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| 1. note | 1 p. (front only)<br>P 6/14/00 NLSFG7-104 # 1 | nd | ~~P1~~, P3 |

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- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

Bill:

Mike says he wants to hold a CCLP mtg. in Jan. to discuss for 15-20 min. the topic of criminal law initiatives for next Congress. This provides a good opportunity to follow up Monkman's suggestion on Wed. Since I'll be away, this one is all yours. I attach an LRM on one good criminal claw initiative we can pursue.

Steve.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 21, 1982

FOR: MICHAEL M. UHLMANN

FROM: STEPHEN H. GALEBACH

SUBJECT: OMB Request for Review of Justice Department Draft Bill on Government Appeals of Post-Conviction Orders for New Trial

This bill looks like a very good idea to me, and McConnell's letter to the Speaker is quite well drafted.

In 1970, Congress amended the Criminal Appeals Act to allow government appeals of trial court errors in criminal cases. The amendment was intended to remove statutory barriers to government appeals whenever the constitution would permit, but the amendment did not allow appeals of erroneous post-conviction orders for a new trial.

It seems ironic that the government would be able to appeal from a post-trial dismissal of counts on which a defendant is found guilty, but not allowed to appeal a grant of a new trial on the counts. Allowing appeals for both seems logical, constitutional, and eminently good policy.

Rpt. to G. Jones 12/23

OMB Gen. Counsel's office also favors introducing the bill early in the next Congress

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

# ROUTE SLIP

TO Mike Uhlmann
Mike Horowitz
Frank Seidl
Karen Wilson

- [ ] Take necessary action
- [ ] Approval or signature
- [ ] Comment
- [ ] Prepare reply
- [ ] Discuss with me
- [ ] For your information
- [ ] See remarks below

FROM Greg Jones Ext. 3802 11/19/82 DATE

REMARKS

Please review the attached Justice Department draft bill and get back to me by cob December 27.

We will consider this bill for submission in the 98th Congress.

Thanks.

cc: Jim Murr

OMB FORM 4
Rev Jul 82

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

The Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and appropriate reference is a legislative proposal to amend 18 U.S.C. 3731 to authorize government appeals of post-conviction orders for a new trial.

Prior to 1970, the right of the United States to appeal trial court errors in criminal cases was severely restricted. Not only were the parameters of appellate jurisdiction under the then applicable Criminal Appeals Act unjustifiably narrow, the government's opportunities to obtain appellate review under the Act were further constrained by the Act's reliance on arcane common law distinctions that had no analogue in modern federal practice. By 1970, the Supreme Court had come to characterize the Act as a "failure."[1/]

Recognizing that the Criminal Appeals Act virtually precluded any government appeal of erroneous decisions in criminal cases and thus frequently stood as a bar to the rational and effective enforcement of our criminal laws, the Congress in 1970 amended 18 U.S.C. 3731, the statute governing appeals by the United States in criminal cases, to give the government the broadest authority permitted under the Constitution to appeal a trial court's dismissal of an indictment or information. In order to emphasize its intention that the new statute was to be a marked departure from the unwarrantedly severe restrictions on government appeals under the former Criminal Appeals Act, the Congress specifically included in the new language of 18 U.S.C. 3731 the admonition that "[t]he provisions of this section shall be liberally construed to effectuate its purposes."

While, as has been noted by the Supreme Court, it was the intent of the Congress in its 1970 amendment of 18 U.S.C. 3731 "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit,"[2/] the

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1/ United States v. Sisson, 399 U.S. 267, 307 (1970).

2/ United States v. Wilson, 420 U.S. 332, 337 (1975).

1970 amendment neglected, in one important area, to correct the then prevailing unwarranted restrictions on government appeals. The area left unremedied was with respect to erroneous post-conviction orders for a new trial.3/ It is the purpose of this legislative proposal to authorize government appeals in this situation.

