State Court Procedures Regarding Pre-Verdict Judgments of Acquittal And the State's Right to Appeal Those Judgments

Report to the Advisory Committee on Criminal Rules
of the Judicial Conference of the United States

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I. Introduction

A. Background

Federal Rule of Criminal Procedure 29(a) [Rule 29(a)] authorizes the trial judge to enter a judgment of acquittal in response to the defendant's motion or on its own motion when the evidence is insufficient to justify a conviction, either at the time the government rests or at the conclusion of all the evidence.[1] Further, the judge may under Rule 29(b) reserve decision on an acquittal motion and decide the motion either before the jury returns a verdict, after a jury verdict of guilty, or after the jury is discharged without a verdict.[2] Under federal statutory law[3] and Supreme Court decisions,[4] it is well

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[1] Fed. R. Crim. P. 29(a) states:

> After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

[2] Fed. R. Crim. P. 29(b) states:

> The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

[3] 18 U.S.C. § 3731(1994) provides in relevant part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Despite unrelated amendments to other parts of § 3731 made in 1986 and 1994, this formulation has not been changed since Congress passed it in 1970 and the President signed it into law on January 2, 1971. *See* Title III of the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1880 (1971). The prevailing Supreme Court interpretation of this provision is that Congress intended to expand prosecutor appeals to the fullest extent not prohibited by the double jeopardy boundary. *See* United States v. Wilson, 420 U.S. 332, 337 (1975); United States v. Jenkins, 420 U.S. 358, 363 (1975); United States v. Martin Linen Supply Co, 430 U.S. 564, 568 (1977); United States v. Scott, 437 U.S. 82, 85 (1978).

[4] *See* Fong Foo v. United States, 369 U.S. 141, 142-43 (1962). Supreme Court held that the Double Jeopardy Clause prohibited appeals from judgments of acquittal directed by the trial judge prior to submission of the entire case to the jury. The Court forbade review even where verdict was directed very early in the district court trial, i.e., the judge directed a judgment of acquittal for the defendants in the middle of the governments' examination of its fourth witness.

United States v. Morrison, 429 U.S. 1, 3 (1976). Court held that the Double Jeopardy Clause does not distinguish between bench and jury trials, thereby serving to bar government appeals of acquittals in bench trials, in which a judge rather than a jury acts as the trier of fact.

United States v. Martin Linen Supply Co, 430 U.S. 564, 567, 571-72 (1977). Court held that the Double Jeopardy Clause prohibited prosecution appeal of a judgment of acquittal issued by a trial judge after a deadlocked jury had been discharged. The Court concluded that the district judge's ruling was an acquittal "in substance as well as form" and, consequently, a government appeal was barred under the precedent established in Fong Foo.

Sanabria v. United States, 437 U.S. 54, 68-69 (1978). Although the trial court's acquittal was based on an erroneous legal theory leading to a mistaken evidentiary ruling, the Court held that the prosecution was

settled that once jeopardy attaches, pre-verdict judgments of acquittal are not appealable no matter how "egregiously erroneous" the trial court's decision. Only when the trial judge reserves ruling on the defendant's motion until after a jury returns a guilty verdict is the government permitted to appeal the granting of a motion for a judgment of acquittal.[5]

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nonetheless barred from appealing. The Court concluded that no matter how "egregiously erroneous" the legal rulings leading to the judgment of acquittal, no exception existed to the constitutional rule forbidding successive trials for the same offense.

Smalis v. Pennsylvania, 476 U.S. 140, 146 (1986). The Court found that a trial judge's granting a demurrer based on insufficiency of the evidence upon completion of the prosecution's case in a Pennsylvania state court bench trial constituted a nonappealable acquittal for double jeopardy purposes. The court held that the demurrer constituted an acquittal because the court ruled as a matter of law that the prosecutor lacked the evidence to establish factual guilt. *Id.* at 144 n.5. The court concluded that the Double Jeopardy Clause barred the Commonwealth's appeal not only when it might result in a second trial but also if reversal would translate into "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." *Id.* at 145-46 (*quoting* United States v. Martin Linen Supply Co, 430 U.S. 564, 570 (1977)).

Cf. United States v. Serfass, 420 U.S. 377, 389, 394 (1975). The court ruled that the United States was permitted to appeal the district court's dismissal of an indictment prior to trial because jeopardy did not attach until the beginning of the actual trial. Rejecting defendant's argument that the trial court's dismissal had the same effect as an acquittal on the merits, the Court noted that "an 'acquittal' cannot be divorced from the procedural context in which the action so characterized was taken. The word itself has no talismanic quality for the purposes of the Double Jeopardy Clause." *Id.* at 392 (citations omitted).

United States v. Wilson, 420 U.S 332, 333 (1975). The Court ruled that the Double Jeopardy Clause did not bar the prosecution's appeal of a trial judge's decision to grant the defendant's motion for an acquittal on the grounds of pre-indictment delay following a guilty verdict by the jury. Finding that an appeal by the government would not necessitate a second trial of the defendant since a successful government appeal would simply reinstate the guilty verdict, the Court concluded the government could appeal a trial judge's post-verdict ruling of acquittal without violation of the Double Jeopardy Clause. *Id.* at 353.

United States v. Scott, 437 U.S. 82 (1978). After hearing all the evidence, but before submitting the case to the jury, the trial judge granted Scott's motion to dismiss based on pre-indictment delay. Holding that the mid-trial dismissal was appealable, the Court emphasized that the case had been terminated on the defendant's motion, and the trial court's decision was procedural and did not turn on the defendant's guilt or innocence. *Id*. at 98-99 (declaring that defendant who chooses to terminate action on basis unrelated to factual guilt does not suffer injury of double jeopardy). The Court reversed a previous decision in United States v. Jenkins, 420 U.S. 358 (1975) and declared a new doctrine: "We now conclude that where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal from his successful effort to do so is not barred." *Id.* at 101. The Court further stated that a pre-verdict judgment of acquittal entered pursuant to Fed.R.Crim.P. 29 will be nonappealable only when "it is plain that the District Court. . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction."

For a more in-depth discussion of the Supreme Court's decisions dealing with the question of whether prosecutorial appeals of acquittal violate the Double Jeopardy Clause, *see* Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal*, 44 Am.U.L. Rev. 433 (1994).

[5] Fed. R. Crim. P. 29 Advisory Committee Notes: "Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. Thus, the government's right to appeal a Rule 29 motion is only preserved where the ruling is reserved until after the verdict." (citing United States v. Martin Linen Supply Co., 430 U.S. 564, 570(1977)).

The Department of Justice [DOJ] has proposed amending Rule 29[6] to preserve the government's right to appeal a trial court's decision to grant a motion for judgment of acquittal.[7] DOJ argues, "Rule 29 as currently constituted represents an anomaly within the Rules and indeed within the judicial system."[8] In addition, DOJ contends, "[f]or the Rules to preserve an unreviewable discretion to dismiss in its entirety a criminal case, perhaps the most fundamental and grave proceedings in any system of laws, is wrong as a matter of policy and of justice."[9]

Specifically, DOJ's proposed amendment "would require the district court to reserve decision on whether to grant a judgment of acquittal (unless the court simply denies the motion) until after the jury returns a verdict."[10] And it would "preclude the entry of a judgment of acquittal before the jury returns a verdict, or if the jury is discharged without having returned a verdict"[11] (emphasis added).

DOJ argues "some judges have exercised this discretion improperly, and granted dismissal motions pre-verdict expressly to avoid the possibility of appellate review."[12] DOJ cites "a survey [it conducted] of all United States Attorney's Offices asking for empirical data regarding their experiences with either pre-verdict or post-verdict dismissals over the past three years."[13] DOJ received responses from 74 districts that identified a total of 240 cases. Of that number, 159 cases were completely or partially dismissed before verdict. DOJ reported examples of pre-verdict dismissals to argue that Rule 29 has been employed unfairly to terminate prosecutions.[14]

Further, DOJ contends that the proposed amendment does not alter the basic purpose of the Rule. It preserves the government's appellate rights and ensures that erroneous rulings will be corrected by the courts of appeals.[15] Relying upon Supreme Court precedent that permits the prosecution to appeal the grant of a motion for judgment of acquittal when ruled upon after the jury has returned a guilty verdict, DOJ asserts that "meritless or erroneous dismissals can be reversed and verdicts of guilt reinstated without offending the Double Jeopardy Clause."[16]

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[6] *See* Appendix B for Justice's proposed amendments to the 2002 version of Rule 29.
[7] Memorandum from U.S. Department of Justice (Criminal Division), to Hon. Edward E. Carnes, Chairman, Advisory Committee on Criminal Rules 1 (March 31, 2003) (on file with authors).
[8] *Id.* at 4.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 1.
[13] *Id.* at 3.
[14] *Id.* at 3-4.
[15] *Id.* at 4.
[16] *Id.* citing *United States v. Scott*, 437 U.S. 82 (1978). *See also* United States v. Wilson, 420 U.S. 332, 333 (1975) (explaining that the government could appeal a trial judge's post-verdict ruling of acquittal without violating double jeopardy because an appeal by the government would not necessitate a second trial of defendant since a successful government appeal would simply reinstate the guilty verdict).

B. Committee's request to the Federal Judicial Center

To help inform the debate, the Committee asked the Federal Judicial Center [Center] to conduct a study of state laws that allow the trial judge to grant a motion for a judgment of acquittal prior to the case's submission to the jury. Specifically, the Committee wanted to know (1) whether a state judge may enter a judgment of acquittal before a jury verdict, and (2) whether the prosecution may appeal from judgments of acquittal directed by the trial judge prior to submission of the case to the jury. The Committee suggested a four-stage approach to answering these queries. For stage one, the Center was asked to identify state procedural rules that are identical or similar to the federal rule. For stage two, we were asked to identify those state rules that govern the appeal of judgments of acquittals before a verdict. For stage three, we examined the relevant state authority to identify those that permit the state to appeal such judgments. For the fourth stage, the Committee is interested in knowing the number of state cases in which a judgment of acquittal was entered without the possibility of appeal. At this time, it is not clear how much time such an undertaking would involve. Collecting data for this stage would require Center staff to contact each state court's administrative body to determine the agency responsible, if any, for collecting and maintaining data on events occurring during a criminal trial. A review of docket sheets for salient information would follow.

This report presents information on stages one through three.

C. Report overview

Section II describes our research methods. Section III presents a summary of our findings. Section IV describes specific aspects of state court practices that authorize or permit pre-verdict acquittals. Finally, Section V discusses the different approaches taken by state courts that prohibit the prosecution from appealing pre-verdict judgments of acquittal and the approaches developed by a distinct minority of states that do permit the prosecution to appeal the trial judge's grant of an acquittal prior to submission of the case to the jury.

Appendix A contains the states' statutes, rules or other legal authority permitting trial judges to enter a judgment of acquittal on either the defendant's motion or on their own motion.

Appendix B contains DOJ's proposed amendments to Rule 29.

II. Methods

To determine whether a state permits pre-verdict judgments of acquittal, we searched relevant databases in both Westlaw and LEXIS, including but not limited to: criminal and general statutes, criminal and appellate rules, court rules, published and unpublished opinions, and relevant legal commentary. For most of the states, we were able to locate a court rule or statute similar to Rule 29(a). A relevant state rule or other legal authority consistently surfaced when we used using the following search terms:

"motion for judgment of acquittal," "motion for directed verdict," "motion for acquittal" "motion for judgment on the evidence," or "motion to dismiss for insufficient evidence."

Our research task was more complicated for those states where a rule was not found using these terms. We had to analyze opinions, legal treatises, and practice manuals, to determine if such a practice was authorized. A number of states had rules that described the relevant process that were included within other rules with titles not obviously or directly related to a motion for judgment of acquittal or directed verdict, e.g., order of trial.

For each state permitting pre-verdict judgments of acquittal, we attempted to collect information on a number of questions, including when the defendant can make a motion for judgment of acquittal, whether the court can make such a motion on its own, whether the court can reserve decision on the defendant's motion, whether the court has discretion to deny defendant's motion even if the rule's standard is met, and the scope of offenses eligible for dismissal by a judgment of acquittal. *See* section IV of the report.

