In the

Supreme Court of the United States

United States,

Petitioner,

v.

Ronald S. Jenkins,

No. 73-1513

Washington, D. C.
December 9, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 73-1513
RONALD S. JENKINS, Respondent.	:	

Washington, D. C.,

Monday, December 9, 1974.

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

BEFORE:

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

APPEARANCES:

ANDREW L. FREY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner.

JAMES S. CARROLL, ESQ., 126 West 119th Street, New York, New York 10026; 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 will hear arguments next in 73-1513, United States against Jenkins.

Mr. Frey, you may proceed whenever you're ready.

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 a grant of the petition of the United States for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit, which dismissed the government's appeal from an order of the District Court in this case, which in turn dismissed respondent Jenkins' indictment for knowing failure to submit to induction into the Armed Services.

This case is related to the next case, which you will hear, United States against Wilson, both involve the issue of whether the United States may appeal constitutionally, consistently with the double jeopardy clause, from a post-trial ruling which would be denominated an acquittal under the definition in Jenkins.

The Wilson case also involves the further issue of whether the ruling there was an acquittal for purposes of such a rule, if the Court were to adopt such a rule.

Now, the pertinent facts surrounding Jenkins'

offense, as disclosed by the evidence at trial and as specifically found by the District Court, are undisputed.

Mr. Jenkins was ordered on February 4th, 1971, to report for induction on February 24th. The validity of that order, as initially issued, is unchallenged.

Mr. Jenkins received that order. He wrote to the Local Board thereafter, requesting a form on which to apply for conscientious objector classification.

On the day before his induction, he went down to his Local Board, again to pick up this form; at that time he gave them a brief written statement of his conscientious objection claim. At that time he was told that his induction order would not be postponed and that he should report the following day.

On February 24th, 1971, he failed to report for induction.

These findings were all specifically made by the District Court.

Now, it's the government's position that these facts required, as a matter of law, the entry of a judgment of conviction against respondent Jenkins.

However, the District Court concluded that because these events took place prior to this Court's decision in Ehlert, and because at the time of these events, in the view of the District Court, it was the law of the Second Circuit

that the Local Board was required to postpone respondent Jenkins' induction and to consider his claim of late crystallizing conscientious objection, it would be unfair to apply the Ehlert principle to the defendant who was before the District Court.

QUESTION: In this case, it is a case in which the respondent Jenkins did have a counselor whom he consulted?

MR. FREY: He did. Yes.

QUESTION: Was that man a lawyer or not?

MR. FREY: The draft counselor, I believe was not a lawyer.

QUESTION: But he presumably had some expertise with respect to the law of Selective Service?

MR. FREY: I don't know, it's not in the --

QUESTION: Or else he wouldn't have been a very good counselor, I suppose.

MR. FREY: It's not in the record. Presumably.

QUESTION: And therefore, presumably would have known the law of the Second Circuit; right? Wasn't that part of -- some of the reasoning of the case?

MR. FREY: Well, that's -- but that's sheerly speculative. I don't -- that was not a part of Judge Travia's --

QUESTION: But if you go to a -- if a person has a doctor, for example, you assume the doctor knows something about medicine, just by definition. If you go to a counselor,

a draft -- a Selective Service counselor, you assume, almost by definition, if he is a counselor, unless he's a fraud and a charlatan, he knows something about Selective Service law, don't you?

MR. FREY: Well, yes.

QUESTION: It doesn't need to be in the record.

MR. FREY: But -- well, I don't know whether this Court could take judicial notice of it, but I think that what the District Court held was that with respect to people who at that time were ordered to report for induction, when the law of the Second Circuit was as had been held in the Geary case, it would be unfair to apply Ehlert retroactively.

Now, that's a question of law, and that's a question of law which was decided in favor of the government in a case called Mercado, which was then pending on appeal in the Second Circuit.

Because of the conflict between the two cases, the Solicitor General authorized an appeal in the Jenkins case.

And as the Court of Appeals decision in Mercado clearly establishes, the District Court here was in error in dismissing the indictment, and the respondent was demonstrably guilty and he should properly have been convicted.

However, a divided panel of the Court of Appeals never reached the merits of our appeal; rather, it held that the District Court's action, although labeled a dismissal,

was in fact an acquittal as the concept was defined in United States v. Sisson. While the Court of Appeals recognized that amended Criminal Appeals Act would authorize the government's appeal if the Constitution permits it, it concluded that this Court's decision in Ball, Kepner, Fong Foo, and Sisson prevented it, the Court of Appeals, as an inferior court from allowing the appeal in this case.

Although there is some suggestion that Judge Friendly felt that these holdings were suitable for reconsideration by this Court.