The present gap in the appellate jurisdiction conferred by 18 U.S.C. 3731 which prohibits review of post-conviction erroneously granted new trial orders is wasteful of resources and harmful to the government. Since the government has no opportunity to obtain correction of a wrongly entered post-conviction new trial order, all such cases must be retried at considerable public expense and further burdening our overcrowded courts. Moreover, the likelihood of the government's prevailing again at a second trial is necessarily diminished for reasons unrelated to the guilt or innocence of the defendant, for the strategy of the prosecution will have already been revealed and with the passage of time government witnesses may have become unavailable or their memories dimmed. In recent years, the government's inability to seek review of post-conviction new trial orders has been responsible for the government's ultimately losing an increasing number of cases in which it had originally obtained a conviction. In our view, there is no reason not to extend the broad authority for appellate redress of trial court errors now set out in 18 U.S.C. 3731 to the context of post-conviction new trial orders.4/ Indeed, such an amendment is fully consistent with the present purposes of the statute.

The compelling need for appellate review of orders granting a criminal defendant a new trial was well illustrated in Judge Mansfield's concurrence in United States v. Sam Goody, Inc., 675 F.2d 17 (2nd Cir. 1982), in which a new trial was granted to the defendants convicted following a one-month trial on charges of criminal copyright infringement and interstate transportation of stolen property. Although Judge Mansfield found that the trial judge had "grossly abused his discretion in granting a new trial," he was constrained to agree with the majority that there

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3/ See, e.g., United States v. Alberti, 568 F.2d 617 (2nd Cir. 1977); United States v. Taylor, 544 F.2d 347 (8th Cir. 1976).

4/ The absence of appeal authority with respect to post-conviction new trial orders is particularly anomalous in view of the government's well established right to seek appeal of a post-conviction judgment of acquittal. See, United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977).

was no authority for the court to entertain an appeal of the new trial order.5/ He emphasized, however, that this result worked a "grave injustice":

> The effect of the district court's order is to deprive the public of a fairly-won and fully supported conviction.
>
> * * *
>
> Should the government be unable, because of the passage of time or lack of prosecutorial resources to reassemble all the proof for a long and expensive retrial, the guilty appellants will go scot-free.
>
> 675 F.2d at 27.

Judge Mansfield further noted:

> The ironic part is that if the trial judge had only dismissed the counts of which appellants were found guilty rather than grant a new trial, the government would be entitled to appeal as of right under 18 U.S.C. 3731 and the dismissal would be reversed, leaving the verdicts of guilty to stand and avoiding the waste of another long trial.
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> 675 F.2d at 28

The government's authority to appeal adverse decisions in criminal cases is limited by two principles. First is the constitutional principle, embodied in the Double Jeopardy Clause of the Fifth Amendment, barring multiple prosecutions or punishments for the same crime. In United States v. Wilson, 420 U.S. 332 (1975), the Supreme Court held that "where there is no threat of either multiple punishment of successive prosecutions, the Double Jeopardy Clause is not offended," 420 U.S. at 344, and thus "when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause." 420 U.S. at 352-353. Therefore, it is clear that this proposal's authorization of appeal of a

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5/ Judge Mansfield also concurred in the majority's denial of the government's petition for a writ of mandamus.

post-conviction new trial order is constitutionally permitted, for a successful government appeal would merely result in reinstatement of the conviction, not a second trial.6/

The second limiting principle, cited by the Court in Wilson and subsequent cases, however, is that the government may not appeal in a criminal case without express statutory authority.7/ Since such express authority is now lacking in 18 U.S.C. 3731 with respect to post-conviction orders for a new trial, the specific statutory amendment set out in the enclosed legislative proposal is necessary.

