In the

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS)
)
Petitioner,)
)
v.) No. 71-692
)
DONALD SOMERVILLE,)
)
Respondent.)

Washington, D. C.
November 13, 1972

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PEOPLE OF THE STATE OF ILLINOIS, Petitioner,	:	
v.	:	No. 71-692
DONALD SOMERVILLE, Respondent.	:	

Washington, D. C.

Monday, November 13, 1972

The above-entitled matter came on for argument at 11;00 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR. Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS P. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

EDWARD J. GILDEA, ESQ., Assistant Attorney General of Illinois, 188 West Randolph Street, Suite 2200, Chicago, Illinois 60601, for the Petitioner.

RONALD P. ALWIN, ESQ. 39 South La Salle Street, Chicago, Illinois 60603, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-692, Illinois against Somerville.

Mr. Gildea, you may proceed.

ORAL ARGUMENT OF EDWARD J. GILDEA, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GILDEA: Mr. Chief Justice, and may it please the Court:

This cause is here on a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review a judgment of that Court reversing an order of the District Court for the Northern District of Illinois dismissing a Petition for a Writ of Habeas Corpus.

The facts in issue are these:

The petitioner in the Writ of Habeas Corpus in the District Court, Donald Somerville, was indicted by an Illinois grand jury for the offense of feloneous theft.

A jury was selected and sworn to try the issues of that case. The day afterwards, before any evidence was heard and before any opening arguments were made by counsel, the counsel for the State of Illinois moved the Court to dismiss the indictment on the basis that it failed to charge a crime cognizable by the State of Illinois. That is, it failed to aver a necessary element of the offense of feloneous theft and that is the intent to permanently deprive.

Over a general objection of defense counsel, the Court sustained the State's motion and dismissed the indictment. Two days later the matter was resubmitted to an Illinois grand jury and a second indictment was returned charging the very same offense, this time alleging the necessary averments to constitute an offense under Illinois law.

QUESTION: Let me back up now to the day of trial. Suppose the day before the trial motion had been made by defense counsel challenging the indictment on the same grounds and the Court had dismissed the indictment as defective, what would have been the status under Illinois law of that case? Would they have gone to the grand jury again, got a new indictment?

MR. GILDEA: Yes, your Honor. Under Illinois law no offense was ever charged, the defendant had never been placed in jeopardy, and the State was free to resubmit the matter to any grand jury.

QUESTION: How is he more in jeopardy after the jury is picked under that kind of an indictment, a defective indictment, than he was before?

MR. GILDEA: I don't believe in any more jeopardy, depending upon whether the Court attaches emphasis to the concept of attachment. But in terms of the double jeopardy principles, I understand it he is no more in jeopardy after the selection of a jury than he is before under these circumstances.

QUESTION: And he was in no jeopardy before under the defective indictment?

MR. GILDEA: He was in no jeopardy. And under the traditional and the classic rule, he was in no jeopardy afterwards, bearing in mind that the classical rule for attachment of jeopardy is only when a defendant is placed on trial before a jury or a judge in the event of a bench trial on a regularly charged indictment. However, if there is some defect in the jurisdiction of the court before which the matter is presented, under the classical rule of double jeopardy, he is not then in legal jeopardy as the concept was understood initially and as it has been understood, to my way of thinking, since the inception of the rule.

QUESTION: Well, are you seeking a ruling here that is based on the jurisdictional nature of the indictment?

MR. GILDEA: No, your Honor. We feel that that is one aspect of the case. But we feel that we can't sustain our position on another basis besides the jurisdictional basis, and that is under the "manifest necessity" doctrine that was espoused in the United States v. Perez and that was continuously employed by this Court up until as recently as United States v. Jorn, our basis being that in reference and in deference to Illinois State criminal procedure, the question of judicial power to try criminal cases, the Court before whom Donald Somerville was arraigned for trial had in fact under Illinois

law no power to try him for that offense.

QUESTION: Then suppose the trial had been going on for three days and the defect were discovered, your position would be the same?