Now, the issue in this case may be simply stated: Does the double jeopardy clause of the Fifth Amendment bar government appeal from a post-trial decision of the District Court terminating a prosecution in favor of the defendant, where such a decision is an acquittal under the definition of the concept in Sisson, if the appeal raises only issues of law and if a reversal would not require the defendant to undergo a second trial?

Now, the constitutional question of the appealability of a legally erroneous acquittal, where no second trial is required, is, surprisingly enough, in view of its importance, a matter of first impression before this Court.

I will, later in my argument, show in detail why this is so with reference to the four cases relied upon by Judge Friendly.

QUESTION: Isn't Fong Foo on that point?

MR. FREY: No. As I -- I'll get to it later, but briefly Fong Foo is not on point, because what it prohibited was an appeal where retrial would be required.

QUESTION: That was a legally erroneous acquittal, wasn't it?

MR. FREY: That's true. I mean Fong Foo establishes the proposition that there may be circumstances in which a legally erroneous acquittal is not reviewable. But it was not talking about the circumstances of this case, because in Fong Foo the trial had never been completed, and you really were in a Somerville-Perez type of -- interrupt a trial situation ending in an acquittal.

It's perhaps close, in some ways, to Jorn.

The reason why this is a question of basically first impression today, in 1974, is clear when you look at the history. At common law and under the holding of this Court in the Sanges case, the government had no right of appeal in criminal cases, in the absence of a statute authorizing such appeal.

And then in 1907 Congress passed the old Criminal Appeals Act, and it was construed in such a manner ultimately in Sisson, but it had been all along, to preclude appeals in cases of this sort.

So that as a matter of statutory law prior to 1971,

the federal government could not appeal rulings of this sort in criminal cases.

Moreover, the issue did not come up in State cases, because the double jeopardy clause, by the ruling in Palko, was not deemed applicable to the States until the fairly recent decision of this Court in Benton.

And I would like here to just point out, with respect to the significance of Benton, something that Judge Friendly noted, which is that the ruling that you make in this case today is a ruling that will be binding not only on the federal government but on each of the fifty States. And if you say there can be no appeal here, you are saying that this is a fundamental principle that is applicable in equal force all over.

I should note that there are some States that have authorized appeals in this situation as a matter of State law. There's a recent decision of the New York Court of Appeals, in July of this year, in a case called ? Insabella, 359 N.Y. Sub 2d 100.

QUESTION: Does every State have a double jeopardy -- a guarantee against double jeopardy in its constitution, do you know?

MR. FREY: I'm not certain, but I think there is generally some in -- I'm told 48 of the 50 States do.

QUESTION: Constitutionally?

MR. FREY: Have a State constitutional provision. But of course the interpretation of that might be --

QUESTION: Certainly.

MR. FREY: -- in accordance, for instance, with Justice Holmes' dissent in Kepner.

QUESTION: Right.

MR. FREY: Our position in this case is a very simple one. We say that the concept of double jeopardy relates to the subjection of a defendant in a criminal case to a second trial. It therefore comes into play only where a second trial is to be had.

Since our appeal, if successful, would not lead to a second trial, double jeopardy is simply irrelevant here, and the appeal is constitutionally permissible.

Now, in our brief we've set forth various authorities that make it clear that the element of second trial was at the heart of the double jeopardy notion at common law, and in the application of the American constitutional principle, as explicated by this Court on numerous occasions.

QUESTION: Your appeal, if successful, if it had been -- your appeal, if successful and if it had been entertained by the Court of Appeals would have resulted in what?

MR. FREY: It would have resulted in a remand presumably with the -- it would have resulted in a remand with a direction to the District Court to undertake further pro-

ceedings under a correct view of the law, and those proceedings would, in the absence of something that doesn't appear on the record, be the entry of a judgment of conviction.

It would not be the taking of further evidence. It would not be the dismissal of this indictment and the commencement of a new proceeding with a new indictment.

It would simply be what we're entitled to, we believe, as a matter of law, is a judgment of conviction in this case.

QUESTION: Have you -- I'm just thinking aloud; if I've ever seen a reviewing court opinion, direction to enter a judgment of conviction, simpliciter plano, without any further proceedings.

QUESTION: As I understood, it's a directed verdict, isn't it?

MR. FREY: Well, it's --

QUESTION: Of guilty.

MR. FREY: I'm not suggesting --

QUESTION: That would be --

MR. FREY: -- that the Court of Appeals, as to exactly what it is that the Court of Appeals would do. But here we have a situation in which the District Judge has found, as a fact, every element of the offense. He's made his findings of fact.

So it's hard to conceive what he could do. He would

have no choice as a matter of law, when the case goes back to him, but to enter a judgment of conviction.

Now, perhaps what the Court of Appeals would do is reverse the order dismissing the indictment, remand the case for further proceedings consistent with its decision.

QUESTION: What would "further proceedings" have been, if not a trial?

