In the

Supreme Court of the United States

United States,

Petitioner,

v.

George J. Wilson, Jr.,

Respondent.

73-1395 C 2

Washington, D. C.
December 9, 1974

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HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner, v. GEORGE J. WILSON, JR., Respondent.	No. 73-1395

Washington, D. C.,

Monday, December 9, 1974.

The above-entitled matter came on for argument at 1:01 o'clock, p.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 F. PWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice 20530; on behalf of the Petitioner.

PHILIP D. LAUER, ESQ., 654 Wolf Avenue, Easton, Pennsylvania 18042; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Frey, you may proceed with United States against George J. Wilson.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on the government's petition for writ of certiorari to review a judgment of the Court of Appeals for the Third Circuit, dismissing the government's appeal from the judgment of the District Court in this case, which, after a jury verdict of guilty, dismissed respondent's indictment because of allegedly prejudicial pre-indictment delay.

Respondent was the financial secretary and business manager of a union local in Pennsylvania.

The indictment charged that he had converted approximately $1200 in funds belonging to the union for the purpose of paying the cost of his daughter's wedding reception in 1966.

This payment was made by a check issued by two officers of the union, Brinker and Schaefer. Brinker died in 1968, before the investigations of respondent's activities by the FBI was very far along.

By the time the indictment was returned in this

case, in 1971, Schaefer was terminally ill and he was unavailable to testify at respondent's trial.

On the basis of the unavailability of Messrs. Schaefer and Brinker, respondent twice moved before trial for dismissal of the charges against him. Hearing were held on both these motions, and the evidence on behalf of the government at these hearings showed that Schaefer and Brinker had no active role in the union's business affairs, that their signatures on union checks were a routine perfunctory matter.

Respondent, on the other hand, testified that he had never directed anyone to prepare the check or to use union funds to pay for his daughter's wedding.

After each hearing the District Court denied respondent's motion to dismiss. At trial, respondent moved for a judgment of acquittal, which was denied, and the case was submitted to the jury, which returned a guilty verdict.

Respondent then renewed his motion for judgment of acquittal; it was again denied.

Thereafter, respondent filed further post-trial motions, again asking for acquittal and also for arrest of judgment and a new trial.

Each motion was based, in part, on his contention regarding the pre-indictment delay.

Three weeks after the filing of these motions,

the District Court entered an order dismissing the indictment, on the grounds of prejudicial pre-indictment delay.

It did so without alluding to its previous actions, denying the same motions prior to trial, but stating that it had taken notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer.

Since we believe that the District Court had erred in its legal conclusion, that there was an unreasonable delay depriving respondent of his opportunity for a fair trial, and that this was in violation of the due process clause of the Fifth Amendment, an appeal to the Third Circuit was authorized.

The Court of Appeals initially entered an order dismissing the appeal and citing Sisson and claiming that the appeal was not permissible under the statute.

Consequently we filed a petition for rehearing, and also in the event there was some statutory problem in their view, they petitioned for mandamus in the alternative, relying on the Dooling case in the Second Circuit.

Rehearing was denied, and this time the Court of Appeals issued an opinion. it agreed that there was no statutory impediment to appeal, leaving aside, of course, the statute's incorporation of any constitutional restriction. It concluded that the appeal was constitutionally barred,

because the action of the trial court was an acquittal, and because acquittals could not, in its view, be appealed consistently with the double jeopardy clause.

In concluding that the action of the District Court was an acquittal, the Court of Appeals relied on the definition of the term in Sisson, where, by the way, it was being defined for the purpose of determining a question of appealability under former Section 3731.

That definition is: the trial judge's disposition is an acquittal if it is a legal determination on the basis of facts adduced at trial relating to the general issue of the case.

The Court of Appeals said that the determination made by the District Court here was based on facts adduced at trial, which we don't dispute, and that these facts related to the general issue of the case. And that therefore, since it was based on facts adduced at trial which related to the general issue of the case, it was an acquittal, even though the determination itself had nothing to do with the general issue of the case.

Now, the case poses two questions, one which we began discussing this morning in the Jenkins case, that is, assuming that this is characterized as an acquittal properly by the Court of Appeals, does that bar our recourse to appellate review?

And secondly, the question of whether, if that is the case, was it properly so characterized?

Now, I'd like to deal further with the first issue, if I may, which we were discussing this morning.

I think the Court has to look at this question which, as I've indicated, is a matter of first impression here, and it has to consider what it is that the government is asking to have done, and what the interests are of the systemof public justice on the one hand, and the legitimate interests of the defendant, that the Constitution recognizes and seeks to protect, on the other hand.

Now, we submit that there is no articulable value, there is no rational constitutional policy that is disserved by allowing government appeals in circumstances such as those presented by this case.

If the government appeal fails, that is, if we're wrong on the merits and the District Court was right, then the judgment is affirmed and the defendant is finally discharged, and the matter is concluded.

On the other hand, if it succeeds, the trial court is simply required to attach to the trial that has already taken place, the correct legal consequences.

Now, -- but none of the values which the double jeopardy clause is designed to serve are impaired by our --

QUESTION: In this case, Mr. Frey, could that be

done by simply reinstating the guilty verdict and entering judgment on it?

MR. FREY: Well -- yes, you would direct the District Court, presumably, if it was wrong in its ruling, to enter a judgment on the verdict.

Now, of course there may be -- again, there may be other post-trial motions which the District Court would wish to consider before entering a final judgment, such as a motion for a new trial, which he never reached, because of the grounds on which he concluded the case.

But it's perfectly clear, it seems to me, that the jury has found the facts and has found them favorably to the government.

And in this sense the situation is not as different -- we're not contending that we're in a materially stronger position in this case than we would be in the Jenkins case, although one could possibly seek to make a distinction between jury and non-jury trials.

In the Jenkins case, the judge acted in two functions: he performed the jury's function as a finder of fact, and he performed his judicial function, and it's there that he went wrong and it was his error in performing the judicial function --

QUESTION: Didn't he enter judgment after the veredict here?

MR. FREY: In this case he never entered a judgment of conviction, he dismissed --

QUESTION: So the motion for arrest of judgment was just to arrest a forthcoming judgment?