MR. GILDEA: Our position would be the same insofar as the manifest necessity doctrine, that is, that the Court would still have to have declared the mistrial. Then the question may then arise as to whether or not on some other theory, such as an estoppel theory, the State should be allowed to reprosecute him, and that would depend on whether or not the defendant had sustained any substantial burden as a result of the error, if it is an error, on the part of the prosecutor in drafting a defective indictment and proceeding to trial. And that would depend, again, upon the course that the trial took up to the time of the mistrial. Then depending on whether or not the status of the evidence, whether or not the evidence at that point reviewed by another court was such that one might say that the defendant had the advantage or was on the verge of an acquittal at that point.

QUESTION: If Illinois hereafter simply lets the trial go forward and finish and leaves it up to the defendant to raise the jurisdictional question, then what you have lost is simply the wasted time, you just wasted some time and effort?

MR. GILDEA: Well, not entirely, your Honor, because Illinois --

QUESTION: Well, really if he was convicted in that trial and he appealed and the case was reversed, you could retry him.

MR. GILDEA: That is correct, your Honor.

QUESTION: But if he was acquitted, you could not.

MR. GILDEA: You could not. But if he is acquitted, I think interjects an element into the case. And that goes back to I think the inception of the rule which is the principle of autrefois acquit.

What we consider here is the fact that all that the law is concerned about or concerned with is a resolution of the issues of a case, the merits of the case. And if it proceeds to a verdict and there is an acquittal, then it's hard to say that the acquittal that was returned by the jury had anything whatsoever to do with any defect in an indictment.

QUESTION: That's exactly right. So you couldn't try him again then.

MR. GILDEA: No, your Honor. And I think then --

QUESTION: We are really arguing here whether the State should be permitted to terminate the trial and not waste its time when a sufficiently serious defect in the proceedings arises which would almost guarantee reversal.

MR. GILDEA: That is correct, your Honor. There is nothing in the course of the proceedings insofar as they transpired up to the point where the mistrial was declared that

would indicate that the State was at a disadvantage. As a matter of fact, no evidence whatsoever had been introduced. There were not even so much as opening arguments.

QUESTION: But whatever box the State found itself in it created itself.

MR. GILDEA: There is no question that the error is attributable to the prosectuion.

QUESTION: So you are saying -- is your general proposition that where there is a defect in the trial that would guarantee reversal, or almost guarantee reversal, arising out of the State's negligence, a mistrial can always be declared?

MR. GILDEA: Where an irreversible error has occurred in the course of proceedings --

QUESTION: And it's the State's negligence -- and it's rooted in the State's negligence.

MR. GILDEA: And it's rooted in the State's negligence, unless there is something in the record that would indicate that the assertion must -- there was substantial prejudice to the defendant or unless there was some indication in the record that the assertion of the defect was interjected for the purpose of avoiding an acquittal. Then under those circumstances we are submitting that does not constitute double jeopardy, because what would happen in that case, if the trial weren't aborted, it would proceed to a termination.

And the best we could hope for is, well, there could be an acquittal. But in the facts of this case, of course, on the retrial, there was a conviction and there is no indication here that the subsequent trial was in any way different from the initial proceedings, or that the State gained any advantage in the course of the subsequent trial. So what the alternatives are are simply to proceed to a termination, in which case all that the State could hope for is gaining a conviction in which case the defendant could assert the jurisdictional defect which is never waived and would have in his corner at his advantage the prospect of having a retrial. It just could not be avoided.

QUESTION: If it's a jurisdictional defect, how can jeopardy attach? That is, if there is an indictment which cannot bring him to trial, then what difference does it make that the formality of the jury having been selected and sworn has been carried out?

MR. GILDEA: That's what we assert as the traditional view.

QUESTION: But that traditional view doesn't relate to defective indictments. Is there any case in this Court which has ever said that jeopardy attaches on a non-indictment, an indictment that is no indictment?

MR. GILDEA: No, your Honor.