MR. FREY: Assume that if we win this case, and the defendant does not avail himself of the clemency opportunity, there will be the entry of a judgment of conviction. I can't imagine what else the District Court could do.

QUESTION: That's all? Just without the defendant even there in the courtroom?

MR. FREY: Well, the trial was completed. This order was entered -- of Judge Travia's, was entered three weeks after the trial was over. And this order was legally incorrect, it erroneously dismissed the indictment.

Now, he may have before him other motions, motions for a new trial, motions for a verdict of acquittal on some other ground. I don't believe that that's before him.

But if he had such motions before him, as in the case of United States v. Weinstein, where a similar situation arose, the Court of Appeals sent it back and they said you couldn't do what you did and now you can consider the motions that are before you and proceed accordingly. Either grant a

new trial, which was what was pending in Weinstein, or enter a judgment of conviction in accordance with the jury's verdict.

I don't see that it's material for purposes of this case what it is that would happen in the District Court, --

QUESTION: Well, you say --

MR. FREY: -- we're not asking for a further trial.

QUESTION: Under your submission, it seems to me it's quite material, because you say this would be a different case if the remand -- if you are successful in the Court of Appeals, if the Court of Appeals entertained your appeal, and if you succeeded on the merits of the appeal. You concede that there would be double jeopardy if the remand, after your successful argument, after the Court of Appeals accepted your argument, would be for a trial; don't you?

MR. FREY: Well, but whatever else --

QUESTION: So I think what happens after the remand is rather important to your argument, as I understand it.

MR. FREY: But, Mr. Justice Stewart, the question is what is the relief that we are requesting. In Fong Foo, the relief that was requested was to vacate the judgment of acquittal that had been entered by the District Court, and to conduct, hold a new trial.

QUESTION: Unh-hunh.

MR. FREY: Now, the relief that we're requesting

here is not to hold a new trial. There's nothing in our appeal that requires a new trial.

QUESTION: Well, what would you -- what would the prayer of your -- what was the prayer of your brief in the Court of Appeals?

MR. FREY: Well, I'm sorry --

QUESTION: If the Court of Appeals directed a judgment of guilty, that would be unprecedented, wouldn't it?

MR. FREY: I don't believe so. I don't believe so. But I think it's not -- it's not pertinent here, because we are not -- the trial was completed.

Let's suppose, for instance, that the District Court had not made these findings of fact, the trial had simply -- the trial had been completed and he had made his ruling of law without making the findings of fact, all of them that are essential for a conviction. Then our position is that the case would be remanded to him to make findings of fact on the basis of the evidence that he heard at trial, which he had not yet made.

That process is not a second trial, whatever, it may be a continuation of the first trial, but even that, it seems to me, is questionable where the evidence has been completed, the prosecution and the defense have rested and submitted their case, made their final statements. The trial is over.

Now the question is what legal consequences attach to the events that occurred at trial.

QUESTION: Well, it took the form of a dismissal of the indictment, wasn't it?

MR. FREY: That's correct.

QUESTION: And I suppose the Court of Appeals could reverse the order dismissing the indictment and remand the case for further proceedings that might seem appropriate --

MR. FREY: That's what I'm suggesting that it should do, yes.

Even if he had labeled it an acquittal, we would say he should -- which he didn't do here, but had he done it, we would say that they would reverse the order of acquittal and remand it for further proceedings consistent with their decision.

QUESTION: Well, what if Judge Travia had determined, on a somewhat different factual situation, after a bench trial, that the statute of limitations barred this prosecution, and made all the findings that indicated, otherwise he would certainly find the man guilty.

But he says, on the basis of the statute of limitations, I am going to enter a judgment of acquittal. Do you say the government can appeal that determination without violating double jeopardy?

MR. FREY: Absolutely. Absolutely.

Indeed, I think that the -- that analytically it's not the appeal itself that ever violates double jeopardy. The problem is that the double jeopardy clause is pertinent because if, what the relief that's requested by the appeal is a new trial, and if we may not, because of the double jeopardy clause, have a new trial, then we're asking for an advisory opinion. There is no case or controversy, and in that sense the double jeopardy clause bars the appeal.

QUESTION: So you distinguish between an identical ruling on the statute of limitations at the close of all the evidence, and one at the close of the government's case? One, retrial would be required if you reversed the judgment that was entered at the close of the government's case.

MR. FREY: We would distinguish it, and if it were entered at the close of the government's case and prior to the defense, in a jury trial -- now, in a non-jury trial I think it would be somewhat different, because you don't need a second trial. We would argue that you would be sending it back for a continuation of the first trial.

QUESTION: You mean the judge would just pick up hearing the evidence from the defendant two years later?

MR. FREY: Well, if it were two years later -- I don't think that the Constitution would bar that in a judge trial.