The determination of whether the prosecution had the right to appeal a pre-verdict judgment of acquittal had to be made on a state-by-state basis because the federal statutory and case law ban on appealing pre-verdict judgments of acquittal does not apply to bar such appeals in state courts (see discussion *infra* section V). This involved searching relevant databases for each state in both Westlaw and LEXIS, including criminal and general statutes and rules of procedure, opinions and relevant legal commentary. Although we were able to locate statutory language addressing the states' right to appeal in criminal matters for almost every state, these statutes are not uniform and determining whether the statutory language bars pre-verdict judgments of acquittal involved analyses of statutory language and case law clarification in almost every instance.

Although we strove to be as accurate as possible, our analyses and conclusions are based on our interpretation of the relevant authority. In most cases, affirmative or negative responses to the queries presented in this report are derived from unequivocal language contained in the relevant legal authority. Where no clear language exists, we erred on the side of caution and noted, where appropriate, the necessary caveats.

III. Summary of Report

Overall, we found that 47 states and the District of Columbia[17] permit the trial judge to enter a judgment of acquittal before the case is submitted to the jury. Although many of these states have enacted rules similar to Federal Rule of Criminal Procedure 29, the state rules and general statutes are not uniform and contain a number of permutations. Three states do not permit pre-verdict judgments of acquittal in jury trials: Louisiana authorizes the practice in bench trials only; Oklahoma and Nevada authorize the trial

[17] This report does not cover the following U.S. jurisdictions: Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands.

judge only to advise the jury to acquit the defendant if the court finds the evidence insufficient.

Of states permitting pre-verdict judgments of acquittal, 26 require the trial judge to enter the verdict, if the requisite standard has been met, either after the evidence on either side is closed or at any time before submission to the jury.

Only West Virginia and the District of Columbia have provisions mirroring the federal rule that permit the judge to reserve decision on defendant's motion made either after the government closes its evidence or after the close of all the evidence.

Twenty states permit the judge to reserve decision on a defendant's motion for judgment of acquittal, but only if the defendant's motion is made at the close of all the evidence. Eight states have statutes explicitly or implicitly prohibiting the judge from reserving decision on defendant's motion for a judgment of acquittal.

Based on our analysis of the various state statutes aided by our reading of the relevant case law, we concluded that thirty-six states plus the District of Columbia prohibit the state from appealing a judgment of acquittal prior to submission of the case to the jury:

(1) Four states and the District of Columbia have express constitutional or statutory bans precluding appeal;

(2) One state expressly prohibits appeal solely by judicial decision;

(3) Twelve states have statutes limiting prosecution appeals by express reference to double jeopardy protection similar to the federal statute; and

(4) Nineteen states prohibit appeal by implication because their statutes limit appeal to an exclusive list of trial court actions or specific narrowly defined circumstances.

Thirteen states appear to permit the state to bring the appeal, although the federal double jeopardy ban bars the appellate court from actually reviewing the trial court's decision to grant a pre-verdict judgment of acquittal, because the defendant would be put on trial twice for the same crime. Courts in those states that permit the prosecution to appeal the acquittal are limited to rendering an advisory opinion on the underlying merits of the prosecutor's claim. Several statutes appear to call overtly for advisory opinions in cases that have become moot because of double jeopardy bars. Others implicitly invite advisory opinions because the statutes use broad language to authorize prosecution appeals or specifically authorize the prosecution to appeal from a judgment of acquittal.

IV. State Court Procedures Regarding Pre-Verdict Judgments of Acquittal

A. Is the trial judge permitted to direct a judgment of acquittal prior to submission of the case to the jury?

Our review and analysis of state statutes, rules, case law and other relevant authority reveal that almost all states permit or authorize the trial judge to direct a judgment of acquittal prior to the submission of the case to the jury.[18] Three states do not permit the trial judge to issue pre-verdict acquittals in jury trials. Louisiana authorizes the practice in bench trials only.[19] Nevada and Oklahoma do not allow the defendant to make a motion for, and the trial judge is not permitted to issue, a pre-verdict judgment of acquittal. If the court finds the evidence insufficient, the court is only authorized to advise the jury to acquit the defendant, and the jury is not bound by the advice.[20]

Of the states that permit pre-verdict acquittals, a number of distinctions emerged, including for example, the titles or nomenclature courts use to describe those judgments as well as the types of authority that authorize such judgments. Below we highlight these distinctions.

1. Terminology distinctions

We found that many states have abolished the motion for "directed verdict," substituting for it the motion for "judgment of acquittal."[21] However, Arkansas,[22] Michigan[23] and South Carolina[24] continue to use the term "directed verdict." Several states use terminology that contains some variation of the sufficiency of the evidence standard required to grant a judgment of acquittal. For example, Montana titles its rule "Evidence insufficient to go to jury;"[25] Pennsylvania's rule is called "Challenges to the Sufficiency of the Evidence;"[26] and Utah uses the title "Discharge for Insufficient

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[18] We were able to make a definitive determination for 47 states and the District of Columbia. Note that although N.Y. Consol. Law Serv. Crim. P. Law § 290.10 permits the judge to issue a "trial order of dismissal" upon the defendant's motion if the trial evidence is not legally sufficient, it is not permitted to do so if the "trial evidence would have been legally sufficient had the court not erroneously excluded admissible evidence offered by the people". *Id.* § 290.10(1) & (2).

[19] La. Code of Crim. P. Art. 778 permits the judge in a bench trial only to enter a judgment of acquittal on one or more of the offenses charged. *See also* State v. Crawford, 848 So.2d 615, 631 (La.App. 4 Cir. 2003) (in defendant's jury-tried murder case, counsel was not ineffective because he failed to file a motion for a directed verdict because the vehicle for seeking an acquittal at the end of the state's case was a motion for acquittal and could only have been filed in a bench trial).

[20] Nev. Rev. Stat. Ann. § 175.381; Okla. Stat. Ann. tit. 22 § 850.

[21] *See, e.g.*, Ala. R. Crim. P. 20.2; Alaska R. Crim. P. 29(a); Colo. R. Crim. P. 29(a); N.D. Crim. Rule 29(a); Ohio Crim. R. 29(A).

[22] Ark. R. Crim. P. 33.1(a).

[23] Mich. Ct R. 6.419.

[24] S.C R. Crim. P. 19.

[25] Mont. Code Ann. § 46-16-403 (2002).

[26] Pa. R. Crim. P. 606; *see also* Wis. Stat. § 805.14 Motions challenging sufficiency of evidence; motions after verdict. Wisconsin is unique in that its civil rules of proceedings apply to evidentiary issues in criminal trials. *See* Wis. Stat. § 972.11(1) which provides in part:

Evidence."[27] Other variations among the states' legal authority include: "judgment on the evidence before verdict,"[28] "motion before submission to the jury,"[29] "order of trial,"[30] and "trial order of dismissal."[31]

2. Authority distinctions

The majority of those states authorizing the trial judge to issue a judgment of acquittal prior to submission of the case to the jury have enacted express statutory provisions detailing the practice, many fashioned after Federal Rule 29(a). These provisions were found in the states' rules of criminal procedure (21 states),[32] general statutes (12 states),[33] general court rules (8 states),[34] and penal codes (2 states).[35] As to five states, we were unable to locate express statutory language authorizing the practice, but we concluded that five states "impliedly" permit pre-verdict judgments of acquittal because we found relevant case law discussing the practice in a manner that assumes these states authorize their trial judges to grant the motion.

For example, in *State v. Matuszewski*,[36] the Washington Supreme Court held that when a trial court dismisses a criminal case on the ground of insufficient evidence after the government has concluded its case, the double jeopardy provisions of the Constitution preclude retrial, even if the court's ruling is erroneous.[37] In a Texas case, the court stated "[t] he record in the instant case reveals that after the State closed its case-in-chief, counsel for appellee moved for a directed verdict." [38] The appellate court held that the "trial court's judgment is, in effect, an acquittal of the appellee, which regardless of how egregiously wrong, cannot be reviewed."[39]

> . . .[t]he rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction.

[27] Utah Code Ann. § 77-17-3 (2003).
[28] Ind. Stat. Trial P. R. 50.
[29] N.J. Ct. R., 1969 R. 3:18-1 (2003).
[30] N.M. Dist. Ct. R. Cr. P. 5-607 (2003).
[31] N.Y. Consol. Law Serv. Crim. P. Law § 290.10 (2003).
[32] *See* authority provided *infra* Appendix A for Ala., Alaska, Ariz., Ark., Colo., Del., D.C., Fla., Iowa, Me., Minn., N.M., N.D., Ohio, Pa., R.I., S.C., Tenn., Vt., W.Va., and Wyo.
[33] *See* authority provided *infra* Appendix A for Georgia, Ill., Kan., Mass., Mont., Neb., N.Y., N.C., Or. S.D., Utah and Wisconsin.
[34] *See* authority provided *infra* Appendix A for Conn., Idaho, Ind., Md., Mich., Mo., N.J., and Va.
[35] *See* authority provided *infra* Appendix A for Cal. and Haw.
[36] 637 P.2d 994 (Wash. 1981).
[37] *Id*.
[38] State v. Roberts, No. 04-99-00768-CR, 2000 WL 85043, at *1 (Tex.App. Jan. 26, 2000) (not designated for publication).
[39] *Roberts*, 2000 WL 85043, at *1. *See also* Smith v. State, 802 So.2d 82, 85 (Miss. 2001)(holding trial court did not error in failing to direct a verdict in favor of defendant at the close of the state's case; citing to a prior opinion denying defendant's appeal of trial court's failure to grant defendant's motion for directed verdict at the close of the state's case, the court reiterated that a motion for directed verdict is an attack on the sufficiency of the evidence and thus the standard of review for a judgment notwithstanding the verdict applies upon appeal); State v. Dinapoli, 823 A.2d 744 (N.H. 2002)(defendant argued that the trial court should have granted his motion for directed verdict prior to submitting the case to the jury because the

In Kentucky, in addition to case law, which delineated the standard for handling a criminal defendant's motion for directed verdict,[40] the Kentucky Constitution and two related statutory provisions make reference to a "directed verdict of acquittal."[41]

B. Under the state provision, when can the defendant move for a judgment of acquittal?

Pursuant to federal Rule 29(a), the defendant can move for a judgment of acquittal after the government closes its evidence or after the close of all the evidence.

The majority of states (38) with statutory provisions authorizing pre-verdict judgments of acquittal[42] follow the federal rule as described above. Other practices in the remaining states include, for example, Arkansas, which requires the defendant's motion to be made at the close of the evidence offered by the prosecution and at the close of all of the evidence.[43] Indiana permits a party to move for judgment of acquittal on the evidence after another party carrying the burden of proof of going forward with the evidence upon any one or more issues has completed presentation of its evidence; or after all the parties have completed presentation of the evidence upon any one or more issues; or after all the evidence in the case has been presented and before judgment.[44] In Alabama, the defendant can make a motion at the close of the state's evidence and/or at the close of all the evidence.[45]

Florida expressly provides for a practice not found in any other state. Florida Rule of Criminal Procedure 3.380(a) allows the prosecuting attorney as well as the defendant to move for a judgment of acquittal.[46]

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evidence was insufficient to prove intent; citing to a prior opinion, the court restated the standard defendant must meet to succeed on his motion for directed verdict).

[40] Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) ("on motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given such testimony") (citations omitted).

[41] *See* Ky. Const. § 115 (allows prosecution appeals except from a judgment of acquittal in a criminal case); Ky. R. Crim. P. 10.24 (permits motion for judgment of acquittal after a jury verdict of guilty provided that the defendant moved for a directed verdict of acquittal at the close of all the evidence); Ky. Rev. Stats. § 500.070 (state does not have to disprove any element of a case unless evidence supporting the defense is of "such probative force that in the absence of countervailing evidence the defendant would be entitled to a directed verdict of acquittal.").

[42] *See, e,g.*, Colo. R. Crim. P. 29(a); D.C. Sup. Ct. R. Crim. P. 29; Idaho Ct. R. 29; Mont. Code Ann. § 46-16-403; N.M. Dist. Ct. R. Cr. P. 5-607; Pa. R. Cr. P. 606.

[43] Ark. R. Crim. P. 33.1(a).

[44] Ind. Stat. Trial P. R. 50.

[45] Ala. R. Crim. P. 20.2.

[46] Fla. R. Crim. P. 3.380(a) provides:

For those states where we relied on case law to establish implied authorization for pre-verdict acquittals, it was generally clear from language in the opinion that the defendant could make a motion at the close of the government's case, but it was less clear whether a motion was permitted at the close of all the evidence.