The reason I referred to the manifest necessity

doctrine is because this Court has -- it has been intimated in Benton v. Maryland which is premised upon People v. Barrett a New York case, where it was said that there was a different connotation attached to the term "attachment of jeopardy" where it was said that from the viewpoint of the defendant, what difference does it make whether or not the Court has jurisdiction and any judgment could be sustained because as a practical matter he still faces the jeopardy of the prospect of being sentenced to the penitentiary and not for observing the error. So there seems to be some suggestion that there is a difference between practical jeopardy and legal jeopardy. And that's why I made that distinction.

But under the traditional view, there was no legal jeopardy in this case because the Court had no jurisdiction to try the issues.

QUESTION: The logical conclusion of that is that even if he were tried and acquitted, there would be no double jeopardy.

MR. GILDEA: Well, no, I don't think so. I don't think so for this reason --

QUESTION: You said because there is no jurisdiction there is no jeopardy.

MR. GILDEA: I say this -- I think I am allowed to make this one qualification, and that is, what is the purpose of jurisdiction? And I say this, that the only purpose in

jurisdiction is to restrict the exercise of the judicial power of the Court. It's for the advantage of the defendant, so to speak, so that the Court cannot try any criminal case except those that are allowed by the particular State constitution.

Now, if it should proceed to do so, even though the court has no jurisdiction to do it, the ultimate issue in any legal proceeding is to determine the merits of the case. And if the merits of the case are determined by a court even though it did not have jurisdiction, then we are put in this position: A jury or a trier of fact has resolved the issues against the State. Now, albeit the court perhaps did not have jurisdiction, the State was not prejudiced by that and there is no reason to suspect that had the court had jurisdiction there would have been a difference in the outcome of the case. Therefore, since the matter was determined on the merits, then why allow the State to avert that result simply by claiming lack of jurisdiction? So I think that's a big difference.

QUESTION: On that basis, then, if the judge had said to the defendant, "By the way, the indictment is defective; do you want a mistrial," and he said, "No," the judge said, "All right, we will go ahead," and he's convicted. You would say that would stand, too, then?

MR. GILDEA: No, I don't, because he could not waive that. My basis is this: The court could not proceed. If

the court did not have the authority granted by the State --

QUESTION: What if he said, "No, let's go ahead," and he was acquitted?

MR. GILDEA: He said, "Let's go ahead," and he was acquitted. I think in that instance, first of all, I think that the court would have been acting beyond its powers. Now, if the defendant participated in that and said, "Let's go ahead," then it's a different situation. Then perhaps in that instance, if he agreed to an illegal judicial proceedings, then I question whether or not he could claim double jeopardy.

QUESTION: Let me suggest a hypothetical. It may seem a little extreme to you. Suppose in one of the very large courts in the country where they have, as they do in several places, 150 or 160 trial judges and nobody knows all of them by sight, that some person walked into the courtroom under a valid indictment and he is not a judge at all, he is just a fellow with a black robe and he sits and presides over the trial and a conviction results. Is that a valid conviction?

MR. GILDEA: No, your Honor.

QUESTION: A complete nullity, is it?

MR. GILDEA: It's a complete nullity. And I think perhaps this really points out the --

QUESTION: All right, let's take it one step further. An acquittal results.

MR. GILDEA: Again, it's a complete nullity.

It's always been the view. It's never differed. I think from the inception of the rule, if we refer to from the time of Lord Cook all the way up to the present, it's always been the same.

QUESTION: Let's take the next step. Could he be tried again by a real judge?

MR. GILDEA: Yes, your Honor.

QUESTION: Now, here we have a non-indictment instead of a non-judge, haven't we?

MR. GILDEA: Yes, your Honor.

QUESTION: The distinction is difficult for me to grasp, but perhaps you can enlighten me.

MR. GILDEA: I am not sure whether or not there is a distinction. If you consider in this respect, at least in Illinois it's the indictment that gives the court, an indictment by a grand jury, that gives the court judicial power to try a case. Now, if there is no valid indictment, that court whether it wears black robes or whether the judge has been sworn and is drawing a salary under the State law, it makes no difference, because he has no more authority than I to sit in judgment upon a defendant in the other situation. In either case the court does not have the authority to try that issue.