MR. FREY: Presumably. It's not clear what he acted on. I don't think that there was a motion for dismissal of the indictment as such, but that is the relief that he granted.

Of course, under Rule 12 he was required to consider and act on that prior to trial, and he did consider and act on it prior to trial and deny it, and there's some question about his power subsequent to trial to reopen that matter, or whether, if he's once denied it prior to trial, only the appellate court, in our view, would have --

QUESTION: Well, he dismissed the indictment, according to the Appendix --

MR. FREY: Prior to trial, sir.

On this very ground that he acted on subsequently.

QUESTION: Unh-huh.

MR. FREY: Now, we think it --

QUESTION: This would be like Jenkins, except for the different trier of fact, if in Jenkins Judge Travia had first found the defendant guilty, and then separately --

MR. FREY: It's difficult to -- it's difficult to say what that means. We say that, in effect, of course, he

found the defendant guilty had he applied the correct law to what he -- to what was done.

But I suppose it would be true that -- I don't think a judge in a non-jury trial enters a verdict, however, which would be the situation --

QUESTION: He enters a judgment.

MR. FREY: He enters a judgment. Of course, once he's entered a judgment, then his power to act with respect to that judgment is limited, further. It then becomes subject to appellate review.

QUESTION: Well, he can entertain a motion for a new trial.

MR. FREY: I think -- yes, there are certain forms of relief that he can -- that he can grant.

In the Green case, Mr. Justice Black discussed some of the policies of the double jeopardy clause, the interests that are served that we say at not adversely affected by a government appeal here.

He begins at page 187 of 355 U.S., by saying: The constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.

Then, after quoting from Blackstone and from Ex Parte Lang, he said: The underlying idea, one that is deeply

ingrained in at least the Anglo-American system of jurisprudence is 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 and expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty.

Now, we submit that these interests are not at stake in the government's appeal in this case. That what Justice Black was clearly talking about was the situation in the Ball case and in cases of that sort.

Now, also I note that even in the context of a second trial, following a legally erroneous acquittal, Mr. Justice Cardozo observed in Palko v. Connecticut -- and here I refer to Palko because of its relevance to the constitutional policies that are at stake here -- the State is not attempting to wear the accused out by a multitude of cases with accumulated trials; it asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. This is not cruelty at all, nor even vexation in any immoderate degree.

QUESTION: Of course, Palko in effect said you could have a rational system of jurisprudence without the

double jeopardy clause, din't it?

QUESTION: Yes.

MR. FREY: Well, it said that the core value of the double jeopardy clause that would be transmitted to the States under the notion of Palko through the due process clause would be basically the Ball notion, that a man who has been tried and acquitted on the facts can't be subjected to a second prosecution.

QUESTION: But, even if Palko was still law, we would be dealing in the federal system, as we are here, not with the core notion but with the double jeopardy clause itself.

MR. FREY: Yes, I understand that, and I don't mean to suggest, in alluding to Palko, that he meant to exclude the possibility of other considerations. Because one of the things that happened in the Palko opinion was that he discussed Kepner, and in discussing Kepner, he -- the Court refrained from overruling Kepner, but it did clearly indicate in its discussion that it had a great deal of sympathy for Justice Holmes' views in Kepner.

Now, the Court could have decided Palko by overruling Kepner, it instead took the course of saying that, to the extent Kepner imposes more than this core notion, adds more to the double jeopardy clause than this core notion, that added ingredient is not applicable to the States through the

due process clause.

And, of course, in Benton v. Maryland, in which Palko was overruled, as Justice Harlan pointed out in dissent, what Maryland had tried to do came within this core notion, and the case could have been decided on due process grounds, what Maryland did was indefensible even on those grounds.

Now, the result reached by the Court of Appeals in this case, if enshrined as a constitutional holding by this Court, will create serious illogicalities and will be wholly inconsistent with recognized law in other related instances.

I think the clearest instance that comes to mind is the instance of Supreme Court review of acquittals by Courts of Appeals.

Let's take, for instance, the Russell case, which this Court decided two terms ago. The defendant was convicted and he appealed to the Court of Appeals. The Court of Appeals examined the evidence that was adduced at trial relating to the general issue, and it found, on the basis of that evidence, that a government agent had supplied the necessary ingredient for the manufacture of the controlled substance.

It held, applying an erroneous legal standard, that on those facts there was entrapment and the defendant was

entitled to acquittal.

Now, if an acquittal is not appealable, then I do not understand by what means we were able to take the Russell case to the Supreme Court and get a reversal.

QUESTION: Well, of course, the acquittal came in the Court of Appeals in Russell, not in the District Court.

MR. FREY: That's true, but of course the Court of Appeals was performing the identical function in Russell that the District Judge was performing here in the Wilson case. That is, ruling on a question of law.

It was to the jury was committed the responsibility of finding the facts.

What the judge did here was indistinguishable in terms of any functional analysis, from what the Court of Appeals did in Russell.

I mean, in fact the logic would be that if the District Court himself, after having taken this action -- suppose we came along with an opinion of the Court of Appeals the next morning? Suppose, in Jenkins, Mercado had been decided the following morning, and we had gone back to Judge Travia and said: Well, see, you've made a mistake. And he says, That's right, I've made a mistake; I reconsider, I withdraw my prior order and I enter a judgment of conviction.

Presumably that would, under the analysis of the respondents in these cases, that would violate the double

jeopardy clause.

QUESTION: Then you think that if the judge acquitted the man on illegal grounds or unconstitutional grounds, that the Court of Appeals could reinstate it now; is that where you're going to end up?

MR. FREY: In a jury trial or in a --

QUESTION: Either.

MR. FREY: Well, in a jury trial, there's no doubt that the Court of Appeals could, in our view, could order him to enter a judgment of conviction. Assuming there is no other matter before him that would prevent the judgment of conviction.

QUESTION: You're back to the directed verdict again.

MR. FREY: Well, the jury -- it's not a directed verdict. In the case of a directed verdict, you're dealing with the defendant's and government's constitutional right to ajury trial. You cannot direct a verdict of guilty, because that would defeat the right to the jury trial.

