# Supreme Court of the United States



OCTOBER TERM, 1970

In the Matter of:

Docket No. 19

UNITED STATES OF AMERICA,

Appellant,

vs.

MILTON C. JORN ~~JONES~~,

Appellee.





Place Washington, D. C.

Date October 22, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

# C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Appellant, | : | |
| vs. | : | No. 19 |
| MILTON C. JORN, Appellee. | : | |

Washington, D. C.,

Thursday, October 22, 1970.

The above-entitled matter came on for argument at 10:07 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

RICHARD B. STONE, ESQ.,
Office of Solicitor General,
Department of Justice,
Counsel for Appellant

DENIS R. MORRILL, ESQ.,
315 East Second South Street
Salt Lake City, Utah
Counsel for Appellee

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 19, United States vs. Jorn.

Mr. Stone, you may proceed whenever you are ready.

ARGUMENT OF RICHARD B. STONE, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. STONE: Mr. Chief Justice, and may it please the Court, this criminal tax case which is no on reargument comes to this Court on direct appeal from the United States District Court for the District of Utah.

The case presents a situation in which I think it can be said that both defense counsel and the government agree that the trial court acted arbitrarily and perhaps mistakenly in granting a mistrial.

That same judge some months later, apparently recognizing his error in some way, refused to permit the government to retry the case on grounds of double jeopardy, and it is upon that decision that the government now appeals.

I would hope to devote the bulk of my argument today to the merits of this case, but I would like to at the outset address myself very briefly, before stating the facts of this case, to the jurisdictional aspects of this case, that is to the government's right to appeal the trial judge's dismissal on grounds of double jeopardy under section 3731 of title 18 of the United States Code, which is known as the

Criminal Appeals Act.

I imagine that the Members of this Court remember that on argument last term the Court asked government counsel in effect how the government could bring this appeal when section 3731 allows the government to appeal from the granting of a motion in bar only "when the defendant has not been put in jeopardy," and when in this case the defendant had technically been put in jeopardy at the first aborted trial in the sense that the jury had been empaneled before the trial was dismissed.

Q The factual setting is true, I suppose, in most of the mistrial cases we have encountered in the courts in this country, isn't it?

A That's right, and that is precisely the point I am about to make. Of course, at the time of the original argument, it was still undecided by this Court whether the phrase "not been put in jeopardy," in section 3731, meant jeopardy literally or whether it meant jeopardy in the full constitutional sense. In other words, whether the jurisdictional and the merit questions in a case like this would be essential to the same question.

And of course that question was decided by this Court at the end of the term in the Sisson case, which was handed down subsequent to the original argument of Jorn.

Now, in Sisson, this Court decided that the Criminal

Appeals Act forecloses appeal from a motion in bar granted after jeopardy is literally attached. And I think it can very fairly be said that the Court in Sisson placed considerable weight on the government's very candid admission that it had always assumed this restrictive interpretation of the Criminal Appeals Act, the government had always assumed that the Criminal Appeals Act restricted the government precisely in this way, and the government had never sought to appeal for motions in bar granted after jeopardy has attached.

I think, however, that we can say with equal candor that we had never hesitate to appeal from the granting of a motion in bar in a situation like the present one, that is a situation in which the defendant was placed in literal jeopardy at the first trial under circumstances allowing him constitutionally to be tried a second time, but in which the defendant has not been placed in jeopardy at the second trial, the trial at which the motion we are appealing from was granted.

In other words, we have always read the phrase "not been put in jeopardy" in section 3731 to refer to jeopardy at the trial at which the motion under consideration was granted. And, as the Chief Justice suggested, to hold otherwise would mean that the government could never appeal a dismissal on grounds of double jeopardy subsequent to a mistrial because a mistrial is usually granted after a jury has been empaneled and literal jeopardy has attached. And this would be so even

though the predecessor statute on which section 3731 was based, which I submit was a much more restrictive statute than section 3731, and evidence even a greater policy against government appeals in criminal cases than did section 3731, that predecessor statute allowed appeals only from special pleas in bar. And the classical and practically the only example of a special plea in bar was a plea of convict or quit, which is the plea of double jeopardy.

I think even the most restrictive view of the phrase "motion in bar," which was evidenced by Mr. Justice Stewart's opinion in the Mersky case, makes it clear that it is has always been assumed that this was -- that a plea of double jeopardy was a motion in bar even under the most restrictive definition, and to refuse to allow the government to appeal on section 3731 grounds in this case would be simply to read convict or quit, double jeopardy out of the definition of special plea in bar and leave that phrase of the statute totally meaningless.

And as we state in our supplemental brief on this point, there are at least two cases decided by this Court in which the government was allowed to appeal from an adverse determination of double jeopardy, and I am referring to the Tateo case at 377 U.S., and the Oppenheimer case, in which there was a jurisdictional objection to the appeal.

