In the

Supreme Court of the United States

David Emery Serfass,

Petitioner,

v.

United States,

Respondent.

73-1424 C2

Washington, D. C.
December 9, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

DAVID EMERY SERFASS, Petitioner,	:	
v.	:	No. 73-1424
UNITED STATES, Respondent.	:	

Washington, D. C.,

Monday, December 9, 1974

The above-entitled matter came on for argument at 10:05 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 F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HARRY A. DOWER, ESQ., First Valley Bank Building, Center Square, Allentown, Pennsylvania 18101; on behalf of the Petitioner.

EDWARD R. KORMAN, ESQ., Attorney, Department of Justice, Washington, D. C. 20530; 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: We'll hear arguments first this morning in 73-1424, Serfass against the United States.

Mr. Dower.

ORAL ARGUMENT OF HARRY A. DOWER, ESQ.,

ON BEHALF OF THE PETITIONER

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

At the outset I would like to reserve, if I may, five minutes of my time for rebuttal.

If I may, sir, I'd like to reserve five minutes of my time for rebuttal.

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

MR. DOWER: May it please Your Honors, this matter appears before the Court, your having granted a petition for a writ of certiorari on the petition of David Serfass, to review the record of the Third Circuit which had reversed a decision of the United States District Court for the Middle District of Pennsylvania.

Chief Judge Michael Sheridan had granted an order dismissing the indictment, the motion having been filed on behalf of Mr. Serfass. He had been indicted for refusing to submit to induction under the Selective Service Act.

David Serfass was in the Peace Corps in Panape,

a remote island in the Pacific, and he had completed his two years of duty there and was requested by the Panape Transportation Authority to serve several months longer to complete the training of a native as a maintenance superintendent.

There was some mixup in his notifying his Draft Board that his term in the Peace Corps had been concluded. He did receive a notice to report for induction; there was again another mixup, but he did make it to Allentown, his residence, at 2:00 a.m. on the day that he was to report for transportation at 5:00 a.m.

He went to the induction center in Wilkes-Barre, and was found to be suffering from amoebic dysentery, and was returned, to report at a later date.

It was at that interval, for the first time, that he spoke to the pastor of his church and learned -- and in his discussions with his pastor, he began to have very serious reservations about serving in the military service.

He then, upon advice, applied for Form 150 from the Selective Service Administration, which is the form to be used for an application for classification as a conscientious objector.

The draft board perfunctorily denied his application and just stated to him that there was no change in classification, over which he had no control, and again ordered him to

report for induction. This time he again went to the induction center, and, the usual procedure in cases of this kind, at the last minute refused to take the oath and to submit to induction.

About twenty months later, he was indicted and arrested and a trial date was set for a speedy trial. At that time we filed two motions: one, a motion to dismiss the indictment; and also a concurrent or simultaneous motion to postpone the trial.

Judge Sheridan did grant the -- ordered the postponement of the trial, set a date for oral argument of the motion to dismiss, and at that argument the United States Attorney did stipulate that the application for conscientious objector classification, which David Serfass had made, did meet the prima facie requirements.

Following this and within a short time after the oral argument, Judge Sheridan requested, and this was agreed by both parties, that is, by David Serfass and by the United States, that his entire Selective Service file be submitted to Judge Sheridan. And this was done.

Some months later, Judge Sheridan, pursuant to a line of cases in the Third Circuit, did grant the motion, did order the dismissal of the indictment.

The government appealed, and we moved to dismiss in the Third Circuit on the ground of lack of jurisdiction,

and that matter, as well as the argument on the merits, were briefed simultaneously.

The Third Circuit at that time had adopted a procedure whereby it, on its own order, would dispense with oral argument, and it was done in this case.

It, of course, has oral arguments, but in this case there was no oral argument.

Now, the time interval here was interesting. This Court, in its decision in Ehlert, had indicated that there is a no-man's-land between the Draft Board having considered a request, on the merits, for conscientious objector classification after a notice of induction had been received, and the same kind -- rather, a consideration of this issue within the military service; that the Court may very well consider that to be a situation different from Ehlert.

The Musser case, which was decided last summer in a per curiam opinion, I think only one dissent, Justice Douglas dissented, in a sense clarified, at least for the Third Circuit, the holding in Ehlert; and under Musser it was held that the draft boards had no power to consider a request for conscientious objector classification after a notice of induction had been sent.

As a consequence, the Third Circuit reversed on the merits, and also denied the motion to dismiss for lack of jurisdiction.

QUESTION: Let me back up a little bit, if I may, Mr. Dower: In the hearing on your motion before Judge Sheridan, could he have made a finding, a determination of guilt?

MR. DOWER: Yes, sir -- I'm sorry, not a finding of guilt; he could have made --

QUESTION: A determination of guilt.

MR. DOWER: He could have terminated the case, which is what he did.

QUESTION: Well, no, but could he have made a determination that the man was guilty --

MR. DOWER: No, sir.

QUESTION: -- and that there was no necessity of going on with the trial?

MR. DOWER: No, sir, he could not have made a finding of guilty.

The motion to dismiss was accompanied by an affidavit relating to several pages from the Selective Service file. But no jury trial has ever been waived, there was no formal motion for acquittal. It is quite correct, sir, that we do not argue for a moment that he could have been found guilty on the motion to dismiss the indictment, not having been tried.