C. Under the state provision, is the court permitted or required on its own motion to grant judgment of acquittal before submission to the jury?

This section addresses whether the states follow the federal practice of permitting the court on its own motion to grant judgment of acquittal. Currently, Rule 29(a), authorizes a federal court at any time before submission to the jury to consider whether to grant judgment of acquittal. We found that a large number of state courts do not follow the federal rule. In fact, many require the judge *sua sponte* to direct an acquittal, if the evidence is insufficient.

We uncovered considerable variation among state court procedures. In some instances, we were unable to collect the information we were seeking because of the lack of specificity in the legal authority. Consequently, we present information only on states where the information was available. We describe the practices below and the frequency in which they appeared in the states' materials.

i) Twenty-six states[47] require a court to enter to enter a judgment of acquittal on its own motion after the evidence on either side has closed, if the evidence is insufficient to support a conviction.

ii) One state[48] requires a court to enter a judgment of acquittal on its own motion at any time before submission to the jury.

iii) Two states[49] follow the federal practice of permitting, but not requiring, the court on its own motion, to enter a judgment of acquittal at any time before the case is submitted to the jury.

iv) Two states[50] permit the court on its own motion to enter a judgment of acquittal, after the evidence on either side is closed.

> If, at the close of the evidence for the state or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant shall, enter a judgment of acquittal.

[47] These states are: Ala., Ariz., Cal., Conn., Colo., Del., D.C., Haw., Idaho, Iowa, Kan., Me., Mass., Minn., Mo., N.J., N.M., N.D., Ohio, R.I., S.C., S.D., Tenn., Vt., W.Va., and Wyo. *See infra* Appendix A.

[48] Ala. Rule Crim. Proc. 20.2. *See infra* Appendix A.

[49] Official Code of Georgia § 17-9-1 and Md. R. 4-324. *See infra* Appendix A.

[50] Fla. R. Crim. Proc. 3.380 and 725 Ill. Compiled Stat. 5/115-4. *See infra* Appendix A.

v) One state[51] permits the court on its own motion to enter a judgment of acquittal, at any time before final judgment.

vi) One state[52] permits the court on its own motion to dismiss the action and discharge the defendant; however, prior to dismissal the court may allow the case to be reopened for good cause shown.

vii) Another state[53] permits the court on its own motion to enter a judgment of acquittal after the prosecutor has rested its case in chief, and before the defendant presents proofs.

D. Under the state provision, can the court reserve decision on the defendant's motion?

Federal Rule of Criminal Procedure 29(b) permits, but does not require, the court to reserve decision on the defendant's motion for a judgment of acquittal, whether defendant's motion was made after the government closes its evidence or after the close of all the evidence. The court can then proceed with the trial (where the motion was made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict, or after it returns a guilty verdict, or after the jury is discharged without having reached a verdict. This section describes only those state provisions that clearly either permit or prohibit the court from reserving decision on defendant's motion.[54]

Only West Virginia and the District of Columbia have provisions mirroring the federal rule in permitting the court to reserve decision on defendant's motion, made either after the government closes its evidence or after the close of all the evidence.[55] New York also allows the court to reserve decision on defendant's motion after the evidence on either side is closed. However, unlike Rule 29(b), if the court reserves judgment on the motion, it must permit the trial to proceed and may not render a judgment until a jury verdict is reached (i.e., the court may not decide the motion before a jury verdict or after the jury is discharged without a verdict.)[56]

Twenty states permit the court to reserve decision on a defendant's motion for judgment of acquittal, but only if the defendant's motion is made at the close of all the

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[51] Ind. Stat. Trial Proc. R. 50. *See infra* Appendix A.
[52] Mont. Code Ann. § 46-16-403. *See infra* Appendix A.
[53] Mich. Ct. R. 6.419. *See infra* Appendix A.
[54] Seventeen states make no mention in their statutory or case law authorization for pre-verdict judgments of acquittal as to whether the court is permitted or prohibited from reserving decision on defendant's motion. These states include Fla., Ga., Ind., Ky. , Md., Miss., Mont., Neb., N.H., N.J., N.M., Okla., Or., S.C., Tex., Va., Wis. *See infra* Appendix A.
[55] W.Va.R.Cr.P. 29(b); D.C. Superior Ct. R. Cr. P. 29.
[56] N.Y. Consol. Law Serv. Crim. P. Law § 290.10.1(b) ("court may. . . reserve decision on the motion until after the verdict has been rendered and accepted by the court. . .").

evidence. For example, Alaska Rule of Criminal Procedure 29(b) allows the court to reserve decision only on a motion for judgment of acquittal made at the close of all the evidence.[57] Many of these statutory provisions specifically prohibit the court from reserving decision upon defendant's motion made at the close of the government's case. For example, Colorado Rule of Criminal Procedure 29(b) specifically states that the "court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case, but may reserve decision on motion made at the close of all the evidence."[58]

Eight states have statutes explicitly or implicitly prohibiting the court from reserving decision on defendant's motion for a judgment of acquittal. For example, Alabama Rule of Criminal Procedure 20.2(b) explicitly states that "[i]f the motion for judgment of acquittal is made after the close of the state's evidence, the court shall rule on the motion before calling on the defendant to present his evidence. If the motion is made at the close of all the evidence in a jury case, the court shall rule on the motion before permitting argument or charging the jury; if it is not ruled on at that time, it is deemed denied. In a non-jury case, if the motion is not ruled on before the submission of the case for decision, the motion is deemed denied."[59] Although California Penal Code Section 1118.1 does not specifically forbid the court from reserving decision on defendant's motion, such a prohibition can be implied from the provision stating that the "court must enter judgment of acquittal before the case is submitted to the jury."[60]

E. Does the state court have discretion to rule on defendant's motion for judgment of acquittal if the standard for granting the motion is met?

Under Rule 29(a), on the defendant's motion the court must "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."

The majority of states (35) that provide statutory authority for the court to enter judgment of acquittal follow the federal rule requiring the court to grant the defendant's

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[57] *See also* authority provided *infra* Appendix A for Colo., Conn., Del., Haw., Idaho, Iowa, Kan., Me., Mass., Mich., Minn., Mo., Ohio, Pa., R.I., S.D., Tenn., Vt., Wy.

[58] *See also* Conn. Super. Ct. § 41-41; Haw. R. Penal Proc. 29(b); Mass. R. Crim. Proc. 25(b)(1); Mich. Ct. R. 6.419(A); Minn. R. Crim. Proc. 26.03, Subd. 17(2); Ohio Crim. R. 29(A).

[59] *See also* Ariz. R. Crim. Proc. 20(a) ("The court's decision on a defendant's motion shall not be reserved, but shall be made with all possible speed."); Ark. R. Crim. Proc. 33.1(a) (defendant's motion for directed verdict is deemed denied if for any reason it is not ruled upon); 725 Ill. Compiled Stat. 5/115-4(K)(on the defendant's motion the court must make a finding or direct the jury to return a verdict of not guilty, enter a judgment of acquittal and discharge defendant); N.C. Gen. Stat. § 15A-1227 Statutory Notes ("The Commission believed the practice of reserving decision on a motion is little followed—and ought not be encouraged."); N.D. R. Crim. P. 29 (Notes indicates the elimination of the reservation of motion provision and leaves it blank for possible future use.).

[60] *See also* Utah Code Ann. § 77-17-3 (although rule does not specifically forbid reserving decision, the statute appears to entitle defendant to an immediate ruling on the sufficiency of the evidence of state's case at the close of defendant's case).

motion if the standard stated in the rule is met.[61] Four states appear to grant the trial judge discretion either to grant or deny the defendant's motion even if the standard stated in the rule is met. For example, Official Code of Georgia Section 17-9-1 provides that "[w]here there is no conflict in the evidence and the evidence introduced with all reasonable deductions and inferences therefrom shall demand a verdict of acquittal or 'not guilty' as to the entire offense or to some particular count or offense, the court may direct the verdict of acquittal to which the defendant is entitled under the evidence and may allow the trial to proceed only as to the counts or offenses remaining, if any" (emphasis added).[62] Due to ambiguous or absent statutory language or relevant caselaw we were unable to make this distinction for several states.[63]

F. Scope of Offenses Eligible for Pre-Verdict Judgments of Acquittal

Rule 29(a) requires the district court upon the defendant's motion--or permits the court on its own motion--to enter a judgment of acquittal "of any offense for which the evidence is insufficient to sustain a conviction."

State court rules that address the issue[64] limit the scope of offenses for which a judgment of acquittal can be granted to any one or more charged offenses. For example, Michigan Court Rule 6.419 requires the court on defendant's motion to direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support a conviction.[65] In addition, most states' provisions specify the required instrument or instruments in which the offense must be charged, including the accusatory pleading[66], the charge[67], the indictment[68], the indictment or information[69], or the indictment, information or complaint.[70]

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[61] *See infra* Appendix A for statutory language of rules listed for Alaska, Ariz., Cal., Colo., Conn., Del., D.C., Fla., Haw. Idaho, Ill., Ind., Iowa, Kan., Me., Md., Mass., Mich., Minn., Mo., N.J., N.M., N.C, N.D., Ohio, Or., R.I., S.C., S.D., Tenn., Utah, Vt., Va., W.Va., and Wyo.

[62] *See also* Mont. Code Ann. § 46-16-403 ("If the evidence is insufficient to support a finding of verdict of guilty, the court may. . . on the motion of the defendant, dismiss the action and discharge the defendant."); N.Y. Consol. Law Serv. Crim. P. Law § 290.10.1 ("[T]he court may. . . upon motion of the defendant, issue a trial order of dismissal. . ."; Okla. Stat. tit. 22 § 850 ("If. . . the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant.").

[63] *See* authority provided *infra* Appendix A for Ark., Ky., Md., Miss., Neb., N.H., Pa., Tex., Wash., Wis.

[64] For the following states which allow pre-verdict judgment of acquittal we were unable to determine the scope of offenses eligible for a judgment of acquittal: Ark., Fla., Ill., Ky., Miss., Mont., Neb., Nev., N.M., N.C., Okla., Or., Tex., Utah, Va., Wash.

[65] *See also* Pa. R. Cr. P. 606 ("one or more offenses charged").

[66] Cal. Penal Code § 1118.1.

[67] Haw. R. Penal P. 29(a).

[68] Iowa R. Crim. Proc. 2.19(8); N.J. Court R. 3:18-1 ("indictment or accusation"); S.C. Cr. P. R. 19(a).

[69] Alaska R. Crim. P. 29(a); Del. Super. Ct. Crim. R. 29(a); D.C. Sup. Ct. R. Cr. P. 29(a); Mo. Supreme Ct. R. 27.07(a); S.D. Codified Laws §23A-23-1; Tenn. Crim. Proc. R. 29(a); Vt. R. Cr. P. 29(a); W.Va. R.Cr. P. 29(a).

[70] Ariz. R. Cr. P. 20(a); Colo. R. Cr. Proc. 29(a)("indictment, information, complaint, summons and complaint"); Idaho Ct. R. 29(a); Kan. Stat. Ann. § 22-3419; Me. R. Crim. Proc. 29(a); Minn. R. Crim. Proc. 26.03, Subd. 17 ("tab charge, indictment, or complaint"); N.D. R.Cr. Proc. 29(a); Ohio Crim. R. 29(A); R.I. Super. R. Cr. P. 29(a); Wy. R. Cr. Proc. 29(a) ("indictment, information or citation").