QUESTION: And yet you do concede that in this case by contrast to your answer to the Chief Justice's question

respecting the non-judge, that in this case if there had been a verdict of acquittal, the State would have been barred from trying this person again.

MR. GILDEA: Yes, but not on --

QUESTION: There is a difference apparently in the two cases, between the case of an acquittal on a non-indictment and a trial by a non-judge.

MR. GILDEA: I have to concede that I do believe there is a difference because in that instance the parties placed their reliance on the apparent authority of the court. The hypothetical proposed by the Chief Justice was, of course, an extreme one, which it's difficult to imagine having occur, but where all the parties at least assume the authority of the court, and it does proceed before a judge that has the authority to try the issues but whose authority was not activated and by a proper indictment. And this again is solely a restriction on the exercise of judicial power.

QUESTION: In one case it is.

MR. GILDEA: There is a distinction between the two cases.

QUESTION: A properly constituted court with subject matter jurisdiction and personal jurisdiction. In the one case it is a properly constituted court. In the other I suppose it's no court at all.

MR. GILDEA: That's correct.

QUESTION: Is your point really, for lack of a better word, it has to be a valid acquittal?

MR. GILDEA: No, I don't think so.

QUESTION: It has to be an acquittal -- it couldn't be an acquittal of a court without jurisdiction. You wouldn't buy that.

MR. GILDEA: In the one case --

QUESTION: I don't see how you could.

MR. GILDEA: -- if the court has the appearance of judicial authority in it, there is a defect in the mechanism by which that court exercises its judicial authority, then in that instance, if the case proceeds to a verdict and there is an acquittal, then the question remains what is the purpose of the double jeopardy rule. And in this situation, in that situation we are speaking about, again, if the merits have been regularly tried before a court that has apparent jurisdiction to try the case and it's resolved in favor of the defendant, then the question becomes, well, what is the infirmity in that verdict and the subsequent judgment? And the infirmity is a technical one, is it not, the affirmity being that there was not a regular procedure in which that judge was authorized to try the case.

Now, bearing in mind that when we speak about the principle of double jeopardy, we are talking about competing interests. We are talking about the interest of society in

punishing the guilty, assuming that's a legitimate interest, and we are talking about the interest of the defendant in being tried in a single prosecution. Now, when we contrast those two interests in the situation that we are talking about, can we say -- and I think this is how I would resolve the question -- can we say that the State or the prosecution or society by virtue of that defect in the procedure whereby the judgment was rendered suffered such prejudice that the verdict should be overturned? And I would say in that instance, no, it hasn't suffered anything.

QUESTION: Could we back up just a minute? Why wasn't this indictment subject to be amended? Is that Illinois law?

MR. GILDEA: That's Illinois law. Illinois does have an amendment statute, but only as to form of defects. But this went to the (inaudible) ... and for that reason it wasn't subject to being amended.

QUESTION: Suppose instead of a non-judge, this spurious judge, you had a situation where the judge was a genuine judge and you had a valid indictment, but someone just forgot to administer the oath of office to the jurors and you went on with the trial, would that be a valid trial?

MR. GILDEA: I think so, your Honor. Perhaps this is bringing out the point that I should have made before. In this case what we are talking about, we are talking about

technical flaws which will occur, much the same as they occurred in the case of LaVada ? v. New Mexico where the defendant plead (inaudible) and that was overruled and there was a failure to arraign the defendant, and they proceeded to trial and then they recognized that, they rearraigned him, which was a technical mistrial, and proceeded to trial. That's one instance.

Now, again, I say, how is the State prejudiced in terms of the ultimate judgment, verdict and judgment? But if you are talking about, let us say, a judge who has absolutely no authority to preside, then the State in that instance is prejudiced, society is prejudiced, because it cannot tolerate persons without judicial authority presiding in criminal cases. In that case I would say the State or society is prejudiced and there should be a distinction between the two cases.

QUESTION: Under Illinois law, had the trial in the first indictment proceeded and resulted in a judgment of conviction, could that have been collaterally attacked in Illinois courts and the prisoner released?