In the -- after the denial, after the reversal of the District Court order by the Third Circuit, we then

petitioned for a writ of certiorari, and I'm quite aware that there are several others cases to be argued this morning, all of which come up at the same time, and generally deal with the 1971 Criminal Appeals Act, which was an amendment to the Act following this Court's decision in Sisson.

I think perhaps, for me at least, the only thing that's clear about the 1971 amendment is that it was a response to this Court's decision in Sisson.

Now, this Act is different, and, so far as I know, these are the first cases to come up under this Act, raising the question as to what the Act means at least, particularly in reference to the double jeopardy provision.

Now, the Act, I would note, and I think this is quite important, is not the bill that was introduced in the Senate, the Act now provides that in a criminal case an appeal by the United States shall lie to a court of appeals from an order dismissing an indictment -- and the important words, at least as far as we're concerned, is "except that no appeal shall lie where the double jeopardy clause of the Constitution prohibits it."

Now, we're back at the point where perhaps we were in 1907, when the Senate, considering the original Criminal Appeals Act, had decided, or, rather, debated that they were going to depend upon this Court to tell the Senate and tell us what double jeopardy meant. Because, of all the cases that

have been decided, particularly in recent years, and many of them under the Selective Service Act, there really is no firm guide for anyone, so far as I can see, to know just what double jeopardy means in terms of pretrial and, in some cases, post-trial dismissals of an indictment or of a charge, whatever it may be called.

Now, Sisson, of course, was a post-trial dismissal; Serfass is a pretrial dismissal. The second case you have today, the Jenkins case, is one which is again a post-trial dismissal -- I'm sorry, was an acquittal in a trial by a judge. And the third case that you have this morning, the Wilson case, is one in which there was a dismissal of a charge after a trial.

Now, in Serfass, we argue that this Act, the 1971 Criminal Appeals Act must have some meaning in order not to be a truism. I would dispose of the latter part first by saying that I cannot conceive how Congress could enact a Criminal Appeals Act which would authorize the United States to appeal in violation of the double jeopardy provision.

Congress does have the power to regulate the jurisdiction of the courts, but I cannot understand -- and I'm very happy that we don't have to argue, or don't have that case -- that an appeal would lie, which is contrary to the double jeopardy provision.

So if this exception is to have any meaning, then,

this is what I assume these cases are about.

Now, just what is double jeopardy?

Now, I would also point out that, as I understand the real burden, the real thrust of the government's brief in the Serfass case, and to some extent in the others too, that what the government is attempting to do is to have decisions of this Court which in effect would reinstate the bill as introduced into the Senate, under which an appeal would have been possible from any pretrial disposition of a case, short of an acquittal or a conviction, of course -- the government wouldn't be appealing a conviction, theoretically.

QUESTION: Would the difference in language in the bills make much difference, Mr. Dower? Isn't it clear from the bill that was enacted that Congress meant to authorize appeals in all cases, unless appeal would violate the double jeopardy clause?

MR. DOWER: I don't think so, sir. The -- when Congress says that an appeal in a criminal case lies from an order dismissing an indictment, surely it must contemplate that there are situations in which a dismissal would have arisen -- would have brought about -- I'm sorry; that prior to dismissal, jeopardy would have attached.

Now, I think, except for the Jenkins case which is to be argued next, everybody has always thought that an

acquittal was an end to a proceeding. This goes as far back as 1896, in the Ball case, and 1904 in the Kepner case.

Acquittals end it. So that what we are really talking about is, at least in Serfass, is a pretrial disposition of the case, in some fashion other than an acquittal.

Now, what is the -- what does this Act mean? Now, if it -- if it's not a truism. Does it not address itself to a situation where an indictment has been dismissed short of a trial?

And if jeopardy has attached in that proceeding, then double jeopardy clause of the Constitution would prohibit this.

Now, I'm quite aware, sir, Mr. Justice White, of your distinction in your dissent in the Sisson case, the distinction made between technical and constitutional jeopardy, and I'm quite willing to admit that the manner in which we use the words "technical jeopardy" in our brief is different from the way you used it, and, on further reflection, I think that perhaps your distinction, if I understand it, would be more appropriate.

But when does jeopardy attach is, to a large extent, the question that's involved in this case. And, in fact, what is jeopardy?

Now, the government argues that there's no jeopardy

until there's been a trial, either by jury or a trial by a judge alone.

QUESTION: They don't quite go that far, do they?

MR. DOWER: Repeatedly in their brief they do.

QUESTION: Well, jeopardy would attach as soon as the jury was empaneled.

MR. DOWER: Well, this would be included within the term "trial".

QUESTION: That's not a complete trial, though.

MR. DOWER: Oh, no, sir. They quite --

QUESTION: When did jeopardy, in the sense of exposure to a judgment of guilt, begin under this motion?

MR. DOWER: I'm not so sure, sir, that that is the import of all the cases. It would be -- I don't believe that this Court in Sisson, for example, went so far as to say that exposure to guilt was necessary. And this is -- well, really what I would argue is that we ought to determine what is involved in a trial, whether it's by jury or by judge alone, and I submit, sir, that this is the fact-finding process, generally as to the merits or as to some issue which would permanently -- which would dispose of the case.

Now, I don't see any mystical value in a trial as such, or empaneling a jury to commence a trial. Because what a jury --

QUESTION: Except that you can't go to jail without it.

