[164]

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163. *Id.* at 875.

164. Patton v. North Carolina, 256 F. Supp. 225, 231 n.7 (W.D.N.C. 1966) (emphasis in original), *aff'd*, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968).

The Supreme Courts of Pennsylvania[165] and West Virginia[166] have noted that the American Bar Association Criminal Justice Standards recommended that a sentencing judge "should not be empowered to impose a more severe penalty than that originally imposed."[167] The ABA Advisory Committee rejected the idea that a trial judge should be allowed to increase the original sentence based upon additional information not available to the original sentencing judge:

> Even though new facts may be brought to light which might occasionally warrant a heavier sentence, the Advisory Committee believes it is preferable to establish a standard that is prophylactic in effect and easily administered, whereby sentencing judges are not given the power to increase a sentence when an appellant has exercised his right to seek a post conviction remedy.[168]

Finally, some courts have recognized that a per se prophylactic rule enables appellate courts to avoid "the unpleasant task of assessing a trial court's sincerity" when the defendant claims that the increased sentence was motivated by a retaliatory desire to punish him for appealing his first conviction, and the state responds that the increased sentence was properly motivated by additional information regarding the defendant's conduct.[169] On this basis, the Supreme Courts of Oregon[170] and Minnesota[171] have barred increased sentences on grounds of judicial policy, rather than upon constitutional grounds.

The arguments against allowing increased sentences following retrial are most compelling in Washington State, where the defendant's right to appeal is of constitutional magnitude.[172]

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165. Commonwealth v. Littlejohn, 433 Pa. 336, 344, 250 A.2d 811, 815 (1969) (citing STANDARDS RELATING TO POST-CONVICTION REMEDIES § 6.3(a) (Approved Draft 1968)).

166. State v. Eden, 256 S.E.2d 868, 875 (W. Va. 1979) (quoting STANDARDS RELATING TO POST-CONVICTION REMEDIES § 6.3(a) (Approved Draft 1968)).

167. STANDARDS RELATING TO POST-CONVICTION REMEDIES § 6.3(a) (Approved Draft 1968).

168. STANDARDS RELATING TO POST-CONVICTION REMEDIES § 6.3(a) commentary at 96 (Approved Draft 1968).

169. State v. Holmes, 281 Minn. 294, 303, 161 N.W.2d 650, 656 (1968). *See* Patton v. North Carolina, 381 F.2d 636, 641 (4th Cir. 1967) (court found that the task of scrutinizing the motives of the sentencing judge was "most distasteful").

170. State v. Turner, 247 Or. 301, 315, 429 P.2d 565, 571 (1967).

171. State v. Holmes, 281 Minn. 294, 296, 161 N.W.2d 650, 652 (1968).

172. In State v. Hughes and State v. Ng, the appellants filed a motion in the Washington Supreme Court seeking an advance ruling that the prosecution would not be allowed to ask for the death penalty at a retrial if the defendants obtained reversals of

Here, as in West Virginia and Louisiana, increased sentences after retrial would "impair to an appreciable extent the policies underlying the constitutional right to appeal."[173] The prosecution has no valid interest in deterring defendants from exercising their article I, section 22 right to meaningful appellate review. The essential function of an appeal is to minimize the risk of erroneously punishing the innocent. This function is undercut by sentencing procedures that induce potentially innocent defendants to forfeit their right to appeal for fear of retaliation.

VII. CONCLUSION

The decision of the framers of the Washington Constitution to constitutionalize a criminal defendant's right to an appeal marked a distinct and radical break with the common-law past. As the first state in the Union to recognize a fundamental right to meaningful appellate review, Washington occupies a unique historical position. It would contravene the intent of the framers to permit this constitutional right to an appeal to be eroded, diluted, or restricted by policy considerations unrelated to the

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their aggravated first degree murder convictions. In both cases the defendants had received sentences of life imprisonment without possibility of parole. Ng and Hughes contended that it would violate their constitutional right to appeal, as well as their double jeopardy and due process rights, if the state were to be permitted to seek a harsher sentence (death) at retrial than the sentence they received at their first trial.

Following full briefing, the defendants' motions were set for oral argument before the Washington Supreme Court. However, at the eleventh hour the prosecution agreed to stipulate that:

> it will not file Notice of Special Sentencing Proceeding, required pursuant to WASH. REV. CODE § 10.95.040 when the prosecutor requests the death penalty as punishment, in any subsequent retrial of the above entitled cases, nor will the state in any other way seek a new sentencing hearing in these cases to determine whether or not the death penalty should be imposed.

In return, the defendants moved to dismiss their consolidated motions seeking an advance ruling on the state's right to seek the death penalty in future proceedings. The Washington Supreme Court subsequently dismissed the defendants' motion and entered an order stating that "the maximum sentence which may be imposed upon Robert Wayne Hughes or Benjamin Kin Ng in any subsequent proceedings in the cases before the Court is life imprisonment without possibility of release or parole." (Order on Motions, dated June 4, 1984, Chief Justice William H. Williams).

Copies of the briefs in support of the defendants' motions may be obtained from defendants' appellate counsel, Paris Kallas and Nancy Talner of the Washington Appellate Defender Association, 812 Smith Tower, Seattle, WA 98104, and David Wohl, 650 Colman Building, Seattle, WA 98104.

173. State v. Eden, 256 S.E.2d 868, 875 (W. Va. 1979); State v. Washington, 380 So. 2d 64, 67 (La. 1980).

goal of ensuring against the erroneous conviction of innocent defendants.

To preserve the right to appeal as a fundamental safeguard against injustice, we must resist the natural tendency to reduce the workload of the appellate courts by casually dismissing the untimely appeal, or the appeal of the escaped convict. Neither the negligence of counsel nor the commission of the crime of escape by the defendant can justify the dismissal of a criminal appeal. Similarly, we must resist the temptation to reduce or eliminate the time allotted for oral argument. Finally, we must prevent defendants from being deterred from exercising their right to appeal for fear that they will receive a harsher sentence if reconvicted, as a penalty for having successfully appealed their first conviction.

The Washington Constitution specifically instructs us that "a frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."[174] One of the fundamental principles is, as Justice Harlan observed, "the determination in our society that it is far worse to convict an innocent man than to let a guilty man go free."[175] The right to appellate review guaranteed by article I, section 22 is designed to implement that principle.

174. WASH. CONST. art. I, § 32.

175. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).