The essential notion that underlies the double

jeopardy protection is the notion that there has been a factual finding by the trier of fact that acts necessary to constitute the offense did not occur as charged.

And it's that finding, as United States v. Ball makes clear, and that's the paraplegmatic double jeopardy protection, it's that finding which cannot be challenged.

Now, if the judge says, at the close of the government's evidence, that it shows that the defendant was wearing a green hat, and that's an affirmative defense, and therefore he enters a judgment of acquittal.

Our view is that that should be an appealable order, even if he doesn't wait until the end of the trial. But, of course, we don't have to struggle with that here, because he did wait until the end of the trial.

QUESTION: Mr. Frey, I still think you're asking the Court of Appeals to direct a verdict of guilty.

MR. FREY: No, I'm saying --

QUESTION: I don't see how you can get away from it.

MR. FREY: I'm suggesting that as a legal matter the only possibly correct action that could have been taken in this case, on the basis of the evidence found by the judge, was a verdict of guilty. I'm not saying that the Court of Appeals should direct it.

In the Zissblatt case, which we quote in our brief,

Judge Hand addressed himself to the difference between errors of judges and errors of juries, and he said that the defendant -- the double jeopardy protection does not extend to legal errors by judges. And I think Zissblatt was one of these motion-in-bar post- --

QUESTION: Did he say you could direct a verdict of guilty?

MR. FREY: Well, I --

QUESTION: Well, answer me. Aren't you doing that here?

MR. FREY: He didn't say that, and we're not doing that, no. We're saying that what the Court of Appeals should do -- I mean, I'm saying to you that the --

QUESTION: You're saying that the Court of Appeals should say you were wrong in acquitting the man, you should have found him guilty, therefore, proceed pursuant to this opinion.

That's like the old British case: You find a man --

MR. FREY: Well, but, wait a minute --

QUESTION: -- [inaudible] -- consider your berdict.

QUESTION: Well, is there any relief that the Court of Appeals could have directed except that they proceed with the trial?

MR. FREY: Well, the trial was completed.

QUESTION: In this case the trial was completed. Take the case that preceded it.

MR. FREY: No. It simply suggests that --

QUESTION: Now, in this case you --

MR. FREY: -- it's clearly quite inevitable.

QUESTION : In this case they've completed the trial. Is there anything uncommon about reinstating the verdict of a trial court?

MR. FREY: Of course not, Mr. Chief Justice.

QUESTION: But, of course, here you don't have any verdict to reinstate. That's one of your problems, isn't it?

MR. FREY: Well, the verdict can be -- can be entered on the remand. I don't see that judgment can be entered on the remand.

QUESTION: Well, supposing the Court of Appeals had decided it had jurisdiction in this case, said Judge Travia was wrong on the legal point, reversed the order dismissing the indictment, and remanded for further proceedings.

Judge Travia then again addresses himself to the question of what judgment should be entered, since the previous judgment has been vacated. He says, on second thought I've got reasonable doubt about this, I'm going to enter a judgment of acquittal.

Would he be free to do that, do you think?

MR. FREY: Well, there are two points that are

relevant here. One is that the defendant has waived a jury trial, and when he waived the jury trial he waived, in our view, the right to a completely irrational determination. And there's a case, which Judge Friendly wrote for the Second Circuit, called United States v. Mayberry in 274 F. 2d, in which he said: We do not believe we would enhance respect for law or for the courts by recognizing for a judge the same right to indulge in vagarities in the disposition of criminal charges that, for historic reasons, has been granted to the jury.

Now, we're saying that when the defendant waived a jury trial, he waives, in a sense, his right to a completely irrational --

QUESTION: Are you saying that Judge Friendly's view, as there expressed, is that the judge, at a bench trial, can't for any or no reason direct an acquittal, as the jury could?

MR. FREY: Well, we are straying somewhat from the issue --

QUESTION: No, but is that what you're saying?

MR. FREY: -- in this case. I'm suggesting that there would be a substantial question as to whether the judge has the power -- and we certainly think he hasn't the right; but whether he has the power --

QUESTION: You mean if Judge Travia did what my

brother Rehnquist suggests, that the government could appeal that?

MR. FREY: Well, the government could not review. There is a problem of reviewability, of course, if he makes a finding that the defendant did report for induction, or that he has a reasonable doubt that he failed to report for induction --

QUESTION: No, but this is on the review. That you suggested would happen in this case if you prevail. If it goes back to Judge Travia -- I guess he's no longer on the bench, is he?

MR. FREY: That's right.

QUESTION: Yes. But if it went back to Judge Travia and he were now to say, as my brother Rehnquist said, Well, on second thought, I entertain it --

MR. FREY: If he were to say, on second thought I have a reasonable doubt as to one of the elements of the offense, and I find as a fact that there is a reasonable doubt about a certain necessary element of the offense, I have a reasonable doubt that he ever rec eived his notice to report, and therefore it's not "knowing".