The reason why you can't direct a verdict of guilty has nothing to do with double jeopardy, it has to do with the jury trial protection.

QUESTION: Do you know of any case where the Court of Appeals has ordered a trial judge, sitting without a jury, to find a man guilty?

MR. FREY: Well, I'm not sure --

QUESTION: Of course there's no such case.

MR. FREY: You mean where he's found him not guilty?

QUESTION: Yeah!

MR. FREY: Well, you have to realize, this case here, these cases this morning, are basically cases of first impression, so to say that there is no such case -- I mean, there may be no such case because there has been no litigation in this area, because there has been no power of the government to appeal in such circumstances.

QUESTION: And there might still be no such case.

MR. FREY: When the defendant -- well, there may. That's, of course, up to you.

When the defendant waives a jury trial, he waives his right to have an irrational verdict rendered in his behalf, he submits himself to the hands of the judge --

QUESTION: When he waived the jury trial, he didn't waive the double jeopardy plea.

MR. FREY: No, of course not. Of course not. We're not suggesting that he waive the double jeopardy clause.

QUESTION: Yes, you are -- pretty close.

MR. FREY: We're suggesting that different consequences attach.

Now, in the case of the respondent Wilson, he had

a jury trial. The jury found the facts that would support a conviction. The judge clearly applied to those facts a proposition of law, which we submit is erroneous.

And the question is whether we can correct the legal determination. That has nothing to do with disturbing the --

QUESTION: Suppose he were granted a new trial, could you appeal that?

MR. FREY: No. First of all, the statute does not authorize us, and, secondly, it's discretionary.

But if there were a statute authorizing it, the Supreme Court of New Jersey has held, in a case called State v. Sims, in 322 A. 2d, that there is no constitutional impediment to a --

QUESTION: You better stick on the statute, instead of discretion.

MR. FREY: Excuse me?

QUESTION: I think you'd better stick on the statute, instead of discretion.

MR. FREY: Well, the statute confides it to the discretion, in that the appeal statute does not authorize appeals. So, of course -- but that's, it seems to me, a different point.

The jury performed the function it was supposed to perform here, and it found respondent Wilson guilty.

It found all the facts.

QUESTION: Is the government suggesting, in any respect, that we cut back on Sisson?

MR. FREY: Well, I was going to turn now to a specific discussion on that.

QUESTION: All right. Before you do that, let me ask another question.

Suppose there is a guilty verdict, and it's overturned by the Court of Appeals on the -- or by the court, the District Court, on the basis of insufficiency of the evidence. Is that a determination of fact or of law?

MR. FREY: It's a determination of law, clearly. It's the kind of determination that appellate courts make every day. Suppose he refused to overturn it, on the grounds of insufficiency of the evidence, and the case were appealed to the Court of Appeals? And it disagreed with him.

It could only do so as a matter of law.

I think there's some confusion that's introduced here by the fact-law discussion. Courts of Appeals decide questions of law. Now, sometimes those questions of law relate to whether a particular fact has been established at the trial of the case.

But it is a question of law as to whether that fact has been established sufficiently to permit its acceptance.

So that I think it's misleading to get into a fact-law analysis. We are only asking, and by the nature of the appellate process could only be asking, for the right to raise questions of law in the appellate court.

Now, in the case of United States v. Ball, which is the first of the four cases that we have to deal with in this Court, the defendant was acquitted by the jury in a trial that was free from any error adversely affecting the defendant's interest.

Co-defendants who were convicted appealed and the conviction was reversed by this Court for an insufficiency of the indictment.

Thereafter, Ball and his co-defendants were retried. All three convicted. All three sentenced to death. On their appeals to the Supreme Court, this Court held quite rightly, in a holding with which we have no quarrel whatsoever, that Mr. Ball's acquittal had become final, that there was simply no way that he could be tried a second time; the jury having once found him not guilty.

Now, in the course of so doing, the Court uttered a dictum which is one of our problems in this case. It said --

QUESTION: Where are you reading from now?

MR. FREY: I'm reading from page 28 of our brief in Jenkins, which would be page 671 of 163 U.S., the Ball case.

It said: As to the defendant who has been acquitted by the verdict duly returned and received, the Court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution.

Now, of course, nobody was trying to review the verdict of acquittal of Mr. Ball by writ of error, and so that the statement is clearly the sheerest dictum.

In addition, the statement focuses on a verdict of acquittal. In the Wilson case, indeed in the Jenkins case, we submit that we are not contesting a verdict of acquittal, but, rather, a judgment that has the effect of an acquittal, and we think that's rather a different thing.

Now, the next cases to come along was Sisson in 1904 -- Kepner, excuse me.

In the Kepner case, what happened was that the defendant was tried in the Philippines in the court of first instance, and I think it's instructive to see exactly what was before this Court in Kepner.

The -- I'm now referring to the record in the Kepner case, at page 3, there is the decision of the Court of First Instance. And what the Court of First Instance found is that in this case there is evidence tending to show that the money which respondent is charged with unlawfully converting

was in fact appropriated by him under a bona fide claim of right.

And then he said: On the whole I think this evidence is of sufficient weight to raise a reasonable doubt as to the existence of a fraudulent intent, which is an essential element of the offense. I therefore find the respondent not guilty.

Now, under the Philippine practice then in effect, the government appealed to the Supreme Court of the Philippines. It did not allege errors of law in the trial of the case. It said that the judge of the Court of First Instance had made a mistake when he concluded that he had a reasonable doubt about Kepner's fraudulent intent.

And the Court of Appeals, or the Supreme Court of the Philippines, whose opinion is also reproduced here, stated quite clearly that it did not, on the evidence, believe Mr. Kepner's story.

Well, when this case reached the Supreme Court, the conclusion of the Court, although there is a lengthy discussion of the general subject of appeals, the conclusion of the Court is with reference to the Ball case. It says: It establishes that to try a man -- I'm now looking at page 30 of our brief in Jenkins -- to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment.

This, said the Supreme Court in Kepner, is practically the case under consideration, viewed in the most favorable aspect for the government. The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense.