Several states have expanded the scope of offenses for which acquittal may be granted beyond "any charged offense". For example, Alabama Rule of Criminal Procedure 20.1 requires the court to enter a judgment of acquittal "as to any charged offense, or as to any lesser included offense, for which the evidence is insufficient to support a finding of guilty beyond a reasonable doubt." Connecticut Superior Court Rule Section 42-40 directs the judge to enter a judgment of acquittal "as to any principal offense charged and as to any lesser included offense for which the evidence would not reasonably permit a finding of guilty. Such judgment of acquittal shall not apply to any lesser included offense for which the evidence would reasonably permit a finding of guilty." Maryland Rule 4-324(a) permits the defendant to move for judgment of acquittal "on one or more counts, or on one or more degrees of an offense which by law is divided into degrees." The rule further requires the defendant to "state with particularity all reasons why the motion should be granted." In addition, the court is required to specify each count or degree of an offense to which the judgment of acquittal applies.[71]

V. Appealability of Pre-Verdict Judgments of Acquittals

Prosecution appeals themselves are not barred by double jeopardy law.[72] In both federal and state courts, the long-held view is that the prosecution may appeal in a criminal case if expressly authorized by statute.[73] The present federal statute governing prosecutor appeals has been interpreted to bar the appeal of pre-verdict judgments of acquittal in federal courts because the statute prohibits an appeal when the remedy sought

[71] Md. R. 4-324(a). *See also* Ala. R. Crim. Proc. 20.1 ("any charged offense, or any lesser included offense"); Official Code of Ga. § 17-19-1 ("the entire offense or to some particular count or offense"); Ind. Stat. Trial Proc. R. 50(A) ("all or some of the issues in a case"); Mass. R. Cr. Proc. 25(a) ("the offense charged in an indictment or complaint or any part thereof"); N.Y. Consol. Law Serv. Crim. P. Law § 290.10 ("any count of an indictment. . . or any lesser included offense").

[72] James A. Strazzella, *The Relationship of Double Jeopardy to Prosecution Appeals*, 73 Notre Dame L. Rev. 1, 2 (1977). "[D]ouble jeopardy protection precludes only further impermissible trial-level jeopardy, but not a prosecution appeal." *Id*. at 5. The author explains: "Double jeopardy protection is designed as a trial-level protection, protecting the defendant against being twice put in jeopardy for the same offense. The protection bars repetition of a particular occurrence: subjecting a defendant to 'jeopardy'. This occurrence is constitutionally defined as occurring at the point at which a jury is sworn, or (in a non-jury trial) the point at which the judge begins to receive evidence, thereby protecting a defendant from certain second-jeopardy actions in the trial court. Protecting the defendant from litigation in an appellate court proceeding falls outside the protection from second jeopardy because the appeal itself does not subject the defendant to a second 'jeopardy' in its constitutionally defined sense. . . [This] conclusion is also consistent with, and follows from, those Supreme Court cases refusing to dismiss government appeals when the remedy would not require further jeopardy. Were it otherwise, statutes allowing prosecution appeals under any circumstances would be unconstitutional, a conclusion that would invalidate the long-accepted view that such appeals may be allowed if statutorily authorized." *Id.* at 2-4 (footnotes omitted).

[73] *See* United States v. Sanges, 144 U.S. 310 (1892)(holding that the prosecution enjoys no right to appeal an unfavorable ruling in a criminal case without express statutory authorization and rejecting the notion that under common law the government had such a right); United States v. Wilson, 420 U.S. 332, 336 (1975) ("[T]his Court early held that the Government could not take an appeal in a criminal case without express statutory authority"); Arizona v. Manypenny, 451 U.S. 232, 246 (1981)(holding the rule acted as a "presumption" against prosecution appeals absent an express statute).

would place the defendant in further jeopardy.[74] The states are not bound by the federal appeals statute and are free to limit or extend the state's appellate authority as a matter of state law as long as it does not do so in a way that offends constitutional restraints.[75]

Thus, whether states permit the appeal of pre-verdict judgments of acquittal depends on a particular state's governing definition of the prosecution's right of appeal in criminal cases. Our research found that almost all states define the extent of the prosecution's right to appeal by statute and these statutes are not uniform throughout the country.[76] Two states rely upon a state constitutional provision[77], and one state turns solely to its judicial decisions to define appealability by the state.[78] Our findings on appealability are complicated because the statutes that permit appeals by the state in criminal matters vary widely among the states and these statutes rarely provide a clear unambiguous answer as to whether pre-verdict judgments of acquittal are appealable.

A. States Prohibiting Appeal of Pre-Verdict Judgments of Acquittal

Thirty-six states and the District of Columbia appear to prohibit the prosecution from appealing a pre-verdict judgment of acquittal.

1. Prohibiting Appeal by Express Ban

Four states and the District of Columbia have enacted an express constitutional or statutory ban precluding the state from appealing pre-verdict judgments of acquittal, and one state has enunciated this rule solely by judicial decision.[79] California Penal Code

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[74] *See* 18 U.S.C. § 3731 (1994) and discussion *supra* note 3; Strazzella, *supra* note 72, at 8-9. *See also* Fong Foo v. United States, 369 U.S. 141, 143 (1962)(holding that because the trial terminated with a verdict of acquittal, in that the judge directed a judgment of acquittal for the defendants in the middle of the government's examination of its fourth witness, it could not be reviewed without putting petitioners on trial twice for the same crime).

[75] *See* Arizona v. Manypenny, 451 U.S. 232, 249 (1981)(If a state wishes to empower its prosecutors to pursue a criminal appeal under certain conditions, it is free to so provide, limited only by guarantees afforded the criminal defendant under the Constitution); Palko v. Connecticut, 302 U.S. 319, 327-29 (1972) (Court upheld a Connecticut statute allowing prosecution to seek review of legal errors committed during trial even if the defendant had obtained an acquittal from the jury, concluding that the Connecticut statute could permit appeals by the state as long as double jeopardy principles were not violated.)

[76] Forty-seven states and the District of Columbia have statutes addressing the state's right to appeal in criminal cases.

[77] *See* Ill. Const. art. VI, § 6 (provides appeal as of right from final judgments "except that after a trial on the merits in a criminal case, no appeal shall lie from a judgment of acquittal"); Ky. Const. § 115 (allows prosecution appeal "except that the Commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law. . .").

[78] *See* State v. McKnight, 577 S.E.2d 456, 457 (S.C. 2003) ("'while a limited right of appeal in criminal cases has been conferred upon the State by statute in a number of jurisdictions, the extent of the right of the prosecution to appeal in this jurisdiction [South Carolina] has been defined by our judicial decisions.'" (quoting State v. Holiday, 177 S.E.2d 541 (S.C.1970)).

[79] *See* State v. McKnight, 577 S.E.2d 456, 457 (S.C. 2003) (dismissing state's appeal of grant of a directed verdict in defendant's favor at conclusion of state's evidence, the court reiterated the principle established in prior decisions that "based primarily upon the double jeopardy provisions of the Constitution, we have long recognized that the state has no right to appeal from a judgment of acquittal in a criminal case unless

Section 1118.2 (2003) provides that a judgment of acquittal entered before the case is submitted to the jury "shall not be appealable and is a bar to any other prosecution for the same offense." District of Columbia Statutes Section 23-104(c) (1989) provides that the United States or the District of Columbia may appeal an order dismissing an indictment or information or otherwise terminating a prosecution in favor of a defendant or defendants as to one or more counts thereof, "except where there is an acquittal on the merits." Illinois Constitution article VI, Section 6 provides for appeal as a matter of right to the appellate court from final judgments of a circuit court, "except that after a trial on the merits in a criminal case, no appeal shall lie from a judgment of acquittal."[80]

2. Prohibiting Appeal by Reference to Double Jeopardy Protection

Twelve states have statutes that limit prosecution appeals by express reference to double jeopardy protection similar to the federal statute. Provided that the trial judge granted the pre-verdict judgment of acquittal based upon the sufficiency of the evidence of the defendant's guilt[81], a jurisdiction with a statutory formulation expressly linking prosecutor appealability to double jeopardy prohibits the appeal itself because the federal double jeopardy bar to further trial court proceedings comes into play.[82] The language in some of these statutes clearly makes the connection between prosecutorial appeal and the

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the verdict of acquittal was procured by the accused through fraud or collusion;" in a footnote the Court noted that the state's reliance on federal case law is misplaced because the state's right to appeal in South Carolina is governed by judicial decisions. *Id.* at 457 n.3).

[80] *See also* Tenn. App. Proc. Rule 3(c) (2003) which lists those situations in which appeal as of right by the state in criminal actions is available. Notes to subdivision (c) states that the "only limitation placed upon the right of appeal by the state is that it may not appeal upon a judgment of acquittal. . . In addition, notions of double jeopardy place constitutional restrictions on the availability of appeals by the state". . . (citing United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). 13 Vt. S. A. § 7403 (2002) governs appeal by the state and provides a detailed list of trial court actions from which the state can appeal. The Reporter's Notes to Vt.R.Cr. Proc. 29 motion for judgment of acquittal states that "[i]n contrast to prior practice, no appeal on behalf of the state lies from the grant of a motion for judgment of acquittal under Rule 29." The Notes further state that "[u]nder Rule 29, the grant of the motion for judgment of acquittal is a final judgment in form as well as substance, and appeal from it by the state is barred on double jeopardy grounds" (citing Fong Foo v. United States, 369 U.S. 141 (1962)).

[81] *See* United States v. Scott, 437 U.S. 82, 101 (1978)(holding that a pre-verdict judgment of acquittal will be nonappealable only when "it is plain that the District Court. . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction."). *See also* State v. Priddy, 445 S.E.2d 610, 613 (N.C. 1994)(holding that where a dismissal of charges occurs prior to the verdict, the attachment of jeopardy only begins the inquiry as to whether the prohibition against double jeopardy bars retrial; in order for the midtrial dismissal to amount to an "acquittal of an offense so as to bar a second trial, the dismissal must be based on grounds of factual guilt or innocence," citing United States v. Scott, 437 U.S. 82 (1978)); State v. Veltri, 764 A.2d 163 (R.I. 2001)(holding that where the court, before the jury returns a verdict, enters judgment of acquittal, appeal will be barred under double jeopardy principles only when it is plain that the court evaluated the state's evidence and determined that it was legally insufficient to sustain a conviction).

[82] *See* Benton v. Maryland, 395 U.S. 784 (1969) (holding that the states must abide by the federal Double Jeopardy Clause); U.S. Const. art. VI, cl. 2 (under the Supremacy Clause, the state courts must provide at least a minimum federal double jeopardy protection); Fong Foo v. United States, 369 U.S. 141 (1962)(the Double Jeopardy Clause prohibits appeals from judgments of acquittal directed by the trial judge prior to submission of the entire case to the jury).

double jeopardy bar to further trial court proceedings. For example, Alaska Statutes Section 22.15.240 (Michie 1996) generally provides that the "state's right of appeal in criminal cases is limited by the prohibition against double jeopardy" contained in the federal and state constitutions. Michigan Compiled laws Annotated Section 770.12(1) (West Supp. 1997) allows the prosecution to appeal "if the protection against double jeopardy under. . . [the state and federal constitutions] would not bar further proceedings against the defendant."[83] The language in other statutes does not make this connection as apparent although the importance of double jeopardy as a limiting doctrine is recognized. For example, Maine Revised Statutes Annotated Title 15, Section 2115-A (2)(West 1964) allows certain prosecution appeals only "when an appeal of the order would be permitted by the double jeopardy provisions" of the United States and Maine Constitutions. [84]

3. Prohibiting Appeal by Implication

We characterize nineteen states as "impliedly" prohibiting appeals from pre-verdict judgments of acquittal because their statutes: (1) provide a detailed and exclusive "list" of trial court actions from which the prosecution is permitted to appeal; (2) limit appeal to one or two narrowly defined circumstances; or (3) consist of a very general statement of appealability. These statutory schemes do not address pre-verdict judgments of acquittal or make reference to double jeopardy concerns. Under the principal that the state can only appeal when specifically authorized to do so by express statutory language[85], we assume the omission was intended to imply that pre-verdict acquittals are

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[83] *See also* Ga Code Ann., § 5-7-1(a)(3) (2003) authorizes the prosecution to appeal "[f]rom an order, decision, or judgment sustaining a plea or motion in bar, when the defendant has not been put in jeopardy."; Haw. RS § 641-13(2)(1993) (permits prosecution to appeal "from an order or judgment, sustaining a special plea in bar, or dismissing the case where the defendant has not been put in jeopardy."); Mo. Ann. Stat. § 547.200(2) (2003) (contains a residual authorization for prosecution appeals in all criminal cases beyond those specified elsewhere, "except in those cases where the possible outcome of such an appeal would result in double jeopardy for the defendant."): N.J. Court Rules, 1969 R. 2:3-1 (permits state to appeal in any criminal action from a judgment of the trial court dismissing an indictment, accusation or complaint, "where not precluded by the Constitution of the United States"); N.M. St. § 39-3-3(C) (1972) (permits state to appeal from a "decision, judgment or order dismissing a complaint, indictment or information" unless the "double jeopardy clause of the United States Constitution or the constitution of the state of New Mexico prohibits further prosecution"); N.C. Gen. Stat. § 15A-1445(a)(1)(1988 & Supp. 1996) ("Unless the rule against double jeopardy prohibits further prosecution", the state may appeal when there has been a decision or judgment dismissing criminal charges as to one or more counts): R.I. Gen. Laws 1956, § 9-24-32 (allows the state to appeal a judgment before the defendant has been placed in jeopardy); WA R. RAP 2.2(b)(1) (2003) (permits state to appeal from certain superior court decisions "only if the appeal will not place the defendant in double jeopardy").