There are clear limits on the way -- on our ability to challenge this. That's basically an unreviewable finding --

QUESTION: Well, suppose he didn't say "I entertain a reasonable doubt", he said nothing except, "I direct a

verdict" -- or "I find the defendant not guilty."

MR. FREY: Not guilty. Well, all right --

QUESTION: And that's all he says.

MR. FREY: Well, our contention in our brief, of course, we've taken the view that an unexplicated acquittal is not what's at issue here.

But in terms of considering the possible approaches to this problem, were we to have a case with an unexplicated acquittal, but with findings of fact which we're entitled to request from the judge under Rule 23(c), in which he says: I find beyond a reasonable doubt that the three elements of the offense, A, B and C, each occurred; and then he said, I acquit.

I think we would take the position, in such case -- and that's not this case -- that we could have appellate review.

QUESTION: It could be this case.

QUESTION: You'd be right up against Fong Foo, if you did so, wouldn't you?

MR. FREY: Not at all, because we're not asking that we start the proceeding over again with the taking of new evidence before the judge, which is what jeopardy consists of. We're not asking for --

QUESTION: Also the holding was a greviously erroneous judgment of acquittal midway in the trial, and the

-- your client, the United States, as I remember, sought mandamus in that, got it from the First Circuit Court of Appeals, this Court reversed, and said: no matter how erroneous, no matter how egregiously erroneous, that action of the District Judge entering a judgment of acquittal was -- was an acquittal, and any further proceedings would be double jeopardy.

MR. FREY: Well, let me make two points about that.

First of all, it did not say any further proceedings, it said that you can't have an appeal because what the government is asking for you can't have mandamus, you can't have appellate review. So what the government is asking for is to start the whole proceeding over again, empanel a new jury, begin all over again.

That is not our case, it is not remotely like our case. There simply is no question of having a second trial in this case, in the sense which is relevant to double jeopardy under the decisions of this Court.

And the second point, about Fong Foo, is that the issue of whether an acquittal could be appealed was never argued in Fong Foo. The government simply rested its contention in that case on the contention that what happened there was not an acquittal, and not at all on the question of whether -- which is here today, about the appealability of acquittals. That was assumed as given by all parties,

and there only in the context where reversal would lead to a second trial.

Now, before getting to the cases in detail, I'd like to consider the ramifications of policy for this issue.

The effect of the ruling below, as well as that of the Court of Appeals in Wilson, is to let a clearly guilty defendant, that is, one who has been found by the trier of fact, beyond a reasonable doubt, to have committed all the acts constituting the offense, to let such a defendant go free because of a trial judge's erroneous interpretation of a point of law.

Now, we submit that one is hard-pressed to imagine how such a result furthers the ends of public justice.

As Mr. Justice Harlan said in dealing with a related question in United States v. Tateo, which is in 377 U.S. at page 466: Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial; to wit, Mr. Jenkins.

It would be a high price, indeed, for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

Now, there he was talking about a retrial after a conviction, but I think the thoughts, as a policy matter,

in terms of what we're talking about here, what kind of protection we're affording to defendants if we adopt the rule of the Second Circuit in this case.

I think the thoughts are pertinent.

He also made another point in this connection in that paragraph in Tateo, in which he said that if the rule were otherwise, appellate courts would be loath to apply the laws they saw fit and reverse convictions on close questions, because the consequence would be to immunize the defendant from a retrial.

Well, the same thing is true here, if you say that an error of law by the District Court committed on a motion such as this foreven immunizes the defendant from further proceedings, no matter how erroneous the ruling is, then District Judges are going to be reluctant to make these rulings the way they see fit. They'll leave it to the Court of Appeals, in order to avoid this manifestly unjust situation.

So it's not an unmitigated blessing to the defendant if you were to adopt the position of the Second Circuit.

I'd like to reserve the balance of my time for rebuttal.

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

Mr. Carroll.

ORAL ARGUMENT OF JAMES S. CARROLL, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The issue that the Court will have to determine, after the submission of the briefs and the oral argument in this case, is whether the United States had the right to appeal from the District Court's order acquitting the defendant in this case after trial, and after the defendant had been put into jeopardy.

Whether the Court of Appeals in this case was correct in its determination that it did not have jurisdiction under either Section 3731 of Title 18 of under the double jeopardy clause of the Fifth Amendment to hear and determine this appeal.

The government contends that the District Court's decision was appealable, because it was a purely legal ruling with undisputed findings of fact, and that this purely legal ruling could be corrected by the mere expedient of sending the case back to the District Court with instructions to enter a judgment of conviction.