Now, we here are not asking to try Mr. Wilson or to try Mr. Jenkins again upon the merits in an appellate court.

QUESTION: You say the rationale in Kepner was it would have to have a new trial?

MR. FREY: Not that you would have to have a new trial, but that in fact the second proceeding was a new trial that was constitutionally prohibitive.

What had happened was the court of first instance had acquitted on a factual determination of reasonable doubt about fraudulent intent.

QUESTION: Unh-hunh.

MR. FREY: The Supreme Court of the Philippines reviewed the evidence in great detail, and said: We think that Mr. Kepner's story is not credible, we don't think he should have been believed by the court of first instance.

And therefore we find him guilty.

QUESTION: Unh-hunh.

MR. FREY: Now, it wasn't a second trial in the sense that there was formal evidence adduced, it was a review of the record.

QUESTION: But to go further, if the Supreme Court of the Philippines' judgment had been sustained, it would have been no need for a new trial.

MR. FREY: If they had -- if it had been sustained -- no. The issue was that --

QUESTION: Because, under the Philippine practice, as Judge Friendly said, no further proceedings were required by law.

MR. FREY: But this is a case --

QUESTION: But even so, there would have been -- there was double jeopardy.

QUESTION: Because the question there was whether the second trial that he had already had put him in double jeopardy. It's like the Jorn case in the sense that the question in Jorn was not whether the appeal in Jorn would place him in double jeopardy, but whether to have proceeded with the trial in Jorn would have placed him in double jeopardy.

And what the Supreme Court basically held here was that to retry him, even in a court that you would call an appellate court, is not permissible under Ball.

Now, I see I have very little time left.

With respect to Sisson, we don't, in these cases, try to maintain that Sisson is distinguishable -- oh, let me say one more thing about Kepner.

Kepner is not a holding of this Court. It was -- it involved a Philippines Act, and in Green, as Mr. Justice Douglas said in his dissent in Hoque v. New Jersey, it is not binding precedent on this Court.

In Sisson, we believe that Sisson is on all fours. The difference is that Sisson was interpreting the old Criminal Appeals Act, and we suggest that the statement --

QUESTION: I didn't hear what you said there, Mr. Frey. You believe that Sisson is what?

MR. FREY: We think it's on all fours, analytically. That is, in the Jenkins case, we agree that if Sisson was right in its definition of an acquittal for purposes of old 3731, that in Jenkins you had the same beast.

Now, we don't agree in Wilson that you had the same beast, for reasons that I'm not going to be able to get to, but are addressed at length in our brief.

But we say that the determination in Sisson, the statement which was one paragraph in the course of a lengthy and complicated opinion, and which Mr. Justice White noted in his dissent, he didn't believe the Court could seriously mean as a constitutional holding, we think that that dictum

ought not to be followed by this Court.

And I would note that the dictum came about in a case which, as Justice Harlan himself noted in Sisson, the argument was exclusively addressed to the constitutional issues, the Court did not -- excuse me, to the statutory issues. The Court did not have the constitutional question even argued before it.

So that I think an offhand comment unnecessary to the decision should not be given any weight in concluding this very important issue, and that you should look at it afresh.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Frey.

Mr. Lauer.

ORAL ARGUMENT OF PHILIP D. LAUER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. LAUER: Mr. Chief Justice, and if it please the Court:

It's the opinion of the petitioner -- I'm sorry; it's the submission of the respondent in this matter, and I understand it to have been the submission of the respondent in the matter heard by you just previously, that the position of the government would require, if accepted by you, a holding that would be too narrow on double jeopardy grounds for reasonable application in all cases.

We have heard this morning, and again this afternoon, of the government's feeling that in this particular case and in the Jenkins case which preceded it, that you could, in effect, allow an appeal, despite the provisions of the double jeopardy clause, for several reasons.

First, they present to you the proposition that to do so would not violate -- or actually would not even implicate double jeopardy clause, because there would be no retrial.

Prior to following that through, if I may I'd like to recite,however, something before it slips away from me altogether.

There is, I think, one other fact that I would like to add to the factual discussion made thus far by Mr. Frey, and that is that in its review, in its order of court which took the form of a memorandum opinion, the District Judge referred extensively, we submit, to trial testimony. And I think that that is important for reasons which I will try to develop during the course of this argument; namely, that the judge did not simply, as is urged in the brief of the petitioner, rely upon facts which were found at a pretrial hearing. And we also submit that it's impossible to intelligently find that the facts at that pretrial hearing were the same facts which were ultimately found, or which were ultimately presented at the time of trial.

It's our opinion, and we have set it forth in the brief, I believe in some detail, that the facts taken at the trial and the facts upon which the Court relied in its opinion were considerably greater in volume, considerably more varied at the time of trial.

It also seems apparent -- and I will come back to this -- it seems apparent that the District Judge, prior to trial, having heard this argument and heard some testimony on two occasions, concluded on both of those occasions that there were not facts, at least which were satisfactory to him, to warrant consideration, favorab le consideration of our pretrial motion.

However, and this is intimated in the petitioner's brief, he must have changed his mind for some reason; and the government would conclude that it was simply a change of mind.

QUESTION: Did that have anything to do with the finding of guilt or innocence?

MR. LAUER: Did the judge's ruling have anything at all to do with the finding of guilt or innocence? Yes, sir, I believe it did.

I would say to you, first of all, that I do not believe that it is the classical kind of decision which says specifically we do not believe the evidence in this case to have been sufficient to warrant a judgment of con-

viction.

QUESTION: I mean, did it say anything about guilt or innocence?

MR. LAUER: Yes, I believe it did. It said it in this context --

QUESTION: I'm listening. I'm listening.

MR. LAUER: Okay.

I believe it did, in this context. I believe that it discussed the question in very brief terms, admittedly, of whether or not the testimony of the individuals whose absence was challenged by the respondent in this matter would have been -- would have been a subject of some import in making the determination as to guilt or innocence. But it did not specifically make that determination, no, sir.

QUESTION: Didn't touch it at all, did it? Didn't have anything to do with it.

It just said, regardless of the finding of guilt or innocence, I find that this cannot stand. That's what it says.