The absence of express authority to appeal new trial orders under 18 U.S.C. 3731 leaves only one possible avenue for the government to obtain review of erroneous grants of new trials in criminal cases, and that it is through a petition for a writ of mandamus vacating the new trial order and reinstating the judgment or verdict of conviction. However, the writ of mandamus is an extraordinary remedy and will not be embraced by the courts as a substitute for appellate review. As such, its availability as a means of addressing the current gap in appellate jurisdiction over new trial orders is extremely limited. In order to prevail in a mandamus petition, the government must establish not only that the district court's error was "clear and indisputable," Kerr v. United States District Court, 426 U.S. 394, 403 (1976), but that the court's action was so extraordinary as to amount to a "usurpation of power." Will v. United States, 389 U.S. 90, 95 (1967).

The difficult position of the government in seeking correction of a new trial order by way of a mandamus petition was illustrated in In re United States, 598 F.2d 233 (D.C. Cir. 1979). The District Court's new trial order, following the conviction after a three and one-half week trial before a sequestered jury of defendants Antonelli and Yeldell on charges of conspiracy to defraud the District of Columbia and bribery, was based on the failure of a single juror during voir dire to reveal what the defendants asserted was prejudicial information about the nature of her father's employment. In denying the mandamus petition, the court dismissed the government's contention that the trial court was grievously in error in assessing

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6/ In any event, 18 U.S.C. 3731 specifically emphasizes that "no appeal shall lie where the double jeopardy clause ... prohibits further prosecution," a limitation that would apply to the new appeal authority set out in this proposal.

7/ United States v. Wilson, supra, at 336; United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977); United States v. DiFrancesco, 449 U.S. 117, 131 (1980).

the impact of the juror's answer on the essential fairness of the trial, as simply "beside the point, for this is a petition for mandamus." 598 F.2d at 236. The new trial order, even if it constituted a substantial error, could not be corrected by mandamus as long as its entry was within the trial court's jurisdiction. At a second trial, both defendants were acquitted.

Beyond the traditional restraints on the applicability of the writ of mandamus to correct trial court errors, a further problem faced by the government in seeking review of post-conviction new trial orders is that they are not considered final judgments. However, the policy considerations militating against interlocutory review -- avoidance of delay and piecemeal appeals -- are inapplicable in the context of government appeal of a new trial order, just as they are in the case of government appeal of orders suppressing or excluding evidence which are now expressly authorized under 18 U.S.C. 3731.

As was noted by Judge Mansfield in United States v. Sam Goody, Inc., supra, "the effect of denying reviewability in the present case is not to avoid delay but to increase it. The public, which has prevailed, is now put to the delay and expense of seeking once more to obtain a conviction even though the jury's guilty verdict after the first long trial should stand." 675 F.2d at 27. Furthermore, unlike the situation in the civil context where either side may pursue the new trial issue on appeal of the outcome of the second trial and interlocutory appeal might thus offend the policy against piecemeal appeals, in the criminal context, an interlocutory appeal is the only means for the government to seek correction of an erroneous new trial order, since a later appeal on this issue by the government would be barred in the event the defendant was acquitted at a second trial.

In sum, there is a pressing need for the amendment to 18 U.S.C. 3731 set forth in the enclosed legislative proposal authorizing government appeals of post-conviction new trial orders. The United States' present inability to seek correction of erroneous new trial orders is justified by neither constitutional principles nor policy considerations and is clearly contrary to the interests of justice. At best, this situation requires the expense of unwarranted new trials. At worst, because of the inevitable disadvantage to the government in having to proceed with a second trial, it affords properly convicted defendants an opportunity for an unjustified acquittal.

The Office of Management and Budget advises that submission of this proposal is consistent with the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

Ben DeFelice

[redacted]

Dep Dir Pers.
CIA
20505

THE WHITE HOUSE
WASHINGTON

Ron Hinkley

x 7150
x 7559

Rm 120

A BILL

To amend section 3731 of title 18, United States Code, to permit the United States to appeal, in a criminal case, the granting of a post-conviction order for a new trial.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That section 3731 of title 18, United States Code, is amended by inserting ", or granting a new trial after verdict or judgment," after "indictment or information" in the first sentence.