MR. DOWER: Well, again, sir, you are, as I understand your question or comment, unless a man has been exposed to being held guilty, he's not been in jeopardy. And this, I submit, sir, has not been the holding of this Court, as recently as Sisson. That one could -- although the facts of the Sisson case are different, nonetheless this Court did cite with approval a large number of cases in which jeopardy was held to have attached prior to exposure to a finding of guilty. And I'd agree with this.

QUESTION: Like what?

MR. DOWER: All the cases, sir, reach so hard, as did the majority in this Court, to find that the determination made by the court was an acquittal, and I suggest, sir, that you don't need to constrict yourselves by the label of an acquittal.

That once fact-finding has commenced, and reference to an issue that would dispose of the case, that this is when jeopardy attaches.

Now, the reason I say this and argue in this fashion is that the, all the old cases which talked in terms of jeopardy arising upon a trial or an empaneling of a jury when our pleading and practice procedure was such that this was nearly the only way to dispose of an issue.

We did not have Rule of Criminal Procedure 12(b)(1), or really Rule 12, in all its parts.

The common law, aside from the motion on arrest of judgment, which gave everybody so much trouble in the Sisson case, and the motion in bar, aside from that nearly the only way -- the only way that I know of -- to dispose of a case was by a trial.

Now, in the last seventy years we have developed new and modern methods of pleading and practice. They started with the Code pleading as adopted in the States in the late 1930's. We had Rules of Civil Procedure, federal rules; and in 1946, I think is the date, the adoption of the Federal Rules of Criminal Procedure.

And we have done away with the old common-law terms of demurrer, speaking demurrers, yet a speaking demurrer under common law was prohibited; yet, this is precisely -- I'm sorry, this is what; it's not really precisely. This is what Rule 12(b)(1) provides for: some method of disposing of issues prior to a full trial, where, if you like, the court must go outside of the indictment, the bare-bones indictment, in order to make the determination.

Rule 12(b)(4) provides for the holding of a hearing to make these determinations.

There's another, Rule 47, I believe it is, which permits the filing of an affidavit in connection with these

things.

Now, this is different from the 1907 Act. The way these issued can be brought before a court today are entirely different. We now -- and this is what was done in the Serfass case.

Now, there was no dispute as to any of the facts in the motion to dismiss the indictment.

All the government's evidence, incidentally, was in, was before the judge. Although I quite agree there was no possibility of finding him guilty at that time.

But the Court did consider the entire bit of evidence that the government had.

This is also noted, not in precisely those terms, in the government's brief, in the last several pages of their brief they also acknowledge that what happens in the prosecution of a Selective Service case is that the government gets the entire Selective Service file into evidence as a business record. Occasionally there will be an officer from the Induction Center to testify, but whatever evidence the government has is in the Selective Service file.

Now, that was the situation in the Serfass case. Unlike Brewster, for example, where this Court held that an appeal would lie from an order dismissing the indictment, where one did not have to go outside the indictment for the disposition of the case.

But here this was necessary.

Now, I propose, or submit, Your Honors, that in this part of the Twentieth Century what double jeopardy means or should mean is that jeopardy attaches when the fact-finding process begins, as to an issue which would dispose of the case.

Now, no case that I have read speaks in those terms, precisely in those terms; but there are a number of cases in the Circuit Courts that have held to this effect.

QUESTION: Mr. Dower, I gather that your basic submission is that what happened here, since the disposition of the motion was made on the basis of the file and other evidence, that is, you say it represents what would have been the government's entire case had a jury been convened and the case tried.

MR. DOWER: Yes, sir.

QUESTION: That this should be treated as a functional equivalent of an acquittal, even though you concede there could not have been any judgment of guilt.

MR. DOWER: We argue that --

QUESTION: Well, is that right? Is that what you--

MR. DOWER: Yes, sir, in our brief we're arguing in that fashion.

QUESTION: Well, aren't you still arguing that?

MR. DOWER: No, I'm going beyond that, sir, and I'm

saying that let's not confine ourselves to labels of acquittal, in order to find that double jeopardy -- that jeopardy has existed. Because this is what has caused so much trouble, at least to my analysis. All that we need to say is that jeopardy attaches when a fact-finding process begins.

And that you don't have to reach, as I am in great sympathy at least in part with the dissentered in Sisson, that there was a tremendous reaching to find acquittal in order to bring the case within the ambit of the old common-law cases.

And I submit, sir, that this isn't necessary any more, given our -- particularly Rule 12, 12(b)(1). I would go back, Mr. Justice Brennan, to one other observation. The real functional equivalent of this Serfass case is one in which -- again it's a motion which is no longer used, it's a common-law motion -- there is a demurrer to the evidence at the conclusion of the government's case.

This is in effect what we were doing. We now call it a motion of acquittal.

QUESTION: A demurrer to the evidence --

MR. DOWER: I beg your pardon?

QUESTION: A demurrer to the evidence, if it succeeded, had the effect of an acquittal, didn't it?

MR. DOWER: Yes, sir, it would have.

QUESTION: Under the old practice?

MR. DOWER: Right, sir. And also, Mr. Chief Justice, and Mr. Justice Marshall, a demurrer to the evidence, if sustained, would not have run the risk of -- well, a demurrer to the evidence under common law would not have run the risk of a finding of guilty. This has been our custom for centuries.