MR. LAUER: That's correct. I believe that to be substantially correct,but I don't believe that that disposes, if Your Honor please, of the question of whether or not the order constituted an acquittal.

QUESTION: Isn't the implication, however, of the judge's action that had there not been this delay the jury

verdict might well have been different; might well have been not guilty.

MR. LAUER: Yes. This is what I was suggesting previously. But he did not, himself, find that the jury verdict should have been one or the other. But it's clear from his opinion, and it's even clearer, I would submit, upon a careful reading of the record and the record papers, that what is in issue, or what was in issue before the District Judge at that point is whether the outcome would have been substantially affected by the presence or absence of people, we submit, would have been available had not the government substantially --

QUESTION: And the finding of substantial prejudice is simply a way of saying that had the trial been conducted more promptly, the result might well have been different.

It has to be that, doesn't it?

MR. LAUER: That is our position, sir.

QUESTION: And if it had been different, it would have been a verdict of not guilty rather than a verdict of guilty. So, to that extent, it does have something to do with the guilt or innocence, doesn't it?

MR. LAUER: Yes, sir. We believe that it -- well, yes, it has a lot to do with it, but it does not, as Mr. Justice Marshall was saying, it does not specifically

make that finding.

QUESTION: Well, he doesn't know what these witnesses would have testified. How could he make any such finding?

MR. LAUER: Correct.

QUESTION: One was dead, and the other was --

MR. LAUER: Well, I think perhaps --

QUESTION: -- under such a disability that he couldn't testify; isn't that correct?

MR. LAUER: Yes, sir.

I think that perhaps what he could have done is assume -- and did not do, incidentally -- could have perhaps assumed that the witness would have spoken in terms similar to those presented by us in our argument and in our papers, and made a determination on that basis.

But it clearly would not have been a fit basis for disposing of the action in the --

QUESTION: But the ruling really is that he should never have been tried at all.

MR. LAUER: That's correct.

QUESTION: And couldn't be tried again, and, hence, -- or ever tried.

MR. LAUER: I think that --

QUESTION: The ruling is that he should never have been tried.

MR. LAUER: That's correct.

That's correct. But I think that --

QUESTION: And hence -- hence, it certainly doesn't invite any more jeopardy.

MR. LAUER: All right. I think that it -- to reach that point, you have to retreat, in my opinion, from your previous discussion of what constitutes an acquittal, as formulated in Sisson and subsequently cited with approval.

Because it's our position that in getting to this -- well, first of all, it's obvious that the District Judge couldn't, or felt that he could not, make those kinds of determinations pretrial.

And that, in fact, in order to make that determination, he required himself to listen to and consider carefully all of the evidence in the case. In fact, logically, it's the only way --

QUESTION: That may be so. That may be so. He may have relied on -- he may have -- his whole ruling or consideration of the motion to dismiss for pretrial delay, he may have been greatly informed by the trial testimony.

MR. LAUER: Yes, sir.

QUESTION: But his ultimate judgment is he never should have been tried at all.

MR. LAUER: Based upon facts which he didn't learn

until he was tried, that's correct.

That's substantially correct. That he should probably not have -- not "probably" -- that he should not have been tried, and could not again be fairly tried on the basis of the prejudice.

QUESTION: Those facts really went to prejudice.

MR. LAUER: The facts did go to prejudice, yes, sir.

QUESTION: I mean, what finally determined him?

MR. LAUER: Oh, are you asking me?

QUESTION: That he was denied a speedy trial. What finally determined the judge that he had been denied a speedy trial? Was that not having this evidence available, his trial was prejudiced.

MR. LAUER: Correct.

QUESTION: Wasn't that it?

MR. LAUER: Correct.

QUESTION: And that's the connection with the fact-finding.

MR. LAUER: That is the connection with the fact-finding, yes.

My point is that that kind of fact-finding -- I'm sorry; that kind of decision, based upon that kind of fact-finding, could not be made in a case such as this one, until in fact the trial had been complete. By reason of the

-- it could have been made pretrial if a judge was willing, if I may characterize it this way, to stick out his neck and say that: On the basis of what I think the government is going to show, you would have needed these people.

QUESTION: Well, a speedy trial issue requires a determination of prejudice, anyway, doesn't it?

MR. LAUER: Not the speedy trial issue, but the due process issue woudl require the determination of prejudice, yes, sir.

QUESTION: Well, this is the type of thing that many an experienced trial judge wouldn't take your word by affidavit for at a pretrial stage, but sitting through the evidence may have reached a different conclusion on his own.

MR. LAYER: That's correct, sir. That's correct.

We don't disagree at all with that. What we're saying, however, is that, to the extent that that kind of procedure becomes necessary in order for the judge to make such a decision, and if the facts upon which he's going to make that decision are facts which go to the general issue in the case, then that situation is indistinguishable from the kind of an acquittal that you approve, with dissent of course, in Sisson.

QUESTION: I didn't approve.

MR. LAUER: I'm sorry, Your Honor, I was not speaking of you personally.

Some of you approved.

That -- and it is our --

QUESTION: True.

MR. LAUER: That is equally obvious, sir.

And it is our position, however, that to retreat from that at this point in time and to try to redefine it would be perhaps, again, to venture into an area where a definition may not be appropriate.

We think the definition, and we've urged this in our brief, that you, as a body, have previously enunciated, is appropriate and that it fairly and accurately and predictably defines what an acquittal is.

QUESTION: Don't you perhaps overstate or go beyond what you need to go beyond when you say that you could not demonstrate these things by affidavit. In a pre-trial motion, wouldn't it be more accurate to say that a judge is likely to find the demonstration much more graphic when the case is tried than he would find them from some affidavits?

MR. LAUER: If I may, I would not only retreat from that, I did not mean to say that we could not have done it by affidavit. In fact, we did it in this case by two pretrial hearings. We did not do them by affidavit.

But, nonetheless, those hearings, without the production of all of the government's testimony, without

the production of defense testimony having to do with issues that have to do clearly with items of credibility, really, is not as persuasive as you have just put it, as a determination made after having heard all of that.