Q The double jeopardy motion in this case was

made before the jury was empaneled in the second trial, was it?

A That's right.

Now, I want to state the facts on this very brief record in rather considerable detail. I don't think it will take very long, because I think it is important to understand exactly what went on in the court room prior to the granting of a mistrial.

We are in the District of Utah, before the Chief Judge of that District, Judge Ritter, and information is filed against Mr. Jorn, who is charged in 25 counts with having prepared false and fraudulent income tax returns for others; specifically Mr. Jorn was charged with having either invented or grossly exaggerated deductions to which the taxpayers, Mr. Jorn's customers, were not entitled.

The case was called for trial on August 27, 1968, and a jury was selected and sworn during the morning. In the afternoon the United States Attorney indicated outside of the presence of the jury that he wished to amend the 25-count information and reduce it down to 11 counts, all of which involved amounts varying roughly between about $2 and $700.

Now, the court's answer to the prosecution, upon hearing that the indictment -- the information was being reduced down to 11 counts -- and I quote now from page 34 of the record:

"Maybe if we give you a little more time you will dismiss some more. This is a whole bundle of two-bit stuff, it looks to me like."

Q A whole what?

A "A whole bundle of two-bit stuff, it looks to me like," this is the judge addressing the prosecution. I add the observation here that this is Judge Ritter's first remark to counsel in the record, and it illustrates what I think can fairly be described as a consistently hostile attitude towards this prosecution.

The first witness in the case was a revenue agent who was called simply to identify the returns under consideration, and after immediate stipulation that the returns were in fact authentic, the revenue official stepped down and the first real witness was called, and this witness, who was one of a series of the main government witnesses, was one of the taxpayers for whom Mr. Jorn had allegedly made a fraudulent return.

As soon as this witness took the stand, defense counsel, Mr. Morrill, addressed the court as follows, and I am now on page 40 of the record:

"In view of the transcript in the preliminary hearing in this matter, it is my feeling that each of these taxpayers should be warned as to his constitutional rights before testifying, because I feel there is a possibility of a violation

of the law." This is defense counsel's suggestion, as to the witnesses who are about to testify, and the judge responds to that suggestion as follows:

"Well, we want anybody to talk himself into a federal penitentiary here, so what the court has to say to you is this" -- and I will now read the following pages of the record, in which the judge very clearly and emphatically, in what I would call the strongest possible terms, advises the prospective witnesses of their right not to testify for fear of incriminating themselves and of their right to have a lawyer, their right to have a lawyer appointed for them, even though they are not criminal defendants, before they testify in this case involving another defendant.

And, incidentally, in spite of the fact that the prosecution had given assurances that the government did not plan to go against the taxpayers.

The judge then addresses the witness and says -- this is now on page 41 of the record: "Well, what do you want to do?" And the witness responds, "Your Honor, my wife and I have had it pointed out to us that our returns had information in them that we know is wrong, and we have admitted this and I would admit it further in this court."

And the judge responds, "Have you talked to a lawyer?" The witness says, "No, sir." The court says, "I am not going to let you admit it any further in this court, that is all

there is about that. The admissions you have already made were very likely made without telling you what your constitutional rights are." The witness says, "No, sir." The court says, "What is that?" And the witness says, "We were advised at the time we were first contacted by the Internal Revenue Service." The judge responds, "If you were, you were the only taxpayer in the United States that has been so advised, because they do not do that when they first contact you." And at that point the judge explains his version of how the Internal Revenue Services goes about intimidating and incriminating prospective defendants.

Now, the judge excuses the witness at this point and turns to the United States Attorney and says, "Are all your witnesses in this shape?" And the United States Attorney replies, "Your Honor, by the time any of these witnesses were contacted, there was a criminal investigation, not of the witnesses but of the defendant. It is true that the Internal Revenue Service does not require this warning until after first meeting with the special agent, but it is the practice in this office that they do give them this warning. It is not required, but they do so."

The judge then expresses some doubt as to whether the warning could have been sufficient and there is more colloquy between the court and the United States Attorney. Now we are on page 43 of the record, and I am about to conclude.

The judge once again expresses his view that this case never should have been brought because of the trivial amounts involved, and finally ends the colloquy with this statement: "I will tell you what is going to happen to this case. Ladies and gentlemen, it won't be necessary for you to attend the court any further on this matter." And at that point the judge dismisses the jury. The judge then requires all the taxpayers, including the witnesses who had been previously separated and excluded from the court room, to return to the court room -- and we are now on page 44 of the record -- once again, for the better part of three pages, he advises them with respect to their right to remain silent, their right not to testify, and his decision not to allow the trial to proceed until such time as he personally has had further opportunity to suggest to them the unwisdom of putting themselves in the danger of self-incrimination.

And finally the judge says, "So this case is vacated. The setting is vacated this afternoon and will be calendared again. And before it is calendared again, I am going to have you witnesses in and talk with them again before I will permit them to testify."