MR. GILDEA: Very definitely. And an illustration of that is the case that we have included in our brief, People ex rel. Ledford v. Brantley. It was a case purporting the charge to the defendant was burglary. And under Illinois law to constitute the offense of burglary, you have to show ownership of the burgled property in someone other than the

defendant. And in that case they failed to allege the ownership of the burglarized premises. And the inmate in that case, Ledford, after pleading guilty to the indictment, he pleaded guilty which normally waives all defects other than jurisdictional defects, pleaded guilty and subsequently filed a petition for habeas corpus under the State Habeas Corpus Act, and the court held in that case that his plea of guilty did not waive the jurisdictional defect. And therefore it was subject to an attack and a post-conviction proceeding.

QUESTION: Mr. Gildea, in getting back to the distinction you have drawn between the non-judge and the non-indictment cases, this Court in the Green case, 355 U.S., said that the double jeopardy clause, and I'm quoting, is a guarantee "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."

Now, in the face of that principle, how can you distinguish the non-indictment and non-judge cases?

MR. GILDEA: Well, I think first of all, Green, if I am not mistaken involved a case that went to verdict and the defendant was --

QUESTION: I thought the hypotheticals given you were both cases that went to verdict, both the non-judge and

the non-indictment case.

MR. GILDEA: I was coming to this, your Honor. The defendant in that case which was regularly tried had been acquitted of the greater offense and convicted of the lesser offense and appealed, and on reversal and remand, the State again charged him with the greater offense and he was convicted of the greater offense, and the question was whether or not that constituted double jeopardy.

QUESTION: Well, here he had the same offense. In the hypothetical, it's the same offense. In the non-indictment case we are dealing with precisely the same offense, aren't we --

MR. GILDEA: Yes, your Honor. But I think --

QUESTION: -- as in the non-judge case the Chief suggested to you.

MR. GILDEA: The question is what is understood by the language of the Court. And I take it that the language is to be construed in reference to not only the Green case, but all other double jeopardy cases at least in this case from the United States v. Perez up to the present time. And --

QUESTION: I thought that was the thrust of the principle that that's what the guaranty means.

MR. GILDEA: What I understand by that is, what the principle is aimed at is the recognition of the fact that the prosecution has within its resources the power to repetitiously or successively reprosecute a defendant on a criminal charge.

And as I understand it --

QUESTION: Isn't that what in both the non-judge and the non-indictment cases the prosecution was involved in both of them. The prosecution represented the State, and it repeated the second time.

MR. GILDEA: That's true, but --

QUESTION: The identical prosecution.

MR. GILDEA: -- doesn't the same thing happen when a case proceeds to a hung jury? The jury is discharged. Doesn't the same thing happen when a case proceeds to a conviction and because of error interjected in the record by the prosecution, the case is reversed and remanded?

Now, in that instance, we allow reprosecution.

QUESTION: Well, that's because the convicted defendant has himself taken the appeal. That's from the theory upon which he has not been permitted to assert double jeopardy if he is successful on appeal. We are not talking about that kind of case, are we?

MR. GILDEA: Isn't that putting on the horns of a dilemma? In order to exercise his right to challenge the propriety of his conviction, he has to forego his double jeopardy right.

QUESTION: No, he has none is what the court has held. Where he is the appellant and is successful, then he has no double jeopardy claim.

MR. GILDEA: He has, but --

QUESTION: But that's not what we have held in Downum and Jorn and other cases where this principle has been involved.

MR. GILDEA: But I think the principle, what the principle is aimed at, is the abuse of the prosecutor's authority. What I envision to be the abuse of the prosecutor's authority is the ability on the part of the prosecutor to attempt to avoid an acquittal by successive prosecution.

But in this case here, that was not the case, because the State did not attempt to avoid an acquittal, because there is nothing in the record that would indicate that the State was in jeopardy facing an acquittal. As a matter of fact, if we consider the proposition that on the subsequent trial the State was successful and the defendant was convicted and we consider that in terms of the fact that there was an impediment in the indictment that was objectively determinable, and that there were no other indications in the record that the State was at a disadvantage and could not convict the defendant on the merits, I would submit that under the circumstances of the case, the underlying policy of the rule was not violated in this instance.