For instance, in this particular case we had a pretrial hearing initially, in which the judge denied the motion from the bench, without any additional consideration.

When we came back for trial, we were informed that the court was still concerned, and we proceeded to put on some additional testimony.

Now, as I pointed out in the brief, we did not try the entire case, we didn't have the Serfass case, and we unfortunately are not a draft case, where we can take a file and present it to a judge and thereby have him have everything that the government knows about the case.

There was substantially more in the government's case. There was substantially more in our case.

And we would submit that if it requires this kind of consideration of fundamental facts which go to the general issue in the case, then we fall right in the middle of the Sisson definition of an acquittal. And that this case is the equivalent of an acquittal under the facts in this case or under the facts in any case, under the facts in some of the cases that Mr. Justice Rehnquist has --

QUESTION: Are you suggesting that this is a

parallel to some extent of the case where a judge is in doubt as he's going along, but decides to let the case go to the jury, get their verdict, and then, with more time to reflect on the interaction of all the evidence, decides to enter a judgment n.o.v.; is it something like that?

MR. LAUER: I think that -- no, I don't think it is, really. Because I think that that kind of a decision, as you've voiced it to me, or as I understand the question, involves one where the court has in fact cerebrated about these very things and decided: Well, for some reason, I'm not going to do it at this point; I'll let the jury do it.

I don't think the same kind of reasoning applied here at all.

I think that for reasons which I am not privy to, and reasons, incidentally, which support, I believe, our view as to how an acquittal should be defined, the judge at that point was not able to conclude what he subsequently was in fact able to conclude.

And I submit that the test previously propounded here, or something very similar to it, is vitally necessary, because I think that this Court and the Circuit Courts are going to continue to be confronted with situations where there is a question as to whether or not the judge in fact entered an order which is an acquittal or which is a purely legal ruling, as the court would have you -- I'm sorry; as the

petitioner would have you believe, and that without some kind of predictable formulation of what an acquittal is, that you're going to be confronted with this problem over and over.

QUESTION: Under your argument, though, acquittal must have significance under the double jeopardy clause, it no longer has any statutory significance.

MR. LAUER: That's correct.

That's correct.

Well, it has statutory significance in the sense that the double jeopardy clause is the only thing which stands between the government and its appeal. But, you know, clearly that's begging the question. What happens is you've got to get over the hurdle of the double jeopardy clause in this case or in any other to be able to have that appeal.

QUESTION: And if you do get over it, you have it, I take it?

MR. LAUER: Yes, sir. I don't see that I can avoid that, taking this position.

We -- if I may return to it, at least briefly, I would like very much to respond to a portion of the earlier remarks of the petitioner in this matter.

There is the question, as the petitioner has presented it, of whether simply -- well, not simply --

whether by reason of the fact that no retrial is required in this matter, whether the implications of the double jeopardy clause is avoided. That's one peg in the line of reasoning of the petitioner.

And there's further the question of whether or not, by reason of the fact that it is a clear question of law, the double jeopardy clause is not implicated, or, rather, perhaps more accurately, whether it does therefore not become an acquittal which would implicate the double jeopardy clause.

It's our position that this reading of the double jeopardy clause is too narrow. And we would respectfully submit to this Court that the statement that no trial will result cannot be dispositive of the double jeopardy issue in this or any other case.

It's been stated in a recent Harvard Law Review article, that I believe was written sometime after the briefs in this case were filed, or at least at about the same time, that perhaps in these kinds of cases the question of when jeopardy attaches is never -- is no longer a relevant inquiry, or at least not a relevant inquiry in this kind of case.

Because it's the kind of inquiry which is very relevant in cases involving premature mistrials and the Perez or Illinois v. Somerville cases, but perhaps that's not a relevant inquiry here.

What we're suggesting to you is that that kind of

inquiry is relevant in this particular case for this reason: We think that there is no question that jeopardy has attached in Mr. Wilson's case.

Assuming the technical jeopardy terms about which there was much discussion in Mr. Justice White's dissenting opinion in Sisson, there's no question we have technical jeopardy in that a jury was empaneled, and the jury in fact heard the whole case, rendered a verdict.

What we're suggesting is that upon the granting of an acquittal, if that's in fact what this order was, that that jeopardy was thereupon terminated. The defendant at that point in time was no longer in a position of jeopardy, and that bringing him back or -- after a successful appeal to the Circuit Court of Appeals is once again going to expose him to the kinds of risk which constitute jeopardy.

The situation which has developed in this case is indicative of this, we believe, but we think that it's important to keep this kind of a test in mind in determining whether or not double jeopary's principles are going to be violated.

Now, the government says, Unless you go back for a trial, the double jeopardy clause will not be implicated, and you will not be violating the double jeopardy clause.

And we respectfully submit that that is not

sensible, it is not logical, and it does not follow the double jeopardy clause, and for this reason:

This Court has said, for instance, in Price vs. Georgia, and I believe in the Chief Justice's opinion, as I recall, that the "twice put in jeopardy" language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the same offense for which he was initially tried.

There are other references in our brief and elsewhere to the fact that although this kind of situation obviously arises most frequently where there in fact has been a second trial and perhaps a second conviction, that to implicate the double jeopardy clause you need not have that kind of a situation.

And we would be --

QUESTION: What would be your position, Mr. Lauer, if the jury returns a verdict of guilty and the judge grants a post-trial motion, call it for acquittal, call it for dismissing the indictment, on the basis of the statute of limitations. Is that appealable by the government under this statute?

MR. LAUER: I would say that if it were a statute of limitations issue, which could have constituted a jury defense, and if the Court found --

QUESTION: Isn't that ordinarily something that

you charge the jury, about the statute of limitations?

MR. LAUER: No, no. I'm saying that if perhaps -- that it could have formed -- there could be a question of fact. Well, maybe I'm reading too much in your question.

For instance, what I'm saying is if there were a question, and I believe that this is done, if there were a question as to times, dates, and so forth, and the question of the statute was submitted to the jury and the court acted on that kind of information, and, subsequent to the trial, reversed it on whatever label it decided to use, that I don't believe that kind of order would be appealable.