And of course, prior to the empaneling of another jury and retrial of the case, after sufficient warning to these witnesses had been given, the judge granted a motion for the defense to bar retrial on grounds of double jeopardy.

Q Does this record show whether these witnesses were prepared to testify at the second trial?

A No, the record does not show -- there is no further indication of what happened to the witnesses, Mr. Chief Justice, between the time that the first mistrial was declared and the time the motion to dismiss on grounds of double jeopardy was granted. I assume that it would not have been a terribly time-consuming task to have the witnesses consult their lawyers and decide whether they ought to testify at a second trial.

Q But you say --

A Considering the fact that it could have really been done by continuance of the first trial.

Q But the government was prepared to go ahead with the second trial?

A Oh, yes, the government -- well, the government was prepared to go ahead at the first trial, so it was certainly prepared to go ahead at the second trial. Now, the basis of the facts, as I have just recited them, it seems to me that there are basically two ways to interpret what Judge Ritter did in declaring a mistrial.

To begin with, I think it is not unreasonable to contend that the declaration of a mistrial was directly attributable, a direct consequence of the defense's request on page 40 of the record, that "each of these taxpayers should be

warned as to his constitutional rights before testifying."

Now, I admit that Judge Ritter took the bull by the horns before defense counsel had sufficient opportunity to explain what he had in mind with that request. He didn't get to elaborate on it. It is not terribly easy to figure out what his exact purpose was. I suppose he may have hoped simply that Judge Ritter would warn the taxpayers of their rights in language sufficiently strong that it would inhibit their testimony, which would be to the benefit of defense counsel's client, Mr. Jorn.

Q Would that have been appropriate in the presence of the jury?

A Oh, this could have -- it could have been done outside of the presence of the jury.

Q Well, would it have been appropriate under any circumstances?

A I am not sure whether that would not have been appropriate. He did it in the presence of the jury anyway. I don't think it would have been appropriate since this would not have cast any particular problem with respect to the defendant in the case. I don't think the defendant's rights would have been prejudiced by the judge's warning of the witnesses that they were conceivably implicated in the scheme. That was clearly going to come out from the testimony that was given anyway.

I suppose it would have been better had the judge met with the witnesses before the jury was empaneled. This would have been done just as easily that way, but I don't think it would have been any sort of prejudicial error, Mr. Chief Justice, for the judge to have done it like that at the trial.

Now, I suppose defense counsel may in fact have hoped that a recess of some sort would enable the taxpayers to consult with their lawyers or to think more about it, and this would have an additional inhibiting effect on their testimony. Or I suppose conceivably defense counsel might have anticipated exactly what happened in this case, that a mistrial would be declared. I can't imagine he really conceived that the judge would then refuse to allow a further trial on grounds of double jeopardy, but that is, I guess, not beyond the realm either.

Q The defense lawyer didn't make a motion for a mistrial, did he?

A No, he did not, Mr. Justice Harlan. All he did was make a request, and at that point Judge Ritter ran away with the proceedings and no one had much of a chance to make any kind of motion from then on. But it was, in any event, entirely in the defense's interest that these taxpayers say as little as possible, and I assume that at least defense counsel had that in mind when he requested that something be done to assure them of their right not to testify. And I think that in

that light the declaration of a mistrial can fairly be seen as simply a consequence albeit rather excessive, arbitrary consequence of defense counsel's request. In that sense we can place this case in line, I think, with the numerous holdings of this Court, reiterated it all through the decisions, that a mistrial granted on defendant's motion does not bar retrial, and that proposition, I think, is not in dispute in any case in which there is no special circumstances of --

Q At no time did the defendant acquiesce in it, did he?

A That's right, he didn't, and he didn't acquiesce in it --

Q Well, how can he be blamed for it in any sense?

A I don't mean to blame him for it, Mr. Justice Marshall, I mean only to assert that one way to look at this case -- and I am about to go into alternative ground -- one way to look at this case is to say that the request was granted, that the mistrial was a direct consequence of defense counsel's request that some relief be granted in the sense that the defendants be given some warning of their right not to testify.

Q Do you think Judge Ritter would not have done this if the defendant had kept his mouth shut?

A I think it is unclear whether he would have done it or not. I suppose Judge Ritter might have done just anything in this case, but still the defense counsel had his

chance to get in there first and he did so. He did in fact request that something be done about it, and what was done was excessive but it can be seen as a logical consequence of the request.

Q Couldn't this have been helped by sort of a pretrial, with the consent of both sides?

A Yes, I --

Q No problem would have been settled then without -- we have never had the jeopardy --

A I think that is right. There was, incidentally, a preliminary hearing in the case.

Q There was?