QUESTION: The consequence of what you're arguing, though, is that in these circumstances this motion, in itself, becomes the trial of the case, if it has the outcome that it had --

MR. DOWER: In so far as a discharge of the defendant is concerned, yes, sir.

QUESTION: If the defendant is successful, it has the effect of being a trial of the case?

MR. DOWER: Yes, sir.

QUESTION: Now, is it not true that under the federal statutes, in order to have a jury-waived trial in a criminal case, you must have the consent of the prosecution, the defense and the court?

MR. DOWER: Yes, sir.

QUESTION: Now, do you think that statute is any barrier here --

MR. DOWER: No, sir.

QUESTION: -- or have the parties just slipped side-

ways into a trial on the merits without having consented to submit the issue on the merits to the court?

MR. DOWER: No, sir, the whole import of Rule 12(b)(1) is to take a look at these things at the very beginning of the proceedings, and if there is a thorough and valid defense, no issue of fact involved, you see, there's a thorough and valid defense available, it ought to be considered at the outset, and if this results in the discharge of the defendant, fine, let's get on, dispose of the matter in that fashion.

If it does not, Rule 12(b)(5) says his plea stands and you proceed, if necessary, to trial.

QUESTION: Except that you said a moment ago that your hypothesis to double jeopardy was when the fact-finding process beings. Now you say that in this Rule 12 motion there's no issue of fact involved.

MR. DOWER: No, sir. Under Rule 12(b)(1) if it's -- and 12(b)(4), if it's necessary to support the motion to dismiss, you can file an affidavit or the court can hold a hearing.

QUESTION: But on a motion like that, can the judge who hears the motion find facts, rather than simply decide whether, as a matter of law, there's any support of the government's case?

MR. DOWER: Yes, sir. As occurred in this case.

Judge Sheridan found the facts in the Selective Service file. He didn't make a formal finding of fact, you know, he didn't delineate a portion of his opinion in this fashion, but his opinion --

QUESTION: Then it isn't just a question of law?

MR. DOWER: Oh, no, sir. If it's purely a question of law, such as was the situation in the Brewster case, then I would say that the 1971 version of the Criminal Appeals Act would permit an appeal. Because there has been no fact-finding process commenced. And all it is, all that is involved is a question of law.

QUESTION: I'm confused, Mr. Dower. I thought you said to me earlier that what this came down to was that Judge Sheridan had before him all of the evidence that would have constituted the government's case --

MR. DOWER: The government's case.

QUESTION: -- had it gone to a jury.

MR. DOWER: Yes, sir.

QUESTION: And that he appraised that for sufficiency to get to the jury.

MR. DOWER: All right, sir.

QUESTION: And he concluded that it was insufficient.

MR. DOWER: Yes, sir.

QUESTION: And therefore he dismissed the indictment.

MR. DOWER: Yes, sir.

QUESTION: And now you say there's some fact-finding involved with that?

MR. DOWER: In his consideration of the Selective Service file, which is the entire government's case.

QUESTION: Isn't it merely conclusion that those facts do not amount to a sufficient evidence to convict? Isn't it more a conclusion of law than it is a finding of fact?

MR. DOWER: He would have to have the facts before him, sir, before the District Judge --

QUESTION: Well, if he's got the facts there, the docket, what does he find that that is the file?

MR. DOWER: No, sir, these facts are not on the docket. The Selective Service file comes into evidence at the trial.

QUESTION: Well, I understand --

MR. DOWER: And in this case by stipulation.

QUESTION: I understood his order said, "I conclude that the motion to dismiss is legally correct." Isn't that what he said?

MR. DOWER: Yes, sir, but this was in consideration of the entire Selective Service file, which came in to him by stipulation rather than empaneling a jury and then having a stipulation or having the government offer it.

QUESTION: And he made a finding of fact?

MR. DOWER: His decision is based on the facts which he found from the Selective Service file.

QUESTION: And his finding was a conclusion, that's all -- I don't want to get all involved in facts and law right here.

Your point is that he made a conclusion of law that these facts would not be sufficient to convict this man.

MR. DOWER: Yes, sir. But he had to find the facts first, which were not a part of the judgment rule in the common-law sense, were not a part of the indictment, and these were the things that were necessary for him to determine before he could reach his conclusion that this evidence which the government had would not be sufficient to convict.

I notice the white light is on.

I would just offer one other suggestion --- well, I would just repeat, that I think that far too often courts, lawyers have been struggling to attach a label of acquittal on a pretrial disposition or on some disposition of a case in order to bring it into the common-law rule.

This is no longer necessary, given, particularly, Rule 12, 12(a) and 12(b).

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Korman.

ORAL ARGUMENT OF EDWARD R. KORMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

This case is here on a writ of certiorari to the United States Court of Appeals for the Third Circuit, to review a judgment of that Court, which sustained its jurisdiction to hear an appeal by the United States from a pretrial order of the District Court dismissing an indictment on the merits.

The Court of Appeals also reversed the order of the District Court and remanded the case for a new trial or other proceedings not inconsistent with its opinion.

The petition for certiorari, which was filed here, did not in any way challenge the determination of the Court of Appeals on the merits. It challenged only the determination of the Court of Appeals that it could, consistent with the double jeopardy clause, entertain the appeal by the United States.

Before getting into the merits, I'd like to address myself to one question that occurred to us, and which we've looked into, and that is the availability of the President's pardon and clemency program to these defendants, should the Court delay its decision beyond the 31st of January of 1975.