QUESTION: But if there were no question of fact, it was simply a question of which statute of limitations applied, on a jury verdict of guilty and a post-trial motion granted.

MR. LAUER: Then I would say that, for the reasons we've advanced in this case, that if the decision concerned -- not concerned itself; but founded itself upon trial testimony going to the fundamental issue, in some cases it would not be appealable.

Now, obviously, where the defendant has initiated the review, and this is -- there are many cases covering this, where the defendant has initiated the review himself by himself asking for a new trial, that is a different circumstance, because this Court has held -- and there are

many other cases thoroughly talking about it, that the defendant has in effect waived his right to even discuss the question of double jeopardy.

But if you have a situation not unlike this one, where the Court, for reasons that -- and I think perhaps a better, perhaps not an example of what you're talking about, but another kind of issue with which we've very much concerned, is supposing the trial judge for some reason had heard the matter perhaps without a jury, and at the conclusion of all testimony, of the testimony of the government, which clearly made out the offense, the defense rested without presenting any testimony, and the judge thereafter enters a verdict of not guilty.

And even an explicated verdict of guilty.

What I'm suggesting to you is that there is -- regardless of how the judge comes to that decision, it's not -- it's not critical whether or not -- it's not critical in this discussion whether or not it's labeled anything in particular. It is critical, we would submit, whether or not the defense, through some reason of his own, has waived the double jeopardy question, or whether you get into a question of manifest necessity or one of the other reasons why double jeopardy has been found not to apply.

But we would say that if the defendant, through none of his conduct, waived it, and if the court, in consider-

ing the matter, used trial testimony, used fundamental issues -- I'm sorry, fundamental testimony in the case, going to the fundamental issue in the case, then we would submit that you have a situation where it is not appealable.

QUESTION: You waive it by making a post-trial motion?

MR. LAUER: I don't think that fact alone waives it, no. I think that you waive it where you -- where you make and succeed, perhaps on a post-trial motion, the essence of which is something not cognizable under double jeopardy.

I'm talking about you make and succeed on a motion for new trial. So obviously if you're asking for a new trial, you're not going to be heard subsequently to make the double jeopardy claim when the new trial is heard.

So that I recognize, by the expression on your face, that I may not have completely answered your question, but I believe that I've expressed our opinion at least that this kind of a decision by the Court would be non-appealable.

The other area that we think is of substantial concern -- well, there are a number of them, we feel that another area of substantial concern is the government's reliance in the presentation, the submission of the issue to you, that this is strictly a legal ruling. We don't believe that.

We don't believe that it is strictly a legal ruling, and the government -- the petitioner in this matter, a few moments ago, stated to you that we don't think it's important or relevant to get involved in a lengthy discussion as a fact-law issue. And -- or whether or not this is an issue of law or fact.

But the very fundamental principle that they are putting to you in this matter is that it is a strictly a question of law, and that's the reason, if I may submit so, and if I may raise my voice to that extent, that's the reason why you're being asked to allow this matter to go back and simply correct a pure error of law.

We would submit that that is not the case in this case, and that it's almost hard to dream of a case where that is true, although I think some of the examples perhaps used here this morning may be precisely that. But that is not the case in the Wilson case, where issues, clear issues of fact had to be considered in order to arrive at that question.

The obvious answer to that line of reasoning is, Well, yes, there were factual matters which had to be resolved, but in the end, where the judge made his mistake was the application of the law.

We don't consider it to be that simple, and we would respectfully submit to this Court that the reasons for

concluding that it's a fundamental and simple error of law do not exist in this case.

QUESTION: How do you characterize the cerebrations of the judge?

MR. LAUER: I would say, Mr. Chief Justice, that it's probably a mixed question, of law and fact.

QUESTION: Applying the law of speedy trial to the facts of the case?

MR. LAUER: Yes, I think so, in much the same way that -- in much the same way that a judge arrives eventually at a decision that a given set of facts warrants an acquittal.

QUESTION: Taken from the evidence?

MR. LAUER: Well, I'm not saying that the tests are the same, but I'm saying that --

QUESTION: The same process?

MR. LAUER: Yes, it's the same process that occurs: one examines facts, one looks at them, weighs them, examines demeanor of witnesses or whatever, and, based upon some very fine-tuned kinds of examinations of what has occurred in front of you, one then applies the given law to that set of facts.

QUESTION: Well, on the sufficiency of evidence case, he would be applying -- what -- the standard of proof beyond a reasonable doubt?

MR. LAUER: I would assume so.

QUESTION: Applying that standard to the facts that he had heard up to the time of the closing --

MR. LAUER: Yes, sir.

QUESTION: -- and then saying to himself, This is not enough to persuade any reasonable person beyond a reasonable doubt; is that right?

MR. LAUER: I would assume that that would be the kind of thinking that would go through a judge's mind, if he were --

QUESTION: You say it's about the same kind of a process?

MR. LAUER: I'm saying it's the same kind of process in the sense that -- in the sense, only in the sense that the same kinds of resolution of factual issues and application of legal principles must occur. I'm not suggesting that the same tests, legal tests, will apply, certainly.

QUESTION: No, no.

MR. LAUER: But to the extent that both of them must go on, then clearly you have, in every case, a mixed question of law and fact, and the only place, the only kind of case where the government's particular kind of submission to you in this case is going to apply is where you have no question whatever, we would submit, about the facts, but merely a legal issue which the judge has somehow erroneously

concluded.

QUESTION: To the contrary, I understand the government's position to be that the only decision on guilt or innocence was made by the jury, and the judge -- and that, in itself, was one, -- for some other reason the judge upset that.

MR. LAUER: Yes, sir.

QUESTION: Now, how can you say that one is law and one is fact?

MR. LAUER: I don't understand your question, sir, because I am specifically not saying that one is law and one is fact.

QUESTION: I understand the government to say that if the judge had ruled that the evidence wasn't sufficient, or something of that sort, involving guilt or innocence, it should be a different ballgame. But the judge didn't touch the decision as to guilt or innocence, in any fashion, except to say that there shouldn't have been a trial at all.

Now, do you understand that one?

MR. LAUER: Yes. I disagree with one of the fundamental propositions of it, but I --

QUESTION: Go right ahead.