A It was the result of the preliminary hearing, Mr. Justice Marshall, that the prosecution decided that some of its witnesses were not sufficiently -- did not have sufficient memories of the events that took place, and it was on the basis of that preliminary hearing that 14 of the 25 counts were dropped, and I think there was ample time if Judge Ritter felt especially solicitous of these witnesses and defense counsel was especially worried that their testimony might not be inhibited by any warning, there was ample time at the preliminary hearing to get into this matter at that point, and certainly a few days delay would have cleared up the whole problem.

Q What would have been the situation if Judge

Ritter had empaneled the jury and then said, "Now, gentlemen, this is a pee-wee prosecution and I am not in favor of them, and I am going to dismiss this jury," what would be the situation then if the government wanted to go ahead and retry it before another judge?

A That is a pretty difficult question, Justice Harlan.

Q That is one interpretation that you can put on the judge's remarks, certainly, isn't it?

A I think that that is a -- that in fact the judge was motivated in granting a mistrial on grounds that the witnesses were not prepared by his feeling that this was a pee-wee prosecution, but I think it is probably a bit far-fetched to decide this case as though he had said I am not going to allow the trial to proceed any further on that basis.

Q That would have been -- as suggested in Justice Harlan's hypothetical -- that would have been pretty close equivalent to a direct verdict of acquittal --

A Direct verdict of acquittal, and I suppose there would have been quite a lot of --

Q That would have been the end of it.

A That would have put the proposition that the government cannot appeal a direct verdict of acquittal to its most extreme test, and I suppose technically there would be quite a problem in appealing the case, though I think it

would --

Q We have a decision in this Court right along those lines, in the First Circuit, that however wrong, however wrong --

A That's right.

Q -- is a direct verdict, that is the end.

A That's right, it was discussed -- I think we discussed this proposition at the argument last year.

Q Counsel, what if the defense counsel had moved for a mistrial after this colloquy, had requested a mistrial, do you think the defendant here -- or the respondent here would have waived all claims with respect to double jeopardy?

A I don't know what other claims with respect to double jeopardy there could be. If I understand the Chief Justice's question correctly, I think if defense counsel had moved for a mistrial on these grounds that the witnesses should be entitled to further warning of their rights, and if that were the grounds on which the judge granted the mistrial, I think it is perfectly clear from all the precedents in this Court, I think no one would dispute the fact that defense counsel would -- and I doubt defense counsel would dispute it -- that he would have no further grounds for double jeopardy.

I don't know how there could be a waiver, because I don't know what other grounds for asserting double jeopardy he could have.

Q Suppose -- would it be possible, let me have your comment on this, to treat the conduct of defense counsel in putting the questions he did in the presence of the jury, without attempting at the moment to characterize that conduct, could that be construed -- you put it an invitation, construed is in effect a motion for a mistrial, creating a mistrial situation and therefore make the defendant at the trial court level bear the burden of that?

A Well, to actually call it a motion, I am a little reluctant to do that, since no motion was made, but what I am suggesting is I think this Court can equate it with a motion. This Court can, under the rationale of those cases, holding that a mistrial granted, that defense's motion does not bar retrial, and say that that is also true of a mistrial granted as a logical consequence of the defendant's request. I don't think we have to go strain what would actually happen to say that a motion was made, but we can say that it has the same legal effect as a motion.

I think that is not the only way to look at this case. I think there is an alternative ground on which the government ought to prevail --

Q Mr. Stone, before you leave that, even if he had made the motion for a mistrial and it had been granted, the fact that he had been in jeopardy still exists and this is a question of jurisdiction, appellate jurisdiction in this

case, and if the statute says no appeal once the defendant has been put in jeopardy, what difference does it make what occurs during the trial, that may be a question of whether he can be retried --

A From the point of view of --

Q -- but it may not affect the question of jurisdiction.

A That's right, from the point of view of the Criminal Appeals Act, I don't think it makes -- that is why I discussed that before I set the facts out at all -- I don't think it makes any difference whose motion it was or what the motivations were. From the point of view of the Criminal Appeals Act, the crucial fact is that the motion which we are appealing occurred before the trial at which defendant had not been put in jeopardy.

Q Well, didn't Sisson -- did you read Sisson as saying that appeal just isn't allowed when a defendant has been put in jeopardy, even if he could be retried?

A Well, I read Sisson as saying simply that that is so in a case in which the motion was granted at the trial from which the government is seeking appeal. I don't think that the language of the statute or the reasoning of Sisson require that it be extended to this extreme situation in which the motion --

Q Nor the government's previous practice?

A The government's previous practice clearly did not extend to that because the Tateo case and the Oppenheimer case were examples to the contrary, and we stated in Sisson we have never done that, and at that very time this case was pending and which we were appealing after jeopardy had attached at the original trial, and Tateo and Oppenheimer were on the books, Mr. Justice White, so that I think that our --

Q Sometimes when jeopardy is attached you can appeal and sometimes when it is attached you can't.