We have been told, and counsel for both Mr. Jenkins

and Mr. Serfass have been advised that if they wrote to the respective United States Attorney's Offices and indicated their intention to avail themselves, or their desire to avail themselves of the alternative-service program should there be a judgment in this Court adverse to them, they could preserve their rights to participate in the alternative-service program even if they ultimately applied for it after January 31st, because of a delayed decision of this Court, which might be adverse to them.

To turn to the merits of the appeal in this case, there are really two issues presented.

First, the issue of whether the Congress intended to authorize the appeal from this order. The Criminal Appeals Act provides that the United States can appeal to the Court of Appeals from a decision, order, or judgment dismissing an indictment in a criminal case, unless the double jeopardy clause would bar further prosecution.

Moreover, in order to overcome the restrictive interpretation that had been placed on a similarly worded earlier Criminal Appeals Act, which had limited the government's right to appeal from dismissals only where the dismissals were -- permitted appeals, rather, only where the dismissals were based on the four corners of the indictment.

Congress deliberately wrote in to Section 3731 a rule of liberal construction, and mandated that the statute

be liberally construed to effectuate its purposes.

Not only from this language but from the legislative history of the Criminal Appeals Act, it's plain beyond any doubt that Congress intended to authorize the appeal in question here. Indeed, the Senate Judiciary Committee, in an excerpt quoted at page 16 of our brief, observed that:

"The problems of appealability have become especially serious in selective service cases where judges have reviewed defendants' selective service files before trials and dismissed the indictments after finding that there have been errors by the draft boards. These are issues to be determined by a judge, not a jury, and there is no reason why they should not be subject to appeallate review."

Congress not only was concerned about all pretrial dismissals, but particularly those in selective service cases. And it's quite plain and indeed, from reading petitioner's brief, we had assumed that he had conceded the issue that the statute quite plainly intended to authorize the appeal from the pretrial order dismissing the indictment in this case.

This brings us, then, to the second question that's presented, and that is whether an appeal from this order is barred by the double jeopardy clause.

And in this connection it's worth again recalling the words of the Constitutional provision, "nor shall any

person be subject for the same offence to be twice put in jeopardy of life or limb."

Now, while that term has a certain degree of vagueness and has never been given a completely clear and fixed definition, one thing is certain from every case that has ever construed the double jeopardy clause of the Constitution, and that is a person is not placed in jeopardy until a trial has begun, at which he is in danger of having a judgment of conviction entered against him.

And until that time has come, he has not been placed in jeopardy; and that the double jeopardy clause protects a defendant against being tried, that is, being placed in jeopardy of conviction for a second time, and, at that, in cases such as Illinois vs. Somerville made clear, the guarantee is not even absolute.

Now, this --

QUESTION: Well, that's not quite true when you come to the "twice being put in jeopardy", is it? Or is it? Let's assume that clearly he was put in jeopardy once, and then could he be indicted again for the same offense?

MR. KORMAN: That would depend, I would assume, on how the trial ended.

QUESTION: Well, --

MR. KORMAN: If, for example, there was in this trial, because a jury was --

QUESTION: -- my hypothesis in my question, he has been put in jeopardy once, --

MR. KORMAN: Yes.

QUESTION: -- has gone all through a trial, a fair, due process trial, the jury has deliberated and returned their verdict of not guilty, upon which judgment was entered. Now, could he be indicted again for the same offense?

MR. KORMAN: No, he could not.

QUESTION: So, being put in jeopardy doesn't really mean -- at least when you're talking about the second being put in jeopardy -- it doesn't really mean what you indicate, does it?

MR. KORMAN: Well, I think -- perhaps I answered too quickly. I would think that he could be indicted again, but he could never be tried on the indictment, and therefore he --

QUESTION: He could be indicted again --

MR. KORMAN: Yes, I would --

QUESTION: -- and put to the expense of having to hire a lawyer to defend the same charge?

MR. KORMAN: Well, I would think it shouldn't be done, and probably it probably wouldn't be done. But --

QUESTION: Do you think it constitutionally can be done?

MR. KORMAN: I think it could. But I don't -- I

don't think it's the burden and expense of going to trial against which he's protected, and the bar of the --

QUESTION: Could he even be arraigned?

MR. KORMAN: Well, I would assume that he would have an arraignment, a valid defense of the indictment of which he could move to dismiss.

QUESTION: Well, doesn't the double jeopardy provision stand for the proposition that if a person has once been put in jeopardy, and that's the hypothesis of my question, that he can't ever be even charged again, can't be bothered by the State with defending the same charge.

MR. KORMAN: No, it's not that broad. If he's been put to -- put in jeopardy, and the trial has ended in a conviction or an acquittal, he can't be put to the trouble and expense of another trial.

Now, obviously, if he can't be tried, it would be irresponsible and improper to indict him for that offense, but -- and he would have --

QUESTION: But you think it would be perfectly constitutional to do so?

MR. KORMAN: Well, it -- I don't -- it gets, after a while, I think, he cannot -- it would not be proper for him to be tried, and therefore, I assume from that, that it would not be proper for him to be indicted; and therefore he would have a valid defense to the indictment.

QUESTION: Well, yes, that's what you're -- what you told us originally suggested that all of these things could happen to him a second time, right up to the empaneling of the jury.

And that really is not true, is it?