Aside from the fact that I feel that such a course goes directly counter to the spirit that the double jeopardy clause is supposed to protect, I don't think that this particular position by the government has any sanction or any support

in the cases of this Court.

It is our contention that the decision of the District Court Judge was one that was based on facts adduced at the trial, which went to the general issue of the case, and, as such, this was an acquittal from which no appeal was to be allowed.

In addition, we question whether the decision of the District Court was a purely legal ruling. And whether this so-called legal ruling could be corrected by the simple expedient of directing a judgment of conviction.

We further question whether the government has complied with Section 3731 of the Criminal Appeals Act in that this appeal was not expeditiously prosecuted as is mandated by Section 3731.

To delve into the facts of this case: On February 4, 1971, Mr. Jenkins received a notice to report for induction. Directly thereafter -- and this notice to report for induction, excuse me, was for February 24 of 1971.

Directly thereafter, Mr. Jenkins went to a draft counselor, by the name of Jerome Bibuld. In turn, Mr. Bibuld contacted myself.

Subsequently Mr. Jenkins mailed a letter to the Local Board requesting a CO 150 form, and to this he received no response from the Local Board.

On February 23rd of 1971, the day before Mr. Jenkins

was to report for induction, Mr. Jenkins went to the Local Board, he had conversation with Miss Elaine Morris, the secretary of the Local Board, and he asked that he be given a CO 150 form, and that his induction date be postponed.

At that time Miss Morris called New York City headquarters and spoke to Mr. Thomas Maher, who was the Chief of the Legal Division of Selective Service Headquarters in New York City. Mr. Maher directed that Mr. Jenkins write out a brief statement of his beliefs and opposition to war.

After doing so, and after reading this brief statement to Mr. Maher over the telephone, Mr. Maher determined that Mr. Jenkins had not made out a prima facie case for opposition to all war. Because Mr. Jenkins, in his statement, had said that he was opposed to the war, this present war; although he did not exclude opposition to all wars in his statement.

QUESTION: And Mr. Maher was what -- the Clerk of the Selective Service Board?

MR. CARROLL: Mr. Maher was the Director of the Legal Division of Selective Service Headquarters in New York City. Mr. Maher is presently a U. S. Attorney in the Eastern District of New York. At the time of the prosecution of this case, Mr. Maher was the U. S. Attorney assigned to prosecute this case.

In fact, a motion was made directly prior to the

trial to have Mr. Maher excluded from prosecuting the case, and subsequently, during the course of the trial, Mr. Maher appeared as a witness for the government, to detail the facts that I have just gone into before the court.

On February 24th, Mr. Jenkins did not report for induction. We have not disputed this.

But later on, in March of 1971, Mr. Jenkins did return the CO Form to the Local Board. No action was taken on that form.

It was in April of 1971 that Ehlert vs. United States was decided. Ehlert intervened between the date that Mr. Jenkins was to report for induction and returned the CO 150 form and the date that Mr. Jenkins was subsequently indicted for failure to report for induction.

On October 3rd of 1972, the case came to trial. We waived trial by jury. The original prosecutor, Mr. Maher, was substituted, and the government presented two witnesses: the executive secretary of the Local Board and Thomas Maher.

It is true that before trial we had asked for 45 days in which to present all motions. No pretrial motions were presented, because the Selective Service file was turned over to us, which gave us all of the discovery that we required in the particular case.

The defense presented three witnesses, Mr. Jenkins, the defendant, Mr. Jenkins' mother, and Mr. Jerome Bibuld,

who was Mr. Jenkins' draft counselor.

However, Mr. Bibuld's testimony was not allowed in the case, although we had made an offer of proof that Mr. Bibuld would show that Mr. Jenkins was aware of the fact that he could present a CO 150 form at this time, according to the applicable case law at hat time, and that Mr. Jenkins' beliefs in opposition to the war had crystallized after the date that he was ordered to report for induction but before the date of actual induction.

This was pursuant to the applicable case law in the Second Circuit at that time.

As I stated, the court excluded Mr. Bibuld's testimony, although an offer of proof was made.

We also had three other witnesses who were character witnesses, however, we stipulated to their testimony.

After the trial of the case, Judge Travia requested whether we would like to argue at the particular time as to Mr. Jenkins' guilt or innocence of the offense, or whether we would prefer to submit findings of fact and conclusions of law.

We opted for the latter, and we submitted findings of fact and conclusions of law, proposed findings of fact and conclusions of law, to Judge Travia. Several weeks thereafter, the judgment was rendered.

The government states that this was a dismissal of

an indictment. In fact, in Judge Travia's opinion, after findings of fact and after his discussion of the applicable law, Judge Travia did in fact state that the indictment in this case is dismissed, and the defendant is discharged.

QUESTION: Did you submit proposed findings and conclusions?

MR. CARROLL: Yes, I did.