A Well, it isn't quite that arbitrary. Sometimes when jeopardy is not attached at the trial from which the motion we are appealing was granted, we can appeal, and at the first trial we cannot. You know, one of the problems --

Q I guess the government isn't suggesting that the Criminal Appeals Act, isn't now suggesting that the Criminal Appeals Act should be construed to mean that you can appeal unless he can't be retried?

A You can't appeal the motion granted at the trial at which the defendant was placed in jeopardy, but we have always thought that you can appeal a motion granted at the subsequent trial in which he has not been put in jeopardy, in spite of the fact that he was in jeopardy at the prior trial.

Q Yes.

A And that is consistent with our practice, and I think nothing in the Act or this Court's decision in Sisson

dictates otherwise. I want to go briefly into the alternative ground we have in this case. The other way to look at this case is to assume that not that the mistrial was declared in response to either side's request or motion, but simply that the jury was discharged as a result of Judge Ritter's excessively protective attitude toward witnesses, and the question at this point is whether the prosecution must fail as a result of this judicial arbitrariness even though it is all agreed there was no conduct on the part of the prosecution and no conceivable effort on the part of either the prosecution or the trial judge to harass the defendant or deny him his rights to be tried before that jury. And I submit to this Court that even if this is the view taken of this record, that it is simply a question of whether the burden of Judge Ritter's arbitrariness must fall on the prosecution in spite of lack of any harassment of the defendant.

The rationale of the double jeopardy clause in the decisions of this Court do not require such a result. What the Court has always done in this mistrial situation is to apply a balancing test that is not directly controlled by the double jeopardy clause, it is instead determined by a balancing test in which the defendant's rights are given very liberal interpretation, but in which in the absence of any indication of harassment of the defendant or excessively unfair aid to the prosecution through mistrial, retrial is allowed.

And I think this Court's two most recent decisions in the mistrial area illustrate exactly how this Court has balanced these interests, in the Downum case, for example, decided at 372 U.S., which is the only case in which this Court has refused to allow retrial subsequent to an aborted trial, the prosecutor allowed the jury to be sworn before key witnesses had arrived, and when it became clear that the witnesses were not going to show up, the prosecutor moved for a mistrial. In that case, if retrial had been allowed, it would have unfairly aided the prosecution in proving a case that it could not have proved originally.

But this case, I submit, is not like Downum but is, instead, on all fours with the Gori case, decided by this Court at 367 U.S. In Gori the trial judge, in what was characterized by this Court and the court of appeals as over-eager concern for possible prejudice to the defendant, declared a mistrial because he feared that a line of questioning by the prosecution was about to result in a prejudicial disclosure of the defendant's prior convictions. And, just as here, the defendant in that case neither urged nor acquiesced in the discharge of the jury, but the mistrial was the result of the judicial arbitrariness. And in the absence of any evidence that the defendant had been harassed, this Court refused to terminate the prosecution, merely because the trial judge had acted arbitrarily.

I think to have done otherwise in that case or to do otherwise in this case would really hang on the prosecution a pure element of chance, which is the element of chance that the judge will make some error in spite of the fact that the defendant's double jeopardy rights really are not intended by anyone to be violated, and for these several reasons I believe that this Court ought to reverse the district judge's decision and allow the prosecution to proceed again with a further trial in this case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stone.

Mr. Morrill?

ARGUMENT OF DENIS R. MORRILL, ESQ.,

ON BEHALF OF APPELLEE

MR. MORRILL: Mr. Chief Justice, may it please the Court, I believe the facts stated by Mr. Stone are accurate and sufficient for --

Q I have forgotten, Mr. Morrill, from the record, did you try this case?

A Yes, Your Honor, I did. Yes.

At the outset, I believe that this question before the Court is really a question of jurisdiction, and that under section 3731 the government does not have a right of appeal.

In Sisson, recently decided by this Court, and mentioned by Mr. Stone, this Court clearly stated that once

jeopardy has attached an appeal does not lie for the government. The government here is arguing something that frankly is a little difficult for me to understand, that if the jeopardy we are talking about is jeopardy in the second trial, then no appeal would lie, but if it is the jeopardy in the first trial there is an appeal. This, it seems to me, does considerable violence to any possible interpretation of the legislative history of that Act.

This would make it frankly so that the defendant, by the timing of his motion, can determine whether or not there is an appeal. If we had waited until the jury had been sworn in the second case and then made a motion based on double jeopardy, then the government would admit there could have been no appeal.

Q Unless they brought a third trial.

A I suppose this is correct, unless they tried to prosecute him again.

Q Perhaps there is another corollary that might be relevant, in light of what you have suggested, and that is that if the defense -- if the conduct of the defense is so flagrant that it suggests a possible atmosphere of prejudice to the defendant in the continuance of the trial, then the defendant can insulate himself after that conduct by not making a motion for a mistrial and not acquiescing in that motion. Isn't that correct an analysis?

A I suppose that would be --

Q And then the defense benefits by its own misconduct.