MR. KORMAN: I don't -- I don't follow that part of Your Honor's question.

All of the things that happened to the defendant in this case.

QUESTION: That after a person has once been put in jeopardy, and that led to a clearcut verdict of conviction or acquittal.

MR. KORMAN: No, what I meant to imply by the latter part of my remark, that the protection of the double jeopardy clause is not absolute. It's that a person can be tried on an indictment. The trial can go completely to the end, and both sides rest. The government can have the most complete opportunity and the fairest opportunity to present its case, the jury can split 11-to-1 for an acquittal, and yet the government can retry him again, and place him to the entire burden and expense of a trial. And that's all I meant to refer to by that, the latter part of the comment.

QUESTION: What you really mean is as to the two jeopardies, one is different from the other?

MR. KORMAN: I don't --

QUESTION: Yes. That's what you -- that's what does follow.

QUESTION: The same word means two different things.

MR. KORMAN: Well, I don't know that it means two different things. I think it means the same thing. It means -- it means --

QUESTION: I don't see where it affects the case.

MR. KORMAN: -- it means trial. And in one instance, where the jury has been unable to reach a verdict after a full, and the government has had a full and fair crack at the apple, I think, to use the words Your Honor quoted in the Haitian case: the government can still have a second crack at the apple even because it has, where the jury has been unable to reach a verdict.

On the other hand, where he's been acquitted or convicted, that guarantee becomes absolute.

But in both instances, the determination as to whether a new trial may ensue is essentially based on questions of policy and the questions that go to the history of the double jeopardy clause.

QUESTION: I think what you're saying is, if it were transposed into a civil context instead of criminal, it was that if a suit were had on a civil case and it results favorable to one of the parties, there is nothing to prevent

the losing party from bringing a suit again on the same issues that he has to assert the defense of res judicata in order to stop it, and --

MR. KORMAN: That's correct.

QUESTION: -- the same thing is true in an indictment. He may be indicted by an ill-informed or irresponsible grand jury, with the aid of an irresponsible or ill-informed prosecutor, and he -- the only way he can assert his right is to go in and assert his first jeopardy.

MR. KORMAN: That's correct.

QUESTION: Is that not right?

MR. KORMAN: That's correct.

QUESTION: Now, you're not suggesting that -- or are you suggesting that the constitutionality of the second indictment can't be determined in any other way than by a judicial proceeding in which double jeopardy is asserted and decided?

MR. KORMAN: Well, I would think that if the event happened, that is, a second indictment were brought, the defense would be to dismiss that indictment on the grounds of double jeopardy.

Now, whether you say that it's how -- I think it becomes, after a point, immaterial as to how you characterize it, whether you say the indictment should be dismissed because it can't be retried, and it's pointless to have that

indictment, or to say that after the acquittal even the indictment itself is barred is, I think -- I think it just turns on the language you use.

I don't think it's significant. The significant part is, as this Court has repeatedly said, that it's the double jeopardy clause which protects against a second trial for the same offense.

Now, my adversary has suggested that there are no firm guides on which to instruct the court on how to proceed in this case, which involved a pretrial dismissal. And we would suggest that there are at least a hundred years of precedent of this Court to guide it in deciding this case.

The most succinct summary of the law in this area was stated by Mr. Justice Brandeis in his opinion in Collins vs. Loisel, where he said "the constitutional provision against double jeopardy can have no application unless a prisoner has, theretofore, been placed on trial. The preliminary examination of one arrested on suspicion of a crime is not a trial; and his discharge by the magistrate upon such examination is not an acquittal. Even the finding of an indictment, followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held not to constitute jeopardy."

Indeed, this principle has been illustrated in numerous cases decided by this Court under the old Criminal Appeals Act, which permitted the United States to appeal to this Court directly from an order of the District Court characterized as a motion in bar entered before jeopardy has attached.

And this Court consistently held, in construing that statute, that where the defendant has not been put to trial, he has not been put in jeopardy.

And I think that of particular significance to the issue here are the cases which involved appeals to this Court from motions in bar which sustain the defense of the statute of limitations.

Those -- that defense goes to the general issue in the case and, as a matter of fact, in two opinions of this Court, a pretrial order dismissing an indictment on statute of limitations grounds was characterized as an acquittal. Nevertheless, this Court has repeatedly entertained appeals from such orders because the defendant had not been placed in jeopardy.

The most recent of that was in United States vs. Goldman, in which the issue, the same arguments that were made here were made there, it was an appeal from a dismissal on statute of limitations grounds, which goes to the general issue in the case, it was a pretrial dismissal, and this Court,

rejecting a challenge to its jurisdiction, stated that since the District Court had not commenced its sitting for trial, the defendants in error had not then been placed in jeopardy.

Now, the defendant, of course, concedes that in fact the jeopardy had not attached. Instead, he argues that because of the fact that the dismissal of the indictment was the functional equivalent of an acquittal on the merits, that constructively jeopardy has attached.

Now, this argument which really takes us to the first of the Court of Appeals decisions, which have denied the government the right to appeal from pretrial orders, is based on what we believe to be a serious misconception of the meaning and purpose of the double jeopardy clause.

We don't have to quibble over terms. We can concede that if an acquittal is a termination of a ruling in favor of the defendant after the trial on the issue of guilt or innocence, that may be characterized as an acquittal and that a pretrial dismissal on the merits may be viewed as an analog of an acquittal.