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

Mr. Alwin.

ORAL ARGUMENT OF RONALD P. ALWIN, ESQ.

ON BEHALF OF THE RESPONDENT

MR. ALWIN: Mr. Chief Justice, and may it please the Court:

As Justice Harlan said in his opinion in the Jorn case, the purpose of the double jeopardy provision is a constitutional policy of finality for the defendant's benefit. Here that policy was violated where the defendant was put to trial once on an invalid indictment and then reindicted and put to trial again on the subsequent invalid indictment.

We have in the history of the decisions of this Court two consellations of cases, if you will. We have the Perez case and the cases along the line of following Perez under different circumstances where this Court has held that the trial may be aborted by the trial judge without the consent of the defendant where there is a manifest necessity for doing so, where there is a breakdown in the judicial machinery. Those are the words used by the Court.

On the other hand, we have another constellation of cases, the Downum case, Jorn case, the Green case I think belongs in that category, where the Court has held that the trial cannot be aborted without the defendant having been placed in jeopardy. And I hasten to add that sometimes jeopardy is a conclusion. Suffice it to say that the defendant cannot be retried after the first trial is aborted.

To get to the question now before the Court, the issue is whether or not the existence here of a defective indictment takes this case out of the classic mold to which the general rules applies. And the respondent submits that it does not.

I would like to look at some of the circumstances here which this Court has considered in reaching a conclusion that reprosecution would be barred. Admittedly now these circumstances are not each and of themselves determinative, but they all go into the double jeopardy equation. And one of the first circumstances we have here is that neither the mistrial nor the defective indictment was caused by the defendant. And I call your attention to the Tateo case where the Court found that the mistrial was caused by the defendant, of the guilty plea in that instance, not in this trial. The defendant also subsequently by a 2255 proceeding attacked the judgment of conviction.

Similarly, in the Ewell case, there was interestingly an indictment, and there the defendant subsequently by a 2255 proceeding or at least on appeal attacked the judgment of conviction. Now, this Court held that there was either a continuing jeopardy as expressed in Price v. Georgia or that the defendant had waived his jeopary. Whichever theory is adopted under these facts, the defendant can be retried on a subsequent valid indictment.

Now, interestingly in the Ewell case, there was a bad indictment. But this Court chose not to rest its opinion on the existence of a bad indictment for the proposition urged by the State here that there was no jurisdiction and therefore jeopardy had not attached. This Court relied rather on the sounder proposition that once the defendant attacks the judgment of conviction, his jeopardy has not somehow concluded, there was a continuing jeopardy, if you will.

QUESTION: Do you have the citation of the Ewell case?

MR. ALWIN: Yes, I do, your Honor. I will have it in a minute.

QUESTION: I take it it's not cited in your brief.

MR. ALWIN: It's not cited in my brief. It is cited by the way, in the Petition for Certiorari filed in the previous case when this case was up here before. My associate will look for the citation.

The second point I would like to make here -- we have the first point that this defect was not caused by the defendant. Importantly, however, it was caused by the prosecution. And that distinguishes this case even from the Jorn case where the mistrial was occasioned by the conduct of the trial judge. Here we have the underlying cause, the material cause, if you will, the bad indictment was created by the prosecution.

I pass again to the third point, what I call the fishing cause of the mistrial was the motion for the mistrial was made by the prosecution in this case. Again I call your attention to the Jorn case where in dissenting three Justices noted that the -- I am quoting -- "the mistrial was not requested by the prosecution." This cannot be said about this case.

The citation for the Ewell case is 383 U.S. page 116, 1966 case.

Returning for the moment to this idea that the cause here and also the motion for the mistrial was occasioned by the prosecution's conduct, I would like to call your attention to the concept of overreaching expressed by Justice Harlan in the Jorn case. I think here we have overreaching. Overreaching, I would add, does not have to go so far as to be bad faith. It can be, as Justice Frankfurter indicated in the concurring opinion in Brock v. North Carolina, it can be incompetent or casual or ineffective conduct of a prosecutor.