[84] *See also* Wis. Stat. Ann. §974.05(1)(a) (West Supp. 1996)(permits state to appeal any final order or judgment adverse to the state following a trial or guilty plea or no contest plea "if the appeal would not be prohibited by constitutional protections against double jeopardy").

[85] United States v. Sanges, 144 U.S. 310 (1892)(without express statutory authorization to appeal the prosecution enjoys no such right); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (government has no right of appeal in a criminal case unless there is express legislative authorization); 24 C.J.S. Criminal Law § 1659 (when an appeal was allowed to the state by statute, the right was strictly limited to cases coming within the statutory term). State courts have adopted the principal that the government's right to appeal in a criminal case does not exist absent express statutory authorization. *See, e.g.*, Jones v. State, 471 A.2d 1055 (Md. 1984)(under Maryland law the state's right to appeal in a criminal

not appealable otherwise the legislature would have included them in the statutory list of appealable actions or circumstances. For many of these states, our analyses of the relevant judicial decisions helped to verify this assumption.

Some statutes provide a "listing" of trial court actions from which the prosecution is permitted to appeal. Many such statutes limit appeals, in whole or in part, to pre-jeopardy actions or to post-verdict actions. For example, Florida Statutes Section 924.07(1)(1995) lists those trial court actions from which the state is permitted to appeal in criminal cases, including from an order dismissing an indictment or information or any count thereof, an order granting a new trial, an order arresting judgment, a ruling on a question of law when the defendant is convicted and appeals from the judgment, the sentence (on the ground that it is illegal), a judgment discharging a prisoner on habeas corpus, all other pretrial orders, an order suppressing evidence or evidence in limine at trial, or a ruling granting a motion for judgment of acquittal after a jury verdict. New Hampshire Revised Statutes Annotated Section 606:10 (2002) allows the state in criminal cases to appeal (with the attorney general's approval) questions of law; certain pre-trial orders taken before the defendant has been placed in jeopardy, including an order suppressing any evidence, an order preventing the state from obtaining evidence, or an order dismissing an indictment, information, or complaint; and certain post-trial orders after a finding of guilty by the jury or court including the granting of a motion for a new trial, dismissal, or "any other order requiring a new trial or resulting in termination of the prosecution in favor of the accused if an appeal of such order would be permitted by double jeopardy provisions of the constitutions of the United States and New Hampshire."[86]

For many of these statutory listings, our analyses of the relevant case law led us to conclude that pre-verdict judgments of acquittal were indeed not appealable under the statutory scheme.[87] Most of these statutes that list appealable trial court actions include a

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case is limited; it may do so only when authorized by statute); State v. Olson, 334 N.W. 2d 49 (S.D. 1983)(holding that Court did not have power to hear the case under state statute governing state's right to appeal and it was left to legislature to expand the state's right to appeal); State v. Bailey, 523 A.2d 535, 537 (Del. 1987) *and* State v. Insley, 606 So.2d 600, 602 (Missi. 1992)(citing Sanges in connection with determination that state statute did not authorize appeal of the particular trial court action involved).

[86] N.H. Rev. Stat. Ann. § 606:10.III(c)(2002). For additional examples of statutory listings of mainly pre-jeopardy and post-verdict trial court actions from which the prosecution is permitted to appeal, see Ariz. Rev. Stat. § 13-4032(1992); Md. Code Ann. Cts. & Jud. Proc. § 12-302(c)(1)-(3)(1995); Mont. Code Ann., § 46-20-103(2)(a)(1995); N.Y. Consol. Law Serv. Crim. P. Law § 450.20 (2003); N.D. Cent. Code § 29-28-07 (2002); Or. Rev. Stat. § 138.060 (2001); S.D. Compiled Laws § 23A-32-4(1989); Tex. Code Crim. P. Ann. art. 44.01(a) (West Supp. 1997); Utah Code Ann. § 77-18a-1(2)(2003); Va. Code Ann. § 19.2-398.A (2003) (permits state to appeal specific trial actions only in felony cases and only before a jury is impaneled and sworn in or after conviction and sentencing).

[87] *See, e.g.*, Rolph v. City Court, 618 P.2d 1081(Ariz. 1980)(state is not authorized to appeal from a judgment of acquittal entered prior to a final jury verdict, even if acquittal is based upon an egregiously erroneous foundation); Hudson v. Florida, 711 So.2d 244, 246 (Fla. Dist. Ct. App. 1998) (court rejected state's appeal of judgment of acquittal granted before jury verdict; court interpreted Fla.Stat. § 924.07(1)(j) in context of the state and constitutional double jeopardy provisions to only permit the state to appeal from a judgment of acquittal only if it follows a guilty verdict); Bell v. State, 395 A.2d 1200 (Md. App.), *affirmed*, 406 A.2d 909 (Md. 1979)(judgment of acquittal by court or jury may not be appealed and terminated prosecution when second trial would be permitted by reversal); State v. Greenwalt, 663 P.2d

provision permitting the state to appeal from an order dismissing an indictment or information or any count thereof.[88] In several states, case law indicated that these provisions were intended to address pre-trial or pre-jeopardy dismissals and not pre-verdict judgments of acquittal granted on the basis of the defendant's guilt or innocence.[89]

Several statutes imply that pre-verdict judgments of appeal are nonappealable because they limit appeal to a few narrowly defined circumstances. Two states permit the state to appeal only from a judgment of acquittal and only if it was granted after the jury returned a guilty verdict.[90] Examples of other statutes limiting state appeal exclusively to uniquely defined circumstances include permitting appeal from a judgment declaring an ordinance or statute invalid;[91] from a judgment holding an indictment or information unconstitutional;[92] from an order finding there is a lack of subject matter jurisdiction;[93] or from a judgment dismissing an indictment found to be bad or insufficient.[94]

1178 (Mont. 1983) (court found dismissal for insufficient evidence operates as an acquittal and an appeal constitutes a violation of defendants' rights against double jeopardy)(citing Fong Foo v. United States, 369 U.S. 141 (1962)); People v. Harding, 475 N.Y.S.2d 611 (N.Y. 1984)(prosecution has no right to appeal from an order of dismissal granted in a jury trial at close of prosecution's case, since there is no statute granting such right unless trial judge reserves decision on a defense motion until after verdict has been rendered); Dickman v. Kraft, 472 N.W.2d 441(N.D. 1991)(there can be no appeal from a true judgment of acquittal); State v. Carillo, 790 P.2d 1159 (Or. App. 1990), *aff'd*, 804 P.2d 1161 (Or. 1991)(if court granted judgment of acquittal equivalent to a judgment that the defendant is not guilty of the charged offense, then there is no basis in the law for the state to appeal from that judgment); State v. Olson, 334 N.W.2d 49 (S.D. 1983)(dismissing state's appeal of trial court's order acquitting defendant finding Court did not have power to hear the case under the statute governing state's right to appeal); State v. Musselman, 667 P.2d 1061, 1064 (Utah 1983)(state may not appeal a valid acquittal no matter how overwhelming the evidence against the defendant may be).

[88] *See* Ariz. Rev. Stat. § 13-4032(1)(1992); 10 Del. C. § 9902(a)(1974); Fla. Stat. § 924.07(10(a) (1975); Md. Code Ann. Cts. & Jud. Proc. § 12-302(C)(1)(1995); Mont. Code Ann. § 46-20-103(2)(a)(1995); NH Rev. Stat. Ann. § 606:10.II(c)(2002); N.Y. Consol. Law Serv. Crim. P. Law § 450.20.1(2003); N.D. Cent. Code § 29-28-07(1)(2002); Or. Rev. Stat. § 138.060(1)(a)(2001); S. D. Compiled Laws § 23A-32-4(1989); Tex. Code Crim. P.Ann. art. 4401(a)(1)(West Supp. 1997); Utah Code Ann. § 77-18a-1(2)(a)(2003); Va. Code Ann. § 19.2-398.A(1)(2003).

[89] State v. Bailey, 523 A.2d 535 (Del. 1987)(court clarified that the statutory provision permitting state to appeal from final order where order constitutes a dismissal of an indictment or information or any count thereof (10 Del. C. § 9902(a)(1974)), was intended to allow state to appeal orders dismissing charges before a verdict is rendered and before jeopardy attaches); State v. Hogie, 424 N.W.2d 630 (N.D. 1988)(section does not authorize state to appeal from an acquittal, but state may appeal from a dismissal of an information or other order, regardless of its label, that has same effect as an order quashing an information); Taylor v. State, 886 S.W.2d 262, 265 (Tex. Crim. App. 1994)(court found statute entitling state to appeal an order that "dismisses an indictment, information, complaint, or any portion [thereof]" [Tex. C.C.P. art. 44.01(a)(1)] does not embrace an order of acquittal or an order dismissing prosecution based on sufficiency of evidence showing entrapment).

[90] AL Mass. R. Crim. P. Rule 25(c) (2002); Minn. R. Crim. Proc. 28.04, subd. 1(4) (2002). Under both statutes, the defendant is required to make the motion at the close of all the evidence and the judge must reserve decision on the motion until after the jury returned a guilty verdict or the defendant could make the motion after the jury was discharged.

[91] AL ST § 12-22-70(c), Ala. Code 1975.

[92] AL ST § 12-22-91, Ala. Code 1975; Ex parte Willie Adams, 592 So.2d 641 (Ala. 1991)(state had no right of appeal from trial court's judgment of acquittal and discharge of defendant in criminal case, absent judgment that underlying indictment was unconstitutional). *See also* 10 Del.C. § 9902(a)(1974)(state permitted to appeal from granting any motion vacating any verdict or judgment of conviction based upon

Finally, for several states the relevant statutes were not very clear and case law clarification was necessary in order to imply nonappealability. These statutes contained very general pronouncements of appealability. For example, Ohio allows the state to appeal any decision of the trial court in a criminal case except the final verdict.[95] And Pennsylvania allows appeal from "any final order in a criminal matter only in those circumstances provided by law."[96]

B. States Permitting Appeal of Pre-Verdict Judgments of Acquittal

Thirteen states appear to permit the prosecution to appeal a pre-verdict judgment of acquittal. As discussed previously, while the prohibition against double jeopardy does not prevent the state from bringing the appeal, the double jeopardy clause bars further trial court proceedings and thus bars the appeals court from granting a remedy.[97] "[I]f a prosecution appeal is seeking a remedy prohibited by double jeopardy law, then the case becomes one in which the appellate court would be rendering an advisory opinion on the underlying merits of the prosecution appeal."[98] Although federal courts are constitutionally prohibited from rendering an advisory opinion,[99] the question of whether the state court can render an advisory opinion turns solely on state law concerning the functioning of that state's courts.[100] Thus, in those states with statutes allowing prosecution appeals (assuming that the trial court rendered the functional equivalent of an

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invalidity or construction of statute upon which the indictment or information is founded); State v. Bailey, 523 A.2d 535 (Del. 1987)(state had no right to appeal under 10 Del. C. § 9902(a) because trial judge premised his post-trial judgment of acquittal upon sufficiency of the evidence and not on the invalidity or construction of the criminal statute under which defendant had been charged).

[93] 10 Del. C. § 9902(a) (1974).

[94] W. Va. Code § 58-5-30(1931); State v. Canady, 475 S.E.2d 37 (W.Va. 1996)(under West Virginia statutory provisions, state's only right of review is limited to appealing a decision to dismiss an indictment as being either bad or insufficient pursuant to W.Va. Code § 58-5-30(1931); court also allows state to appeal under a petition for prohibition if trial court exceeded or acted outside its jurisdiction depriving prosecution right to prosecute the case or of a valid conviction provided the prohibition proceeding does not offend the double jeopardy clause or defendant's right to a speedy trial).