But the reason that a defendant cannot be tried again after he has been tried once and acquitted is not necessarily because he has been acquitted, but because he has been placed on trial and been put in jeopardy of conviction once, and so the double jeopardy clause affords him protection, not only from an acquittal but a conviction and

even protection against a second trial where the jury did not reach a verdict if the case was terminated improperly prior to verdict.

And so that it makes little sense to say that the argument that this is somehow an acquittal doesn't really answer any question at all. The question is whether he has been placed once in jeopardy and whether, if the government is successful on its appeal, he would be placed in jeopardy a second time.

And it was this critical distinction which we believe was overlooked, for example, by the Court of Appeals for the Seventh Circuit in United States v. Ponto, which has become theleading Court of Appeals decision on this issue.

There, in an excerpt quoted at page 34 of our brief, the Court of Appeals, in a case not different from the instance case, said that:

"Since the dismissal order was based on a determination on the merits, it was an acquittal to which jeopardy attached."

Now, it's interesting to note, in the Green case, which is one of the case that's cited by the Court, Mr. Justice Black wrote for this Court that: It is the acquittal which ends the jeopardy that has attached at the commencement of trial. It's not an acquittal -- it's not jeopardy which attaches to an acquittal.

Moreover, the Court of Appeals continued:

"Thus, government appeal from this ruling would violate the double jeopardy clause of the Fifth Amendment since a retrial on the charge would be prohibited."

But when was he tried initially on the charge? The Court of Appeals never addressed itself to that issue, and it's not surprising that of the five judges of the Seventh Circuit who composed the majority, two of the five did not even join in this reasoning, and they adopted yet another analysis, which the Ninth Circuit has also subscribed to. And they said that since this was a dismissal with prejudice and since, therefore, the government could not bring a second prosecution, therefore it was barred from appealing.

And in making this argument, the Court relied on an opinion of this Court, in United States v. Oppenheimer. That case was a case in which the government had indicted someone for violating the Bankruptcy Act, conspiracy to defraud -- commit fraud under the Bankruptcy Act.

The defendant made a motion to dismiss on statute of limitations grounds. The motion was granted. The United States never appealed.

Subsequently, this Court had, in a decision, had redefined and clarified the law in the area, and it was plain that the initial determination of the District Court

dismissing the indictment was an error.

The United States then brought a second indictment against the defendant, and he then alleged that that second indictment was barred, either under the doctrine of res judicata or the double jeopardy clause.

And this Court held that the second indictment was barred because the failure of the government to appeal from the first indictment left standing on the record a final order on the merits, and that the civil law doctrine of res judicata applied to a criminal case, even to a pretrial dismissal on the merits, where the government had not appealed but sought to bring a new indictment, the defendant could in effect invoke the doctrine of res judicata.

But, of course, that does not -- does not follow from that that the government could not appeal from the initial dismissal of the order, and of course in United States vs. Goldman, to which I referred to afterwards, which was decided after United States v. Oppenheimer, this Court entertained an appeal, a direct appeal from the dismissal of an indictment on statute of limitation grounds.

QUESTION: Mr. Korman, Is Mr. Dower correct that there's no dispute, that that's all the evidence that would have been produced at the trial?

MR. KORMAN: That's correct. In all Selective Service cases, as Your Honor may be aware, --

QUESTION: Which means this case?

MR. KORMAN: Yes. The --

QUESTION: So what good is a trial in this case?

MR. KORMAN: Well, I would think, for example, from the -- it may not be any good. As long as the Judge adheres to his position, and would dismiss --

QUESTION: Well, is he wrong in his position?

MR. KORMAN: He was found to be wrong by the Court of Appeals, and that determination is not even challenged here.

I agree that had they gone to trial, it would have been foolish to go to trial with the judge entertaining the erroneous view of the law that he had. But that doesn't necessarily follow from that that the defendant was placed in jeopardy of a conviction by the pretrial disposition that took place here.

QUESTION: And if the -- Mr. Serfass, whatever his name is, decided that he would go to trial and he wouldn't put on any evidence or anything, would he, he's in good shape, as long as he's before that judge?

MR. KORMAN: That's correct.

Now, of course, --

QUESTION: Well, why isn't that the end of the case?

MR. KORMAN: Well, it's the end of the -- it's --

QUESTION: He would have been acquitted, wouldn't he?

MR. KORMAN: Well, I assume the judge would have done the same thing, and that's what involved in Mr. Frey's case, where that's exactly what happened.

QUESTION: Yes.

MR. KORMAN: I would note, however, that judge, even Judge Friendly, in his opinion in Jenkins, suggested that if a defendant had available to him a defense which he could have raised before trial, that involved no disputed issue of fact, and deliberately permitted himself to be placed in jeopardy and then delayed his motion in order to gain this tactical advantage, that that was a question he was leaving open and was not deciding.

And indeed, we would argue, if we were faced with that, that where a defendant did that, knowing that he had a defense available to himself and let himself be placed in jeopardy, that the protection of the double jeopardy clause should not be accorded to him, but that need not be reached in this case.

So that the second, what we think to be misguided ground upon which the Courts of Appeals have erred, is this misunderstanding of the doctrine of res judicata. That is because the doctrine would bar a second indictment, where the first indictment was dismissed and not appealed from, therefore,

for some reason, the government could not appeal from the initial pretrial dismissal.