QUESTION: And is that, at page 52a, Judge Travia's first sentence: "The indictment in this case is dismissed and the defendant is discharged". Is that your submission?

MR. CARROLL: I requested that judgment of acquittal be rendered. I never -- I never requested that the indictment be dismissed.

In fact, to go into that briefly, the record --

QUESTION: You say judgment of acquittal -- excuse me --

MR. CARROLL: Yes.

QUESTION: -- judgment of acquittal in haec verba, or just not guilty; what was it you asked?

MR. CARROLL: No, I asked for a judgment of acquittal from the judge.

QUESTION: Judgment of acquittal. I see.

QUESTION: That's the motion that appears on page -- that starts on page 4 of the Appendix, I think, isn't it?

MR. CARROLL: Yes. But --

QUESTION: Motion for Judgment of Acquittal, signed by you.

MR. CARROLL: That's correct.

Throughout the course of these proceedings, however, I was maintaining not simply that on the law Ehlert vs. United States was not retroactive. In fact, I never made such a broadside attack against Ehlert vs. United States.

In fact, what I was saying was that with the peculiar circumstances of Mr. Jenkins' case, Mr. Jenkins was represented by counsel and he had consulted a draft counselor prior to this, he was aware of the applicable case law. The Local Board received his CO 150 form and didn't act on it, even though Geary at that time required that they do so.

And Ehlert came out one month after all of these transactions. And my position was, and I think the position that Judge Travia adopted was that under the peculiar circumstances of Jenkins' case, that Ehlert vs. United States should not be applied to him. That, in fact, Ehlert vs. United States would have been unduly harse in the circumstances of Mr. Jenkins' case.

I'd like to point out also that Mr. Jenkins did take the stand, that during the course of these proceedings, while Mr. Jenkins was testifying, Judge Travia interrupted my

direct examination several times. In fact, at one point during the direct examination, Judge Travia took over the direct examination and questioned Mr. Jenkins very closely about his sincerity, and went in very deeply into Mr. Jenkins' credibility in stating that he was in fact a conscientious objector.

Now, I have also raised another issue, which I didn't ex plore in much depth in my brief, but I would like to bring to the Court's attention: that the trial in this case commenced on October 3rd of 1972, the judgment of the District Court was rendered on October 24th of 1972.

The government's notice of appeal was filed on November 21st, 1972. Its brief, however, was not filed until June 13th of 1973.

In its decision dated December 11th of 1973, the Court of Appeals admonished the government and stated that the government had not, in their view, complied with Section 3731's mandate that the appeals be diligently prosecuted by the government.

They stated in a footnote that the delay in appealing the case, by the government, and I quote, they stated, "thie scarcely conforms with our notion of diligent prosecution, and we would have dismissed the appeal on that ground if defendant had so requested."

After this decision came down, the government

requested one extension of time to petition for rehearing before the Court of Appeals. The rehearing was denied on February 6 of 1974. Later the government asked for an extension of time to petition for a writ of certiorari to this Court, and by order of Mr. Justice Marshall, on February 28 of 1974, the time for filing a writ of certiorari was extended to April 7th of 1974; the petition being filed on April 8th.

It was on May 28th of 1974 that the petition was granted. Again, on July 10th of 1974, the government requested an extension of time to file the brief, to July 24th, 1974; which was granted.

The brief of the government was not received by my office until September 17th of 1974. Similarly -- and I don't think I'm coming into this Court with unclean hands, although I'm asking equitable relief, on October 10th of this year I requested an extension of one month's time, to November 14th, 1974. The argument was set up today, of course.

I think that under the statute itself, that the government has not complied with the mandate in Section 3731 to prosecute appeals diligently.

QUESTION: Mr. Carroll, in the Second Circuit's opinion, that footnote you quoted, page 3a of the Petition for Writ of Certiorari, where the Court of Appeals is talking about

dismissal of the appeal for failure to diligently prosecute, which it said it didn't reach, it said "if defendant had so requested". Had you requested dismissal?

MR. CARROLL: No, I had not, sir, requested it.

I don't think, however, that I waive the right to bring this to this Court's attention, however, because I think it's an affirmative obligation on the government's part to comply with all sections of that particular statute.

QUESTION: In bringing it to our attention, what are you suggesting now, Mr. Carroll?

MR. CARROLL: I'm suggesting that --

QUESTION: You went through the entire --

MR. CARROLL: Yes.

QUESTION: -- routine here, right up through the filing of briefs here.

MR. CARROLL: Yes.

I am suggesting, Mr. Justice Blackmun, that the government -- or, rather, this appeal should be dismissed on two grounds: first, that the government has not complied with Section 3731, in that this particular appeal is barred by the double jeopardy clause; and on the second ground, that --

QUESTION: You really mean certiorari, don't you?

MR. CARROLL: Excuse me?