A I suppose that could be, Mr. Chief Justice, a corollary, and it appears to me, however, that we are talking here about the legislative intent in passing the Criminal Appeals Act and whether this could in fact happen, I don't think, is relevant to that intent.

In the instant case, the government has set forth the facts relating to the declaration of a mistrial, if you can call it a mistrial. There was no formal declaration of a mistrial. The court -- and I agree with the prosecution -- there was no opportunity for anyone, once the court began his discussions with these witnesses, there was no opportunity for anyone to make any kind of a motion before it was all over.

But I believe --

Q You didn't object to the mistrial, did you?

A No, Your Honor, I did not object. As a matter of fact, it was over before I even could get in a word.

Q A whirlwind.

Q Then you agree with your friend's characterization of the judge's --

A I certainly do, Your Honor. I believe the judge's action was arbitrary and was not necessary. Clearly, the judge could have done it a different way. But I also

agree with what Mr. Justice White said. I don't think that makes any difference to the jurisdictional question. That would make a difference to the constitutional determination as to whether or not he could be retried on a constitutional standard.

Q Is it your position that, while an appeal did not lie to this Court under the 1970 statute, but do you also say it would not lie to the court of appeals under the 1942 amendment?

A Well --

Q In other words, even if it doesn't lie here, may we transfer it under the transfer provisions to the court of appeals?

A Frankly, Your Honor, I haven't concerned myself with that question, and I clearly couldn't answer.

Q Well, I would think that is involved here. If you can't appeal here, if it is appealable in the court of appeals, and I would suppose it is our responsibility to transfer it there.

Q The Act does say in all other cases the court of appeals, doesn't it?

A Yes, it does.

Q That is under the '42 amendment.

A Right.

Q But I don't suppose they could appeal anywhere

if this amounted to an acquittal of some kind?

A That is correct. My second point here will be that the constitutional double jeopardy is involved and he couldn't be --

Q Are you saying that there was an acquittal in effect, as in Sisson?

A I believe, yes, that you can interpret the action of the judge, and I will have to agree with Mr. Stone that from the beginning and one accustomed to practice in this court, Judge Ritter's court, frequently has this happen. It was apparent from the outset that he did not want this prosecution to continue, and it is my position, however, that the defendant was entitled to be tried before this jury and any arbitrariness on the part of the judge can't be used as a prejudice to the defendant, that the government must bear the risk of his arbitrariness.

Q If you had gone on with the trial and the judge had not thereafter taken the action he did, I suppose there was nothing to prevent you from taking advantage of the judge's remarks if you went to the court of appeals for a rewiew, nothing to prevent you from claiming that his remarks were prejudicial to your client?

A I suppose that could have been claimed. I will have to agree candidly with Mr. Stone, I don't think they would have prejudiced my client. After the Judge --

Q There is a tendency to suggest a whole atmosphere of criminal conduct, didn't they, on the part of someone?

A Yes, they did, however more on the part of the witnesses who were going to testify. The judge, as I recall, didn't really say anything about the defendant but indicated that what the witnesses had done may subject them to later prosecution.

Q Suppose you take the view that this at least was within the judge's discretion, in other words he wasn't trying to favor the government or trying to favor the defense but, rightly or wrongly, he made the ruling that he did, but still this Court should not say it was not within his discretion to do so, what would you think would be the posture then under the cases we have decided on these double jeopardy?

A On the constitutional issue of double jeopardy set forth in Downum and Gori and Tateo, I believe this action by the judge, while you couldn't characterize it as not being arbitrary, still was in no way, as set forth in those cases, favoring the defendant. If you break the judge's action down into its two parts, first he felt that the witnesses should not testify until they have been warned, and he then said I am not going to let you testify until you have been warned, and then the second part, he turns and dismisses the jury.

Well, if you stopped after the first part, clearly there were many alternatives available. This could have been

done in an hour's time, they could have consulted counsel and the trial could have gone on. But predisposed as the judge was to refuse to allow them to testify, had the trial then gone on there is no doubt but what it would have been a direct acquittal for the defendant. There were no witnesses. And there was no way the trial could continue on the part of the government at that time, once he decided he was not going to let those witnesses testify.

So it would be my position, then, that any solicitude on the part of anyone by the judge was on the part of the prosecution, and this I think fits squarely within Downum, that the jury was dismissed in order to allow the prosecution a more favorable opportunity to convict. They couldn't have convicted under those circumstances.

Q Well, suppose as soon as the jury is impaneled the judge says I have gone over the list of witnesses and I have decided that I am not going to let any of them testify, and the prosecution says those are the only witnesses we have, is it therefore a direct acquittal? The government is powerless then to do anything?

A (No response.)

Q I hasten to warn that my second question is what is the difference between that and what actually happened?