[95] Ohio Rev. Code § 2945.67(A); State v. Keeton, 481 N.E.2d 629(Ohio 1985)(a directed verdict of acquittal by trial judge in a criminal case is a "final verdict" within meaning of R.C. § 2945.67(A) which is not appealable by the state as a matte of right or by leave to appeal pursuant to that statute).

[96] Pa. R.A.P. Rule 341(e)(2002); Smalis v. Pennsylvania, 476 U.S. 140 (1986)(appeal by the state itself is prohibited if a successful post-acquittal appeal by the prosecution would lead to proceedings that violate double jeopardy principles).

[97] Strazzella, *supra* note 72.

[98] *Id.* at 7.

[99] *See, e.g.*, Local No. 8-6 Oil Workers Int'l Union v. Missouri, 361 U.S. 363, 367 (1960); United States v. Evans, 213 U.S. 297, 301 (1909). Federal court jurisdiction is limited to deciding cases or controversies. *See, e.g.*, North Carolina v. Rice, 404 U.S. 244, 246 (1971).

[100] *See, e.g.*, New York State Club Ass'n v. City of New York, 487 U.S. 1, 8 n.2 (1988)(noting that "the special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts" and concluding that the "[s]tates are thus left free as a matter of their own procedural law to determine whether their courts may issue advisory opinions or determine matters that would not satisfy the more stringent requirement in the federal court than an actual 'case' or 'controversy' be presented for resolution").

acquittal on the merits of the case) federal double jeopardy prohibits a remedy to the prosecution under federal constitutional law (i.e., the case is moot), however, the state appellate court can render an advisory opinion on the underlying merits of the prosecutor's appeal.[101]

1. Permitting Appeal by Expressly Inviting Advisory Opinions

Several of the statutes appear to call overtly for advisory opinions in cases that have become moot because of double jeopardy bars.[102] Idaho Appellate Rule 11(c) permits the state to appeal from "[a]ny order or judgment, whenever entered and however denominated, terminating a criminal action, provided that this provision shall not authorize a new trial in any case where the constitutional guarantee against double jeopardy would otherwise prevent a second trial."[103] Kentucky Constitution section 115 allows the prosecution to appeal "except that the Commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law. . .". Further, Kentucky Revised Statutes Annotated Section 22A.020(4)(c)(Banks-Baldwin 1991) provides that in cases in which prosecution appeals are authorized, the court may reverse and order a new trial "in any case in which a new trial would not constitute double jeopardy."[104] Mississippi Code Annotated Section 99-35-103(b)(1994) provides that the prosecution may appeal a judgment acquitting the defendant when a question of law has been decided adversely to the state, but the appeal shall not subject the defendant to further prosecution nor reverse the judgment of acquittal. The Mississippi statute has been interpreted to distinguish between pure issues of law, which are appealable, and other issues involving facts.[105] Nebraska Revised Statutes Section 29-2319(1)(1995) provides that if a bill of exceptions is filed by the prosecuting attorney regarding any ruling or decision of the county court made during prosecution of a cause, the judgment of the trial court shall not be reversed or affected when the defendant in the trial court has been placed legally in jeopardy, and the decision of the reviewing district court "shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which thereafter arise in the district."[106]

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[101] Strazzella, *supra* note 72, at 16-19. For a discussion of when the case actually becomes moot, *see* Strazzella, *supra* at 21-23.
[102] *Id.* at 15 & n.32.
[103] *See* State v. Huggins, 665 P.2d 1053, 1054 (Idaho 1983)(although double jeopardy barred retrial following state appeal of a judgment of acquittal granted to defendant after prosecution rested, court nevertheless renders ruling recognizing that "[i]n a sense, our opinion today is advisory.")
[104] *See* Murphy v. Commonwealth, 50 S.W. 3d 173 (Ky. 2001) (trial court's action effectively constituted an acquittal, and thus, Commonwealth was required to request a certification of the law, in order to preserve the issue for appellate review).
[105] *See* State v. Insley, 606 So.2d 600, 602 (Miss. 1992) (collecting cases that hold the statute does not authorize prosecution appeals of insufficiency of evidence issues) *and* State v. Thornhill, 171 So.2d 308, 312 (Miss. 1965) (finding defendant's acquittal barred reprosecution but still considering prosecution's claim of trial error regarding admission of evidence).
[106] *See* State v. Wilen, 539 N.W.2d 650 (Neb. Ct. App. 1995) (finding error on statutory appeal in directed verdict and noting that double jeopardy bars retrial).

Wyoming Statutes Annotated Section 7-12-101 to 104 (Michie 1997) affords the prosecution a limited possibility of review by means of a bill of exceptions, and further calls for advisory opinions by mandating that the appellate court's decision "shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which may afterwards arise in the state, but shall not reverse nor in any manner affect the judgment of the court in the case in which the bill of exceptions was taken."[107] In addition, Wyoming Statutes Annotated Section 7-12-103 (Michie 1997) provides that if the prosecution is granted a bill of exceptions, the trial judge shall "appoint a competent attorney to argue the case against the state" and shall fix a reasonable fee to be paid by the prosecuting county.[108] This Wyoming statutory provision is cited as an example of how some state courts in practice handle the criticism that the defense position on the merits of the prosecution's claim will be wholly or partially unrepresented in cases where the state allows an appeal when the case is moot because the defendant involved in the particular case cannot be reprosecuted.[109]

2. Permitting Appeal by Impliedly Inviting Advisory Opinions

The remaining eight statutes permitting prosecution appeals invite advisory opinions "implicitly"[110] because the statutory language broadly authorizes prosecution appeals[111] or specifically authorizes the prosecution to appeal a judgment of acquittal, a situation in which federal double jeopardy law clearly prohibits further trial court prosecution.[112] For example, Colorado Revised Statutes Annotated Section 16-12-102(1) (West Supp. 1996) allows the prosecution to appeal any decision of a court in a criminal case upon any question of law provided the defendant is not placed in second jeopardy.

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[107] Wyo. Stat. Ann. § 7-12-104(b). *See* Strazzella, *supra* note 72, at 20 & n.43 for a listing of Wyoming cases involving the Wyoming statutory scheme that have decided the extent of prosecutorial rights in the context of advisory opinions.

[108] *See* State v. Keffer, 860 P.2d 1118, 1121 (Wyo. 1993)(state public defender appeared for appellee in case where Court reversed trial court's refusal to give prosecution requested lesser included offense instruction while noting its decision could not affect jury acquittal).

[109] Strazzella, *supra* note 72, at 21-22.

[110] *Id.* at 15 & n.33.

[111] Ark.R.App.P. Crim. R. 3(c)(2003) (allows prosecution to appeal if "satisfied that error has been committed to the prejudice of the state, and that the correct and uniform administration of the criminal law requires review by the Supreme Court"); Colo.Rev.Stat.Ann. § 16-12-102(1) (West Supp. 1996)(allows the prosecution to appeal any decision of a court in a criminal case upon any question of law, but "[n]othing in this section shall authorize placing the defendant in jeopardy a second time for the same offense"); Conn.Gen.Stat.Ann. § 54-96 (West 1996) (authorizes the state to appeal from a ruling of law "arising on the trial of criminal cases. . . in the same manner and to the same effect as if made by the accused" if permitted by the presiding judge); Iowa Code Ann. § 814.5(2)(d) (West 1994) (authorizing a discretionary appeal from a "final judgment or order raising a question of law important to the judiciary and the profession"); Kan.Stat.Ann. § 22-3602(b)(3) (1995) (allowing state appeal on questions reserved following final judgment); Okla.Stat.Ann. tit. 22 § 1053(3) (West Supp. 1997) (allows prosecution appeal "[u]pon a question reserved by the state").

[112] Ind. Code § 35-38-4-2(4) (Michie 1994)(affording prosecution appeal "[u]pon a question reserved by the state, if the defendant is acquitted"); Nev. Rev. Stat. Ann. § 177.015(1)(b) (Michie 1995) (language purports to permit state to appeal grant of a motion to acquit).

Indiana Code Section 35-38-4-2(4) (Michie 1994) authorizes the prosecution to appeal "[u]pon a question reserved by the state, if the defendant is acquitted." Although permitting the appeal, several judicial decisions in cases involving prosecutorial appeals of acquittals have stressed the double jeopardy bar to further prosecution.[113] In addition, although the legislature enacted statutory language authorizing prosecutor appeals, two state supreme courts refused to consider the state's appeal of a judgment of acquittal based upon jurisdictional limitations[114] and double jeopardy principles.[115]

To summarize our findings on the appealability of pre-verdict judgments of acquittal in state courts, it appears that most states like the federal courts do not allow the prosecution to bring the appeal if the trial judge granted the defendant a pre-verdict judgment of acquittal based upon the sufficiency of the evidence of the defendant's guilt. And in those thirteen states that do permit the appellate courts to consider an appeal by the state of a pre-verict acquittal, double jeopardy bars the appellate court from granting a remedy that would require further trial court proceedings. Thus, the appellate court can

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[113] *See, e.g.*, State v. Stephenson, 955 S.W.2d 518 (Ark. 1997)(state is not permitted to appeal from a directed verdict acquitting a defendant when sole issue is sufficiency of the evidence of defendant's guilt; state supreme court accepts appeals by the state which are narrow in scope when holding would be important to correct and uniform administration of the criminal law). People v. Gonzalez, 666 P.2d 123 (Colo. 1983) (finding that prosecution's appeal of directed acquittal involved a question of law meeting applicable standards regarding future clarity of law; court disapproved judgment of acquittal while acknowledging that double jeopardy prevented reprosecution); *cf.* People v. Kirkland, 483 P.2d 1349, 1350 (1971)("Although the district attorney is authorized to appeal [trial court's grant of defendant's motion for judgment of acquittal]. . . , we see no good purpose to be accomplished by this appeal. . . an appeal after the trial judge has granted a motion for judgment of acquittal upon completion of people's evidence on ground that evidence is insufficient, is in most instances, a completely nonproductive exercise."). State v. Kase, 339 N.W.2d 157, 158 (Iowa 1983) (stating that a moot appeal will be heard even though acquittal was entered because the issue involved a question of public importance that was likely to recur and was in need of authorative interpretation), and State v. Allen, 304 N.W.2d 203, 207 (Iowa 1981)(finding defendant who was convicted of lesser included offense could not again be put in jeopardy for greater offense but then finding error in trial court's ruling). State v. Lamkin, 621 P.2d 995 (Kan. 1981)(acquittal on motion by defendant at close of state's evidence not appealable by state except when question is of statewide interest and vital to correct and uniform administration of criminal law). Otherwise, state is barred from appealing judgment of acquittal and double jeopardy bars further proceedings. *See* State v. Gustin, 510 P.2d 1290 (Kan. 1973) *and* State v. Whorton, 589 P.2d 610 (Kan. 1979). *In re* R.G.M., 575 P.2d 645, 546 (Okla. Crim. App. 1978) (to pursue an appeal by the prosecution on a reserved question of law under Okla. Stat. tit. 22 § 1053(3), there must be a judgment of acquittal or an order of the court which expressly bars further prosecution). State v. McKirsack, 625 N.E.2d 1246 (Ind. Ct. App. 1993) (stating that "only questions of law are considered. . . as a way to furnish guidance to trial courts in future cases," even though acquittal bars further prosecution of defendant).

[114] State v. Viers, 469 P.2d 53, 54 (Nev. 1970)(court decided legislative attempt to have court decide moot questions following an acquittal was beyond the constitutional power granted to the court); Nevada v. Combs, 14 P.3d 520 (Nev. 2000)(a judgment of acquittal, whether based on a jury verdict of not guilty or on a court ruling that evidence is insufficient to convict, nay not be appealed and terminates prosecution when a second trial would be necessitated by a reversal).

[115] State v. Paolella, 554 A.2d 702, 711 (Conn. 1989) (considering a prosecution attempt to appeal under the Connecticut statute, Conn. Gen. Stat. Ann. § 54-96 (West 1996), the state supreme court concluded that the contested trial court action was an acquittal and therefore "double jeopardy bars [the court] from considering the state's claim. . .").

not reverse the trial judge's ruling in favor of the defendant and it is limited to rendering an advisory opinion on the underlying merits of the prosecution's appeal.