Yet a third ground which was suggested by the Courts of Appeals is one similar to that suggested by Mr. Justice Marshall. That is, if you say that the government can appeal from the pretrial dismissal, that will only discourage defendants from making their motion prior to trial, and that will only delay it until jeopardy has attached.

Well, of course, that -- whatever merit there may be to that consideration of policy, however, doesn't answer the question here, since Congress has authorized the appeal and has made the determination of policy itself, and has determined to permit that appeal here.

And, of course, second, if it does become a problem, this Court, either through its rule-making powers, or Congress through legislative action can provide and mandate that these motions be made prior to trial, otherwise they'll be deemed waived, as is true now with motions directed to defects in the institution of the prosecution.

So that essentially the Findley case, United States v. Findley, involved policy considerations that are no longer open to this Court to consider, since Congress has decided itself that it wants the United States to have the right to appeal from these pretrial dismissals.

Moreover, there really isn't any reason to depart from this long line of precedent, to overrule any number of decisions of this Court. None of the considerations which are reflected by the double jeopardy clause are really applicable here, the defendant was not put through any burden and expense and trauma of trial, he was not put through a hearing or determination of fact, which could have resulted in a conviction.

All that occurred here was little more than the argument of a legal question. As a matter of fact, there was a good deal less here than that which occurs at a suppression hearing, where the judges actually hear evidence, where they make the determinations of credibility and where their decision on whether to admit or not to admit a particular piece of evidence could very well be decisive of the case.

Here all that took place was an argument on a motion. The Selective Service file, of course, is -- contains undisputed facts, which is true in every Selective Service case. The defendant rarely ever disputes that he failed to report as ordered, and his only defense can be based on something that may be in the Selective Service file.

So that the facts are never in dispute here. There was no trial of any issue of fact, and the defendant had not been placed in jeopardy.

And for these reasons we believe there is no reason

to deny and to defeat the intent of Congress to authorize the appeal here, or to overrule a long line of decisions of this Court.

We therefore ask that the judgment of the Court of Appeals be affirmed.

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

You have about three minutes left, Mr. Dower.

REBUTTAL ARGUMENT OF HARRY A. DOWER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DOWER: I'll be brief, sir.

I would respond to the government's position in reference to what is involved in jeopardy by saying that a person has got to go through the burden and expense and the emotional strain of a trial.

I think this is really -- these statements in the case is far too narrow. Certainly a person, many people are terrified upon receiving a traffic ticket. The emotional strain can start as soon as that.

Certainly when a person is indicted, he's going to go through a lot of burden and an expense and emotional strain, too.

QUESTION: Well, is there any power you know of, even in a true double jeopardy case, as to which no one would disagree, that is a verdict of acquittal, if an irresponsible jury, as I suggested before, a grand jury reindicted, it

creates all this stress, does it not, that you're speaking of?

MR. DOWER: Yes, sir, and I should --

QUESTION: Is there any other way to deal with that indictment except to go in and assert the claim of double jeopardy and have it --

MR. DOWER: The first time it would occur, sir, I know of no other way than to go in to move to dismiss the indictment.

QUESTION: Yes.

MR. DOWER: But I should think that thereafter -- and I'm not prepared to argue the case -- but thereafter, a civil suit for damages against the prosecutor --

QUESTION: Yes, they've got a suit against the prosecutor, or --

MR. DOWER: I can't imagine --

QUESTION; -- any other suit, he might have a suit, whether it's a good one or not, he might conceivably have a suit against members of the grand jury, and again you'd have the question of whether it was any good.

But there's nothing automatic that stops a second indictment, is there?

MR. DOWER: No, sir. Except the integrity of the --

QUESTION: The integrity of the people involved.

MR. DOWER: -- of the prosecutor's office.

QUESTION: Yes.

MR. DOWER: Yes, sir. I must concede that.

QUESTION: Or their intelligence, if they were ill-informed.

MR. DOWER: I'd rather rely on their integrity, sir.

[laughter.]

QUESTION: But they might simply -- they might simply make a mistake.

MR. DOWER: All right. It's inconceivable that a person could get to that position, being so ill-informed. But, sure, within the ambit of what is conceivable --

QUESTION: That is, the grand jury might not be informed by the prosecutor that the man had been previously tried and acquitted, and then you'd have perhaps various kinds of proceedings against the prosecutor.

MR. DOWER: I should hope so.

I would just say that, once again, I sense that the government, as so many of us have been doing, has just put too much emphasis on labels, and that we really ought to look at the function of these things.

What is a trial? In terms of the burden and expense and emotional strain? It doesn't have really to be -- I'm suggesting that jeopardy in that sense arises well before a jury is empaneled. And with the modern methods of disposing

of issues before a court, prior to the empaneling of a jury, we don't need to read these things so narrowly.

I would also just respond to the closing statement made by Mr. Korman, in reference to the sophisticated -- and I'll be kind -- the sophisticated defense counsel who waits until a jury has been empaneled to bring his motion to dismiss.

He says that this Court, by its rule-making, could probably require these motions be made prior to trial.

I would not be so hasty to conclude to that. I would assume that a rule of that kind would require a great amount of public discussion before it could be even -- even could be considered for adoption.

Thank all.

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

Thank you, Mr. Korman.

The case is submitted.

[Whereupon, at 11:00 o'clock, a.m., the case in the above-entitled matter was submitted.]

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