A Well, in that situation -- and, I will have to

admit, there isn't much difference between the hypothetical you pose and the instant case, except one witness did testify here -- I believe my position would have to be that the government is powerless, that the risk of this judicial arbitrariness, this defendant was entitled to be tried by the jury empaneled to hear the case, and if for some reason other than his own conduct this is prevented, I believe that cases of this Court would have to hold that he had been placed in jeopardy and the second prosecution would be twice in jeopardy and prohibited.

Q I suppose there might be an alternative if the court felt that the conduct of the defense in opening up this line of questioning in the presence of the jury is what brought all this on, and then it might be equated, as Mr. Stone suggested, to a motion by the defense for a mistrial.

A That is true, Mr. Chief Justice. However, I believe on the facts in the record and subjectively, since I was there, that there was no way the remarks by counsel in this case could have foreseeably precipitated the action that happened. I frankly did have an interest in seeing that these witnesses were warned, because I intended to show that it was they and not my client who had committed the crime, and this was the reason I felt they should be warned of their constitutional rights.

So while it is open to interpretation that my

remarks caused the action of the judge, I think that it wasn't the case. I think the record indicates a predisposition of the judge prior to the time I made any remarks with regard to this particular prosecution.

Counsel for the government has mentioned there was a pretrial and possibly -- I mean there was a preliminary hearing and possibly this could have been taken care of earlier. Judge Ritter didn't hear the preliminary hearing and the record in the preliminary hearing, as he stated, was the cause of dismissing many of the counts of the information, and it was my -- that was where I developed my feeling that it may have been the witnesses rather than the defendant who actually committed the crime, and this is why I made the motion.

I suppose it could have been made at an earlier time, but as a fact it was not.

Going to the jurisdictional question again, I believe the legislative history of section 3731, which was discussed by this Court in Sisson, while it is ambiguous in places, indicates that the legislature, in passing this Criminal Appeals Act, was very concerned that it be limited strictly to its terms.

There are remarks in the legislative history indicating that the -- at least some of the Senators debating this bill understood the difference between the attachment of jeopardy and constitutional double jeopardy. I think you must

separate those two questions because jeopardy attaches and there is nothing unconstitutional about the attachment of jeopardy. It attaches every time the jury is sworn. So that is one question.

The Constitution comes into play on a proposed retrial. Then the motion is that the defendant is being put twice in jeopardy. It seems to me that if you argue that jeopardy -- and this has been decided recently by four members of this Court in Sisson -- that jeopardy in section 3731 must mean the attachment of jeopardy, not the constitutional standard, because the Constitution was there and will be there long before the statute.

There was no reason for the legislature to incorporate a constitutional standard in the statute. It was there and they couldn't change what the Constitution means by double jeopardy. I think the legislative history indicates that this question of jeopardy was -- the words "put in jeopardy" were put in this statute to strictly limit an appeal on the part of the government to cases in which there had been no jury empaneled. That is, the motions in bar cases clearly --

Q Well, that is the position Sisson took.

A That is the position that four members of this Court took in Sisson. And I believe that holding prevents a retrial in this case, because jeopardy had attached, and I don't see how you can separate the jeopardy in the first trial

and say, as the government argues, that you can retry him unless he waits until jeopardy has attached in the second trial to make his motion. I believe that the jurisdictional question disposes of the case. However, I also believe that the defendant has been constitutionally placed in jeopardy within the meaning of this Court's cases; specifically that --

Q Well, if you accept, as you do, the view that Sisson took as to what jeopardy meant, then in this case Sisson would say there is jurisdiction, wouldn't they? Your motion was made before the jury in the second trial was empaneled. We were talking not about a second trial there, we had only one trial involved. So this is really within the terms of Sisson, aren't you?

A I don't --

Q Or the government is.

A Your Honor, I don't think Sisson is limited, so I don't think it reads that way. Sisson to me seems to say that once a jury has been empaneled, it doesn't say whether a first jury or second jury, the facts are as you state them, there was no second jury there, and in fact there was no such jury in this case, but that once jeopardy has attached, the legislative history would indicate these legislators did not intend to give the government the right of appeal.

I would request that this Court dismiss the appeal, and even if the appeal were granted, I feel that under the

cases of this Court the defendant has been placed twice in jeopardy and under the Constitution cannot now be retried.

Q Mr. Morrill, just one more question, if I may. Are there any more than two alternative ways of construing Judge Ritter's action, that is, one, it was a declaration of a mistrial without actually using the word "mistrial," or, two, it was, as someone suggested, possibly a directed verdict. Are there any more alternatives in either number one or number two that are suggested?

A Offhand I don't see any, Mr. Chief Justice.

Q The last language that he used that is in the Appendix is certainly would seem to negate -- that is at page 46 -- it would certainly seem to negate the second, that is that this could be construed as a directed verdict because he said so this case is vacated. I am not sure how artfully he was using the term "vacated" -- setting is vacated this afternoon and it will be calendared again, and before it is calendared again I am going to do thus and so by way of warning the witnesses.

That certainly indicates that he did not contemplate his action, a direction of a verdict, should it be?