Appendix A

STATE	AUTHORITY PERMITTING STATE JUDGE TO ENTER A JUDGMENT OF ACQUITTAL BEFORE A JURY VERDICT
Alabama	**Alabama Rule of Criminal Procedure** R 20.1 Nature and Form of Motion (a) Nature of Motion. The court, on motion of the defendant stating the grounds therefore, or on its own motion, shall direct the entry of a judgment of acquittal as to any charged offense, or as to any lesser included offense, for which the evidence is insufficient to support a finding of guilty beyond a reasonable doubt. (b) Form of Motion. Motions for judgment of acquittal may be made either in writing or orally upon the record and shall be argued outside the hearing of the jury; except that motions pursuant to Rule 20.3 shall be in writing. R 20.2 Motion for Judgment of Acquittal Before Submission of Case to Factfinder (a) Time for Making Motion. At the close of the state's evidence and/or at the close of all the evidence, the defendant may make a motion for judgment of acquittal. (b) Decision on Motion. If the motion for judgment of acquittal is made after the close of the state's evidence, the court shall rule on the motion before calling on the defendant to present his evidence. If the motion is made at the close of all the evidence in a jury case, the court shall rule on the motion before permitting argument or charging the jury; if it is not ruled on at that time, it is deemed denied. In a non-jury case, if the motion is not ruled on before the submission of the case for decision, the motion is deemed denied. (c) Effect of Motion. A defendant whose motion for judgment of acquittal at the close of the state's evidence is denied may offer evidence without having reserved the right to do so, to the same extent as if no such motion had been made. The making of a motion for judgment of acquittal is not a waiver of trial by jury. An order granting a motion for judgment of acquittal is effective without the assent of the jury.
Alaska	**Alaska Rule of Criminal Procedure** R 29. Motion for Acquittal (a) Motions for Judgment of Acquittal. Motions for directed verdict shall not be used and motions for judgment of acquittal shall be used in their place. The court, on motion of a defendant or on its own motion, shall enter judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the state's case is not granted, the defendant may offer evidence without having reserved the right. (b) Reservation of Decision on Motion--Renewal of Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a

	verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.
Arizona	**Arizona Rule of Criminal Procedure** R. 20. Judgment of Acquittal (a) Before Verdict. On motion of a defendant or on its own initiative, the court shall enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction. In an aggravation hearing in a capital case, after the evidence on either side is closed, on a motion of a defendant or on its own initiative, the court shall enter a judgment that an aggravating circumstance was not proven if there is no substantial evidence to warrant the allegation. The court's decision on a defendant's motion shall not be reserved, but shall be made with all possible speed.
Arkansas	**Arkansas Rule of Criminal Procedure** R 33.1 Motions for Directed Verdict and Motions for Dismissal (a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor. (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.
California	**California Penal Code** § 1118.1. Trial by jury; entry of judgment of acquittal for insufficient evidence In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right.

Colorado	**Colorado Rule of Criminal Procedure** R 29. Motion for Acquittal (a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment or information, or complaint, or summons and complaint after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the People's case. (b) Reservation of Decision on Motion. If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
Connecticut	**Connecticut Superior Court** § 42-40. Motions for Judgment of Acquittal--In General Motions for a directed verdict of acquittal and for dismissal when used during the course of a trial are abolished. Motions for a judgment of acquittal shall be used in their place. After the close of the prosecution's case in chief or at the close of all the evidence, upon motion of the defendant or upon its own motion, the judicial authority shall order the entry of a judgment of acquittal as to any principal offense charged and as to any lesser included offense for which the evidence would not reasonably permit a finding of guilty. Such judgment of acquittal shall not apply to any lesser included offense for which the evidence would reasonably permit a finding of guilty. § 42-41. Motions for Judgment of Acquittal--At Close of Prosecution's Case If the motion is made after the close of the prosecution's case in chief, the judicial authority shall either grant or deny the motion before calling upon the defendant to present defendant's case in chief. If the motion is not granted, the defendant may offer evidence without having reserved the right to do so. § 42-42. Motions for Judgment of Acquittal--At Close of Evidence If the motion is made at the close of all the evidence in a jury case, the judicial authority may reserve decision on the motion, submit the case to the jury, and decide the motion

	either before the jury return a verdict or after they return a verdict of guilty or after they are discharged without having returned a verdict.
Delaware	**Delaware Superior Court Criminal Rule** R 29. Motion for Judgment of Acquittal (a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence without having reserved the right. (b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
District of Columbia	**District of Columbia Superior Court Rule of Criminal Procedure** R 29. Motion for Judgment of Acquittal (a) Motion Before Submission to Jury. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right. (b) Reservation of Decision on Motion. The Court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the Court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.
Florida	**Florida Rule of Criminal Procedure** R 3.380. Motion for Judgment of Acquittal (a) Timing. If, at the close of the evidence for the state or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant shall, enter a judgment of acquittal. (b) Waiver. A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant. The motion must fully set forth the grounds on which it is based.

Georgia	**Official Code of Georgia Annotated** 17-9-1 When direction of verdict of acquittal authorized; when motion for directed verdict of acquittal allowed; effect of motion upon defendant's right to present evidence and right to jury trial; assent of jury not required. (a) Where there is no conflict in the evidence and the evidence introduced with all reasonable deductions and inferences therefrom shall demand a verdict of acquittal or "not guilty" as to the entire offense or to some particular count or offense, the court may direct the verdict of acquittal to which the defendant is entitled under the evidence and may allow the trial to proceed only as to the counts or offenses remaining, if any. (b) The defendant shall be entitled to move for a directed verdict at the close of the evidence offered by the prosecuting attorney or at the close of the case, even if he fails to introduce any evidence at the trial. A defendant who moves for a directed verdict at the close of the evidence offered by the prosecuting attorney may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted shall not be deemed to be a waiver of the right to trial by jury. The order of the court granting a motion for a directed verdict of acquittal is effective without any assent of the jury.
Hawaii	**Hawaii Rule of Penal Procedure** R 29. Motion for judgment of acquittal (a) Motion before submission to jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses alleged in the charge after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right. (b) Reservation of decision on motion. If a motion for judgment of acquittal is made at the close of the evidence offered by the prosecution, the court shall not reserve decision thereon. If such motion is made after all parties have rested, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
Idaho	**Idaho Court Rule** R. 29. Motion for judgment of acquittal (a) Motion before submission to jury. The court on motion of the defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a

	defendant's motion for judgment of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence. (b) Reservation of decision on motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
Illinois	**Illinois Compiled Statutes** 5/115-4. Trial by Court and Jury (k) When, at the close of the State's evidence or at the close of all of the evidence, the evidence is insufficient to support a finding or verdict of guilty the court may and on motion of the defendant shall make a finding or direct the jury to return a verdict of not guilty, enter a judgment of acquittal and discharge the defendant.
Indiana	**Indiana Rule of Trial Procedure** Rule 50. Judgment on the Evidence (Directed Verdict) (a) Judgment on the Evidence--How Raised--Effect. Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. A party may move for such judgment on the evidence. (1) after another party carrying the burden of proof or of going forward with the evidence upon any one or more issues has completed presentation of his evidence thereon; or (2) after all the parties have completed presentation of the evidence upon any one or more issues; or (3) after all the evidence in the case has been presented and before judgment; or (4) in a motion to correct errors; or (5) may raise the issue upon appeal for the first time in criminal appeals but not in civil cases; or (6) The trial court upon its own motion may enter such a judgment on the evidence at any time before final judgment, or before the filing of a notice of appeal, or, if a Motion to Correct Error is made, at any time before entering its order or ruling thereon. A party who moves for judgment on the evidence at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a judgment on the evidence which is not granted or which is granted only as to a part of the issues is not a waiver of trial by jury even though all parties to the action have moved for judgment on the evidence. A motion for judgment on the evidence made at one stage of the proceedings is not a waiver of the right of the court or of any party to make such motion on the same or different issues or reasons at a later stage as permitted above, except that error of the court in denying the motion shall be deemed corrected by evidence thereafter offered or admitted.

	(b) Jury trial subject to entry of judgment on the evidence. Every case tried by a jury is made subject to the right of the court, before or after the jury is discharged, to enter final judgment on the evidence, without directing a verdict thereon. (c) New trial in lieu of judgment on the evidence. When a judgment on the evidence is sought before or after the jury is discharged, the court may grant a new trial as to part or all of the issues in lieu of a judgment on the evidence when entry of a judgment is impracticable or unfair to any of the parties or otherwise is improper, whether requested or not. (d) Reasons for judgment on the evidence--Partial relief. A motion or request for judgment on the evidence shall state the reasons therefor, but it need not be accompanied by a peremptory instruction or prayer for particular relief. In appropriate cases the court, in whole or in part, may grant to some or all of the parties a judgment on the evidence or new trial in lieu thereof. Unless otherwise specified a motion or request for a judgment on the evidence is general, but the court shall grant such judgment or relief only as is proper. (e) Motion for judgment notwithstanding verdict, motion in arrest of judgment, demurrer to the evidence and venire de novo abolished. The motion for judgment notwithstanding verdict, motion in arrest of judgment, demurrer to the evidence, and venire de novo are abolished.
Iowa	**Iowa Rule Criminal Procedure** R 2.19. Trial (8) Motion for judgment of acquittal. (a) Motion before submission to jury. The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecuting attorney is not granted, the defendant may offer evidence without having waived the right to rely on such motion. (b) Reservation of decision on motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict or is discharged without having returned a verdict.
Kansas	**Kansas Statutes Annotated** 22-3419. Motion for judgment of acquittal (1) The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more crimes charged in the complaint, indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such crime or crimes. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right. (2) If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion

	either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
Kentucky	Authority authorizing pre-verdict judgments of acquittal implied from case law.
Louisiana	Explicitly prohibits pre-verdict judgments of acquittal in jury trials.
Maine	**Maine Rule of Criminal Procedure** R 29. Motion for Acquittal (a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence without having reserved the right. If a motion for judgment of acquittal is made at the close of all evidence, the court may reserve the decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
Maryland	**Maryland Rule** Rule 4-324. Motion for judgment of acquittal (a) Generally. A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not wave the right to make the motion by introducing evidence during the presentation of the State's case. (b) Action by the court. If the court grants a motion for judgment of acquittal or determines on its own motion that a judgment of acquittal should be granted, it shall enter the judgment or direct the clerk to enter the judgment and to note that it has been entered by direction of the court. The court shall specify each count or degree of an offense to which the judgment of acquittal applies.
Massachusetts	**Annotated Laws of Massachusetts Rule of Criminal Procedure** R 25. Motion for Required Finding of not Guilty (a) Entry by Court. The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time. If the motion is denied or allowed only in part by the judge, the

	defendant may offer evidence in his defense without having reserved that right. (b) Jury Trials. (1) Reservation of Decision on Motion. If a motion for a required finding of not guilty is made at the close of all the evidence, the judge may reserve decision on the motion, submit the case to the jury, and decide the motion before the jury returns a verdict, after the jury returns a verdict of guilty, or after the jury is discharged without having returned a verdict.
Michigan	**Michigan Court Rules** R 6.419 Motion for Directed Verdict of Acquittal (a) Before Submission to Jury. After the prosecutor has rested the prosecution's case in chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion. If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations. (d) Explanation of Rulings on Record. The court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal and for conditionally granting or denying a motion for a new trial.
Mississippi	Authority authorizing pre-verdict judgments of acquittal implied from case law.
Missouri	**Missouri Supreme Court Rules** R 27.07. Misdemeanors or Felonies--Motion for Judgment of Acquittal (a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence without having reserved the right. (b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
Montana	**Montana Code Annotated** 46-16-403. Evidence insufficient to go to jury