I would also point out that it can be passive as well as active. In the Downum case we have what might be termed passive overreaching. The prosecutor didn't have the witnesses there to testify against the defendant.

Here apparently it resulted from the drafting of the bad indictment, and the indictments are drafted by the State's Attorney's office. But more importantly here, the State was

actually given a second chance to correct this error before a jury was empaneled and sworn. And that's when the case went to trial. And we suggest here that the error would not have been half so serious if the prosecution had not proceeded to trial on this bad indictment.

QUESTION: If there was no jurisdiction in the Court at that time under this indictment, do you think there was jeopardy when that jury was sworn and took its place in the box?

MR. ALWIN: Yes, your Honor, in a constitutional sense I do. I think that is the meaning of the Ball case where the Court noted the difference between the voidable and the void indictments. I think there was jurisdiction within the meaning of jeopardy under the Sixth Amendment, although I hasten to add the jurisdiction is sometimes an elusive concept. Certainly here there was jurisdiction over the parties and the cause.

QUESTION: Really that's what the Ball case does stand for, doesn't it?

MR. ALWIN: I believe so, yes. Had there been no jurisdiction there, then I think the Court would have to hold that the acquittal itself was invalid. The acquittal could not have suddenly caused jeopardy to exist where there was no jurisdiction.

I point out the purposes of an indictment here. They are to -- at least two purposes of indictment are to enable

the accused to prepare a defense and, of course, to plead former jeopardy. Here there is no indication that the accused had not been able to prepare a defense and was in fact ready to go to trial. And this is indicated also by his objection to declaration of a mistrial which I would point out does not appear to be a token objection. We don't have the record of the State Court proceedings, but I would quarrel with the State's characterization of this objection as a token objection.

Also supporting the argument here, of course, is the decision in Benton v. Maryland where the Court noted that the defendant there, as here, if the first trial had not been terminated, the defendant could well have served out his time under this invalid indictment. This, I think, is a very important practical point which also goes to the jurisdiction of the Court. You see, the defendant could have served time even in a case where the State would argue that the Court had no jurisdiction. A decision in line with what the State urges here would not take into account the practicalities present in a situation like this.

QUESTION: Are you saying that if everyone in the proceeding had been careless and not noted this defect, then he might have been in prison for several years?

MR. ALWIN: Yes, I think he would have been, could have been. However, if it had later come to his attention that I think under the decisions of this Court and the courts

of Illinois, he could have had his conviction vacated by collateral attack.

Now, the State argues that once it comes to his attention, this somehow deprives the judge of a power to continue the trial when in the first instance the judge didn't have any power to continue the trial. I don't think this argument again comports with the reality. The mere fact of knowledge should not be controlling in this case. Here the defendant admittedly with knowledge or notice,if you will, after this defect was called to his attention wanted to continue with the trial. Now, I ask your Honors what would you say if I were here today on behalf of the same defendant and he had objected, let's say he had raised the point, and trial had been terminated on the defendant's motion and then an invalid indictment was obtained and he interposed the defense of double jeopardy in this case we are here for today. I think your Honors would hasten to point out to me that this mistrial had been declared under the defendant's motion. And that's the principle of the Ewell case and the Tateo case. You can't take inconsistent positions and then ask for relief.

As the Court of Appeals for the Sixth Circuit stated in the Haugen case which is cited in the State's brief, you can't blow hot and cold. Now, that was a double jeopardy case where the defendant wanted to blow hot and cold. He objected to an invalid indictment and then he interposed the defense of

double jeopardy.

The respondent in this case was consistent throughout the proceedings. He objected to termination of the trial. He maintained in the Appellate Court of Illinois that the indictment was in fact valid. I think obviously he was adequately placed upon notice and he could prepare a defense. That's one of the essential purposes of the indictment.