A That appears from the record to be the case. However, five months later when, in fact, the case -- the government had the case placed back on the calendar, and our motion was made, and the judge granted the motion, to dismiss

based on double jeopardy. At that point it seems to me that he himself, in reviewing his action in the prior case, had determined that the defendant had been placed in jeopardy by his action.

Q He in fact determined that his action at the very least was unwarranted.

A Yes, and possibly could be construed as having acquitted the defendant.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Morrill.

Mr. Stone?

ARGUMENT OF RICHARD B. STONE, ESQ.,

ON BEHALF OF THE UNITED STATES -- REBUTTAL

MR. STONE: It is hard to believe, Mr. Chief Justice, that I have about two minutes left, and I will be very brief.

I want to first respond to Justice Brennan's suggestion that perhaps this appeal might have been appropriate not in this Court but to a court of appeals. I think the Criminal Appeals Act is, in other ways, a bit cryptic on this point. It does say that appeal lies to court of appeals in cases where it does not lie to the Supreme Court, but I --

Q Now, if one reads the bar to a direct appeal here as meaning not whether jeopardy is actually attached but whether there is a substantial question whether jeopardy is

attached, that in that circumstance an appeal here is barred. It does not answer the question whether an appeal, where there is only --

A I am afraid, Justice Brennan, I don't understand that reading. In other words, the court -- jurisdictionally this Court would not --

Q What you mean is that you don't agree with it.

A No, I don't.

Q Not that you don't understand it. You mean you don't agree with it.

A No, I don't. But I also wanted to respond to the defense's point -- and I think this really -- the defense and Mr. Justice White are both struck as really the government is as well by the arbitrary effect the Criminal Appeals Act has in terms of emotion which is not based in any way on facts of the case can be appealed from if it is granted at one time before jeopardy is attached but not five minutes later after the jury has been empaneled. Now, that is a rather peculiar distinction that the Criminal Appeals Act makes and one which we have accepted, but reluctantly.

The question in this case is whether that arbitrary disposition that the Criminal Appeals Act makes ought to be extended to a situation where it is even more remote and more arbitrary and where we, on our part, have never thought that it ought to be extended.

I want to say in that regard that this Court I think clearly recognized both the majority and Justice White's opinion in Sisson to recognize that the Criminal Appeals Act is quite arbitrary, very cryptic in certain ways, and in definite need of modification, and I think very much in response to that Congress -- the Senate was motivated to pass the amendment to the Criminal Appeals Act, which basically makes double jeopardy and the constitutional issue and the appeals issue pretty much the same, and which also puts the vast majority of appealable cases, where we think they properly belong, in the court of appeals. That does not control the disposition of this case.

The posture right now is that the Senate has passed the bill and it is in conference in the House. There appears to be no opposition to it in the House. There has been some assurance that it would not be controversial. It is attached as a rider to a bill that has some controversial provision in it, but it is very much hoped that this will be definite law --

Q It does not apply to pending appeals?

A No, it does not apply to pending appeals, but I thought that --

Q Well, this is very happy news.

A Yes, it is happy news to the Justice Department and to this Court, and I think the litigants generally, because hopefully soon we won't --

Q Do you think perhaps we will get it before the end of this session?

A Oh, I hope very much we will get it in the lame duck session, Mr. Justice Brennan.

Q That is what I mean.

A I think that might well be. I think --

Q What is the difference between the House and Senate versions?

A The House and Senate version of this bill are exactly the same. This bill is not in dispute between the House and the Senate. Because of the lateness in the term with which this bill passed the Senate, however, it was attached as a rider to another House bill about which there are differences. But I hope that within a month or so --

Q Now, precisely what does it do?

A It makes the Criminal Appeals -- it allows the government basically to appeal in all cases in which there is no verdict of acquittal and which the double jeopardy clause does not come into play. It places those appeals in the court of appeals rather than the Supreme Court, except in those situations where the constitutionality of a federal statute is brought into play, and in those situations the appeal is by the option of the Justice Department, either to the court of appeals or the Supreme Court.

Q I hope the option is exercised in favor of the

court of appeals.

A Well, Justice Brennan, we will take that into account.

Q You say this is a rider to another bill?

A It is a rider to the LEA bill?

Q The what?

A It is a rider to the Legal Enforcement bill, which -- I am told it has some controversial provisions in it and it is going to be, I am told, at the top of the agenda in the lame duck session. I suppose there is always some doubt about what is going to happen in any session, especially in a lame duck session, but we are quite hopeful at this point that the bill will be good law within a month or so, and certainly by the end of this session.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stone.

Mr. Morrill, at our request you stayed with this case after we noted the appeal, and we thank you for your assistance to the Court and, of course, to your client.

MR. MORRILL: Thank you, Your Honor.

(Whereupon, at 11:00 o'clock a.m., argument in the above-entitled matter was concluded.)

- - -