MR. LAUER: -- but I do understand your question. Yes, sir.

Or at least I understand the statement.

I'm not suggesting that one is law and one is fact; I'm suggesting that the government says to you that it can be considered by you and can be appealed because one is clearly law and one is clearly fact.

And I'm simply suggesting that's not true in this case, and it's almost hard to dream of a case where it is true, in sufficient --

QUESTION: Well, suppose the judge had said nothing except, "I set aside the jury's verdict of guilty"?

MR. LAUER: Well, that's what I would suggest -- well, yes.

QUESTION: "And acquit".

MR. LAUER: "Iset aside the jury's verdict and I acquit"?

QUESTION: Yes.

MR. LAUER: I would suggest to --

QUESTION: Would the government have the right to appeal?

MR. LAUER: I do not believe so, no, sir.

QUESTION: Why not?

MR. LAUER: Well, because --

QUESTION: Under the statute --

MR. LAUER: -- part of the government's submission in this case, if Your Honor please, is that one of the reasons

they can appeal, in Jenkins in particular, is that the court explained why it made its mistake.

And, in fact, I would submit that implicit in that argument is that if the court had not explained to the Court of Appeals or to the world at large why it had made an error, that it would not have been appealable.

QUESTION: I don't think -- well, I don't understand the government is going as far as you do.

MR.LAUER: Well, I may be exaggerating for the sake of argument.

QUESTION: Well, I can't blame you, either, for that.

MR. LAUER: But I do believe that the government's position is that it gets this ability to ask you to correct these kinds of errors from the fact that the decision is purely legal, and we are submitting that that's just simply not the case.

There is almost -- a friend once concluded that he felt like a beggar at a banquet, and I -- there's an incredible number of issues to cover here, and it's obvious that we're not going to reach them all.

I would like, if I may, to talk very briefly about some of the rest of them.

The government has referred repeatedly to Kepner Fong Foo, United States vs. Ball, and so forth. We agree

that United States vs. Ball, that the language in United States vs. Ball, which has been referred to, was not language which was the holding of that case.

However, we submit that since that time that very language has become the holding of this Court repeatedly. And we feel that in particular, to get to the government's point, you're not only going to have to reconsider cases such as Sisson, but you're going to have to consider, and, I would submit, overrule Fong Foo in order to get to the point that the government would take you.

Fong Foo is an interesting case, because clearly that case would have required a second trial. There isn't any question about that.

But the characterization as an acquittal was certainly eminently attackable in that case, it was characterized, as I recall it, as being egregiously erroneous. Nonetheless, the acquittal was left to stand.

Now, that decision, if there ever was one, was a complete total error of law. There was no legal justification whatever for what the judge did, no matter what he might have concluded. He could have concluded black was white in that case, or he could have been correct about everything. It could not have affected the fact that he made a complete total, as I read the opinion and as I read the lower court's opinion, a complete and total error of law

was committed in that case.

And this Court did not permit itself to be taken at that time, as far as the government would take you. I'm not certain, quite frankly, that that issue was raised in quite the same way.

But this Court did not allow itself at that time to be taken that far.

And we would submit that to go where the government takes you today is going to require a complete reconsideration and overruling, in fact, of Fong Foo.

QUESTION: But there there would have been a second trial, necessarily.

MR. LAUER: Correct, yes, sir.

Well, okay, if I may, then, just very briefly, in the time remaining, address myself to that. I've indicated it very briefly, but we do not believe, and we've tried to explain in the brief, that there is a necessity for a second trial.

A second trial -- let me state it this way: A second trial is the most obvious situation that can occur where the double jeopardy clause is implicated, and in fact it's the only situation that's going to get to you, because if the defendant is merely indicted, and the indictment is somehow overcome through the efforts of defense counsel, in all likelihood it's not going to reach this stage.

What happens is that where people become indicted, where the government -- where there is a determination of one kind or another which would implicate the double jeopardy clause, and the government comes back, and it reaches a trial stage, then you're confronted with a double jeopardy case in this Court or in appeals courts along the way.

We're suggesting you don't have to get to that point, however, to implicate the double jeopardy clause.

My time has expired, and I'd like to thank you gentlemen.

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

You have a few minutes left, Mr. Frey.

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Well, I'll try to cover the ground I have very quickly.

First of all, with respect to the Sisson formula of what is an acquittal: It's not necessarily to be read the way the Court of Appeals read it, because it says that it's an acquittal if it's a legal determination on the basis of facts adduced at trial relating to the general issue of the case.

Now, the Court of Appeals assumed that the word "relating" related to the facts adduced at trial. I submit that the correct way to read the formula in Sisson is that

the word "relating" relates to legal determination, and it must be the legal determination that relates to the merits.

And, as Marion makes clear, the determination that was made here was not a legal determination on the merits.

This is a legal ruling. We are not challenging any facts the District Court found. We're not saying he was wrong.

We accept every fact, and we say that as a matter of law the facts that he found don't warrant the action that he took.

Now, with respect to Fong Foo, I think it is in fact the case that in Fong Foo one of the things that the trial judge did, however wrong and however much he shouldn't have done it, was to say that on the basis of what he had heard no jury could credit the government's case.

That is, he was ruling on a question -- in part on a question of credibility. He said, No jury could convict on the basis of the evidence that had been adduced.

QUESTION: But the prosecution had finished its case.

MR. FREY: That's true, it was totally wrong action, and in fact we would be prepared to argue, if necessary, but we felt it was not necessary and we did not put in our brief the argument that we had written with

respect to the overruling of Fong Foo, but we think that's clearly another case, and we haven't asked for it here.

Now, I think I'd like to close by referring the Court to what Judge Learned Hand said in the Zisblatt case, again, which is at page 17 of our brief in this case.

He said basically that, "although the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he enounters, whether it has passed upon his guilt or not, it does not extend that privilege to mistakes in his favor by the judge."

And I would like to ask the Court, in deciding this case, to consider why respondent Wilson should be insulated from the punishment prescribed by law, if the District Court was wrong in its ruling.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:01 p'clock, p.m., the case in the above-entitled matter was submitted.]