Another point which I think should be taken into consideration here, and I will make it only briefly, is the potentiality for abuse. We do not argue that in this case there was an abuse by the prosecutor's office of an invalid indictment. But the potentiality is there, especially in this situation, unlike the situation in United States v. Jorn, for example.

I call your Honors' attention to the quotation from People v. Barrett in the Downum case which I think quite adequately covers that particular issue.

QUESTION: Mr. Alwin, doesn't the Illinois law, though, carry some safeguards against this type of abuse if under an invalid indictment the defendant can not only get his conviction reversed on appeal if the State doesn't bring it up at the trial, but actually get collaterally released after the judgments become final. There certainly isn't much incentive for the State to put in deliberately a defect in the indictment thinking if the trial goes badly, we will use it;

if not, we will forget about it.

MR. ALWIN: Well, I think, yes, there is, your Honor. If the State tries an individual serially enough times, I think eventually they will get a conviction which will be upheld. Even this advantage which I think your Honors characterized as slight, but which I don't think is so slight, might be sufficient for a prosecutor to take advantage of.

QUESTION: Even though he knows its subject to collateral attack?

MR. ALWIN: Yes, I think so. I think in the experience of lawyers frequently a prosecutor will go to a jury with a case which due not necessarily to a bad indictment but due to very strong error he may suspect will be reversed. In that situation he does not terminate the trial.

QUESTION: Of course, when you are talking about whether something will be reversed or not, does that always end up as the judgment of the Appellate Court as to whether the thing was not only erroneous but also prejudicial? Here you presumably start the trial with the opening day with an indictment that is demonstrably bad and will entitle this man to be released from any judgment of conviction without anybody's assessment of prejudicial error or the like. I think those are different situations.

MR. ALWIN: They certainly are different situations. I cannot say with certainty to what extent this abuse might be

taken advantage of by the State's Attorney for Cook County, for example, if at all. Perhaps there would be no abuse in our State's Attorney's office in Cook County,but the potentiality is there. And that is one of the things that the double jeopardy clause is designed to guard against.

QUESTION: Isn't there an element of potentiality of abuse, if I can call it that, on the other side also? Your case might be scheduled for trial on Wednesday, and on Monday you see the defect in the indictment. You can move today to strike the indictment and not be subject to double jeopardy. But if you can play a game and if that jury is called and sworn, then you have the present situation. So that there is a potentiality of game-playing in that respect, too, isn't there?

MR. ALWIN: Well, if it were to come to the defendant's attention, I would think that he would be estopped from later raising it if he chooses to go ahead with the trial.

QUESTION: Under Illinois law could this trial have been suspended and the grand jury return a new indictment? I notice it was done very swiftly here, two days or something. Could they have had this jury stand aside and keep it impaneled?

MR. ALWIN: I don't believe so, your Honor. I don't know of a case --

QUESTION: In other words, they were impaneled on one indictment and they had to be tried on that or nothing?

MR. ALWIN: Yes, that is my understanding.

I think the final point I would make here is that the defendant was deprived of his right to go to this jury. In answer to, I believe it was Mr. Justice White's questions to Mr. Gildea, there was a question of whether or not this would be a waste of time for the State to continue with this trial if the same would be reversed on appeal. To answer that it would be a waste of time is short-sighted for this overlooks the valued right of the defendant to go to this jury and by this confrontation to end the confrontation rather with the State at this time.

I would finally point out, if your Honors have doubt about whether or not the defendant's plea of double jeopardy should be sustained as your Honors pointed out in Downum, this doubt should be resolved in favor of the citizen. In the final analysis, as Justice Harlan stated in Jorn, the trial judge's decision to abort the trial should be tempered with the defendant's right to go to this jury which has been selected and sworn and to end this confrontation with the State right at that point. That was overlooked here.

Finally, I would add if in a situation it is a criminal who must go free because, as Justice Clark stated in Knapp v. Ohio, because (inaudible), we must remember here that again as he stated it is the law that sets him free.

I thank you for your attention.

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

Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:49 o'clock a.m., the case in the above-entitled matter was submitted.]