	When, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant. However, prior to dismissal, the court may allow the case to be reopened for good cause shown.
Nebraska	**Revised Statute of Nebraska** § 29-2020. Bill of exceptions by defendant; request; procedure; exception in capital cases. Except as provided in section 29-2525 for cases when the punishment is capital, in all criminal cases when a defendant feels aggrieved by any opinion or decision of the court, he or she may order a bill of exceptions. The ordering, preparing, signing, filing, correcting, and amending of the bill of exceptions shall be governed by the rules established in such matters in civil cases. Motion For Directed Verdict Where a motion for a directed verdict is made at the close of the evidence of the state in a criminal case, introduction of evidence thereafter by the defendant waives any error in ruling or failing to rule on the motion; the defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. State v. Hellbusch, 213 Neb.894,331 N.W.2d 815(1983)
Nevada	Explicitly prohibits judgments of acquittal prior to submission of the case to the jury.
New Hampshire	Authorization for pre-verdict judgments of acquittal implied from case law.
New Jersey	**New Jersey Rules of Court** 3:18-1. Motion Before Submission to Jury At the close of the State's case or after the evidence of all parties has been closed, the court shall, on defendant's motion or its own initiative, order the entry of a judgment of acquittal of one or more offenses charged in the indictment or accusation if the evidence is insufficient to warrant a conviction. A defendant may offer evidence after denial of a motion for judgment of acquittal made at the close of the State's case without having reserved the right.
New Mexico	**New Mexico Court Rules Annotated** RULE 5-607. Order of trial. The order of trial shall be as follows: A. a qualified jury shall be selected and sworn to try the case;

	B. initial instructions as provided in UJI Criminal shall be given by the court; C. the state may make an opening statement. The defense may then make an opening statement or may reserve such opening statement until after the conclusion of the state's case; D. the state shall submit its evidence; E. out of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made; F. the defense may then make an opening statement, if reserved; G. the defense may submit its evidence; H. the state may submit evidence in rebuttal; I. the defense may submit evidence in surrebuttal; J. at any time before submission of the case to the jury, the court may for good cause shown permit the state or defense to submit additional evidence; K. out of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made; L. the instructions to be given shall be determined in accordance with Rule 5-608. The court shall then instruct the jury; M. the state may make the opening argument; N. the defense may make its argument; O. the state may make rebuttal argument only.
New York	**New York Consolidated Law Criminal Procedure Law** § 290.10 Trial order of dismissal 1. At the conclusion of the people's case or at the conclusion of all the evidence, the court may, except as provided in subdivision two, upon motion of the defendant, (a) issue a "trial order of dismissal," dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense, or (b) reserve decision on the motion until after the verdict has been rendered and accepted by the court. Where the court has reserved decision and the jury thereafter renders a verdict of guilty, the court shall proceed to determine the motion upon such evidence as it would have been authorized to consider upon the motion had the court not reserved decision. If the court determines that such motion should have been granted upon the ground specified in paragraph (a) herein, it shall enter an order both setting aside the verdict and dismissing any count of the indictment upon such ground. If the jury is discharged before rendition of a verdict the court shall proceed to determine the motion as set forth in this paragraph. 2. Despite the lack of legally sufficient trial evidence in support of a count of an

	indictment as described in subdivision one, issuance of a trial order of dismissal is not authorized and constitutes error when the trial evidence would have been legally sufficient had the court not erroneously excluded admissible evidence offered by the people. 3. When the court excludes trial evidence offered by the people under such circumstances that the substance or content thereof does not appear in the record, the people may, in anticipation of a possible subsequent trial order of dismissal emanating from the allegedly improper exclusion and erroneously issued in violation of subdivision two, and in anticipation of a possible appeal therefrom pursuant to subdivision two of section 450.20, place upon the record, out of the presence of the jury, an "offer of proof" summarizing the substance or content of such excluded evidence. Upon the subsequent issuance of a trial order of dismissal and an appeal therefrom, such offer of proof constitutes a part of the record on appeal and has the effect and significance prescribed in subdivision two of section 450.40. In the absence of such an order and an appeal therefrom, such offer of proof is not deemed a part of the record and does not constitute such for purposes of an ensuing appeal by the defendant from a judgment of conviction. 4. Upon issuing a trial order of dismissal which dismisses the entire indictment, the court must immediately discharge the defendant from custody if he is in custody of the sheriff, or, if he is at liberty on bail, it must exonerate the bail.
North Carolina	North Carolina General Statutes § 15A-1227**.** Motion for dismissal (a) A motion for dismissal for insufficiency of the evidence to sustain a conviction may be made at the following times: (1) Upon close of the State's evidence. (2) Upon close of all the evidence. (3) After return of a verdict of guilty and before entry of judgment. (4) After discharge of the jury without a verdict and before the end of the session. (b) Failure to make the motion at the close of the State's evidence or after all the evidence is not a bar to making the motion at a later time as provided in subsection (a). (c) The judge must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed. (d) The sufficiency of all evidence introduced in a criminal case is reviewable on appeal without regard to whether a motion has been made during trial, as provided in G.S. 15A-1446(d)(5). CRIMINAL CODE COMMISSION COMMENTARY Subsection (b) is new and changes a rule which the Commission believes has little utility. The Commission believes the practice of reserving decision on a motion is little followed at present in North Carolina--and ought not to be encouraged. It therefore amended a draft provision based on the procedure of another jurisdiction, authorizing reservation of decision on the motion to dismiss, to bar such a procedure. This decision is reflected in subsection (c). Compare A.B.A. Standards, *Trial by Jury* § 4.5. Subsection (d) will allow appeal whether or not a motion has been made or

	renewed, and thus constitutes a change in the law. The phrase "all evidence" in that subsection, however, indicates that the reviewing court must consider the evidence of the defendant as well as that of the State in determining the question of sufficiency. In this respect the subsection represents a continuation of the rule presently followed by the Supreme Court of North Carolina.
North Dakota	**North Dakota Criminal Procedure Rule** Rule 29. Motion for judgment of acquittal. (a) Motion before submission to jury. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information, or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right. (b) Motion at close of all evidence. [Reserved for future use.] (c) Motion after discharge of jury. If the jury is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within seven days after the jury is discharged or the court within such seven- day period may extend the time for making or renewing such motion. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.
Ohio	**Ohio Criminal Rule** Crim R 29 Motion for acquittal (A) Motion for judgment of acquittal The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case. (B) Reservation of decision on motion If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.
Oklahoma	Explicitly prohibits pre-verdict judgments of acquittal prior to submission of case to the jury.

Oregon	*Oregon Revised Statutes* 136.445. Motion for acquittal; standard for granting motion; effect. In any criminal action the defendant may, after close of the state's evidence or of all the evidence, move the court for a judgment of acquittal. The court shall grant the motion if the evidence introduced theretofore is such as would not support a verdict against the defendant. The acquittal shall be a bar to another prosecution for the same offense.
Pennsylvania	**Pennsylvania Rules Criminal Procedure** Rule 606. Challenges to Sufficiency of Evidence (A) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged in one or more of the following ways: (1) a motion for judgment of acquittal at the close of the Commonwealth's case-in-chief; (2) a motion for judgment of acquittal at the close of all the evidence; (3) a motion for judgment of acquittal filed within 10 days after the jury has been discharged without agreeing upon a verdict; (4) a motion for judgment of acquittal made orally immediately after verdict; (5) a motion for judgment of acquittal made orally before sentencing pursuant to Rule 704(B); (6) a motion for judgment of acquittal made after sentence is imposed pursuant to Rule 720 (B); or (7) a challenge to the sufficiency of the evidence made on appeal. (B) A motion for judgment of acquittal shall not constitute an admission of any facts or inferences except for the purpose of deciding the motion. If the motion is made at the close of the Commonwealth's evidence and is not granted, the defendant may present evidence without having reserved the right to do so, and the case shall otherwise proceed as if the motion had not been made. (C) If a defendant moves for judgment of acquittal at the close of all the evidence, the court may reserve decision until after the jury returns a guilty verdict or after the jury is discharged without agreeing upon a verdict.
Rhode Island	**Rhode Island Superior Court Rule of Criminal Procedure** 29. Motion for judgment of acquittal and motion to dismiss. -- (a) Motion for Judgment of Acquittal. (1) Motion Before Submission to Jury. Motions for a directed verdict are abolished and motions for a judgment of acquittal shall be used in their place. The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right. (2) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at

	the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. (b) Motion to Dismiss. In a case tried without a jury, a motion to dismiss may be filed at the close of the state's case to challenge the legal sufficiency of the state's trial evidence.
South Carolina	***South Carolina Rule of Criminal Procedure*** RULE 19. DIRECTED VERDICT **(a) Grounds for Motion.** On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment. In ruling on the motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight. **(b) Defendant's Right to Present Evidence.** If a defendant's motion for directed verdict at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right. **(c) Submission of Case to Jury.** Submission of any charge to the jury shall constitute a denial of any motion for directed verdict previously made by the defendant and not ruled upon.
South Dakota	**South Dakota Codified Laws** 23A-23-1 (Rule 29 (a)) Motion for directed verdict abolished -- Judgment of acquittal entered with or without motion on close of evidence for either side -- Defendant's right to offer evidence after denial of motion. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. A court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in an indictment or information after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of the offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecuting attorney is not granted, the defendant may offer evidence without having reserved the right.
Tennessee	**Tennessee Criminal Procedure Rules** RULE 29. MOTION FOR JUDGMENT OF ACQUITTAL **(a) Motion Before Submission to Jury.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

	If a defendant's motion for judgment of acquittal at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right. **(b) Reservation of Decision on Motion.** If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
Texas	Authority authorizing pre-verdict judgments of acquittal implied from case law.
Utah	**Utah Code Annotated** 77-17-3 Discharge for insufficient evidence. When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged
Virginia	**Virginia Supreme Court Rules** RULE 3A:15. MOTION TO STRIKE OR TO SET ASIDE VERDICT; JUDGMENT OF ACQUITTAL OR NEW TRIAL **(a) Motion to Strike Evidence**. After the Commonwealth has rested its case or at the conclusion of all the evidence, the court on motion of the accused may strike the Commonwealth's evidence if the evidence is insufficient as a matter of law to sustain a conviction. If the court overrules a motion to strike the evidence and there is a hung jury, the accused may renew the motion within the time specified in Rule 1:11 and the court may take the action authorized by the Rule. **(b) Motion to Set Aside Verdict.** If the jury returns a verdict of guilty, the court may, on motion of the accused made not later than 21 days after entry of a final order, set aside the verdict for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction. **(c) Judgment of Acquittal or New Trial.** The court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court shall grant a new trial if it sets aside the verdict for any other reason.
Washington	Authority authorizing pre-verdict judgments of acquittal implied from case law.
West Virginia	**West Virginia Rule of Criminal Procedure** RULE 29. MOTION FOR JUDGMENT OF ACQUITTAL **(a) Motion Before Submission to Jury.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or

	more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence without having reserved the right. **(b) Reservation of Decision** on Motion**.** The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.
Wisconsin	**Wisconsin Statutes Annotated** 805.14 Motions challenging sufficiency of evidence; motions after verdict (1) **Test of sufficiency of evidence**. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party. (2) . . . (3) **Motion at close of plaintiff's evidence**. At the close of plaintiff's evidence in trials to the jury, any defendant may move for dismissal on the ground of insufficiency of evidence. If the court determines that the defendant is entitled to dismissal, the court shall state with particularity on the record or in its order of dismissal the grounds upon which the dismissal was granted and shall render judgment against the plaintiff. (4) **Motion at close of all evidence**. In trials to the jury, at the close of all evidence, any party may challenge the sufficiency of the evidence as a matter of law by moving for a directed verdict or dismissal or by moving the court to find as a matter of law upon any claim or defense or upon any element or ground thereof.
Wyoming	**Wyoming Rule of Criminal Procedure** Rule 29. Motion for judgment of acquittal. (a) At close of evidence. -- Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information or citation after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence without having reserved the right. (b) Reservation of decision. -- If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns the verdict or after

	it returns a verdict of guilty or is discharged without having returned a verdict.

Appendix B

1. Department of Justice's Proposed Amendments to 2002 Version of Rule 29

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the defendant may move for a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may deny the motion or reserve decision on the motion, but the court may not grant the motion prior to the jury's return of a verdict of guilty. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. If the court reserves decision on the motion, the court must proceed with the trial, submit the case to the jury, and decide the motion after the jury returns a verdict of guilty. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict

(1) **Time for a Motion**. Within 7 days after a guilty verdict, or within any other time the court sets during the 7day period, a defendant may move for a judgment of acquittal, or renew such a motion, or the court may on its own consider whether the evidence is insufficient to sustain a conviction.

(2) **Ruling on the Motion**. After the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal.

(3) **No Prior Motion required**. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury verdict.

(d) **Conditional ruling on a Motion for a New Trial**.

(1) **Motion for a New Trial**. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) **Finality**. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellate may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.