QUESTION: You said "appeal", you mean certiorari.

MR. CARROLL: Well, I'm talking about the original

appeal to the Court of Appeals, which, I think, is what is in issue now: whether the Court of Appeals originally had jurisdiction to hear the appeal.

QUESTION: I see.

MR. CARROLL: But I'm also stating that because of the fact that the government has not complied with all of the provisions of Section 3731, in that they have not diligently prosecuted the appeal, that on that separate ground the original appeal should not have been allowed.

The government had made several statements in which they tried to take this particular case out of the traditional case of an acquittal being rendered after a trial before a judge or a jury.

They first make the distinction between a purely legal ruling and the ruling on the facts.

I think this particular distinction is untenable. I think that in this particular case individual facts were considered by the District Court in making its final ruling that the indictment should be dismissed.

In fact, the court went very deeply into the facts of this particular case, and again, as I have stated, the court found that under the peculiar circumstances of this case, that Jenkins was not guilty.

It stated that under the facts of the case, where Jenkins was apprized of the law of the Second Circuit, which

differed from other Circuits at that time, that Jenkins should not be found guilty of refusing to submit to induction.

This case should not be any different because a judge made articulated findings of fact and conclusions of law. A judge, as was stated in United States vs. Mayberry, does not have the luxury to issue simply a judgment of not guilty or guilty. In fact, he must make findings of fact and conclusions of law.

But I submit to you that in this particular case Judge Travia was acting as a fact-finder, that the findings of fact cannot be limited only to the findings of fact that he articulated.

I think he found nine -- nine facts in the case. But I believe that through his discussion he indicated that he had gone deeply into this defendant's credibility, and he indicated that this was part of his decision, that Jenkins would be unduly prejudiced by a different finding by the court.

I could analogize this situation to one that was stated in the Sisson case, where the judge had stated to the jury: If you find such facts, then you will render a verdict of not guilty.

And I think it was the same thing. Judge Travia found such facts, articulated in his findings of fact and articulated in his discussion of the law, and on the basis

of that, he found that Jenkins was not guilty.

If, for example, a judge had given erroneous instructions to a jury, or if, for example, a jury had applied a judge's correct instructions on the law erroneously, in the same way such a verdict from the jury would not be subject to any review, as it was stated in United States vs. Ball.

QUESTION: Mr. Carroll, if the government should prevail here and the case went back, do you think Judge Travia, assuming he were to hear it, could sit on the findings of fact that were made, or would he have to make new ones or additional ones? What is your evaluation of that?

MR. CARROLL: I think that if the Court finds that there is jurisdiction in this case, that the case would have to be sent back to Judge Travia for retrial. And the reason for that is that the Court of Appeals recognized that an affirmative defense could be asserted that Jenkins had in good faith relied upon the existing case law in the Circuit at that time, in refusing induction.

Now, although I think that Judge Travia did make such a finding, although not expressly articulated or impliedly articulated, I think that at the time of trial Judge Travia believed that it was improper to go into that question at the trial stage, when -- when I asked that Mr. Bibuld, the counselor, take the stand, the government asked for an offer of proof, and when my offer of proof was that Mr.

Bibuld would testify as to Mr. Jenkins' conversations with him, and that Mr. Jenkins' beliefs in opposition to war crystallized after February 4th of 1971 but before February 24th of 1971, Judge Travia excluded that testimony because he believed that it would not be relevant, and he believed in fact that it would be redundant of what was already in the Selective Service file.

QUESTION: Well, I take it, you're saying, then, that if the government should prevail and the case is remanded, there's no way to avoid a new trial?

MR. CARROLL: I'm saying that.

I'm also stating that the distinction that the government makes between pure -- a pure legal ruling and findings of fact is not articulated anywhere in the case law, and, in fact, is directly contradicted by the case law. Sisson makes it very clear that the rule or the test that is to be used is whether, on the basis of facts adduced at the trial, going to the general issue of the case, whether the defendant is guilty or not guilty.

Now --

QUESTION: To pursue Mr. Justice Blackmun's question, to which you answered that there would be no way of avoiding a new trial, would that new trial be limited to the election to hav e a bench trial, or would the parties all be free to start from scratch, as it were?

And decided to have a jury trial, if they wanted.

MR. CARROLL: I imagine that the parties would start from scratch, but the first motion that would be made in such a case would be a motion in bar to stop such a trial on the grounds of double jeopardy.

But I don't think that it's necessary to go that far, because I think the appeal in this case alone puts the defendant in double jeopardy. I feel that there was an acquittal in this case, that any subsequent proceedings in this case put the defendant into double jeopardy.

I don't think it's necessary for the government to go to the expense of having this case sent back for another trial, when the only thing that would result from such a course would be for that trial to, itself, be barred by the double jeopardy clause.

QUESTION: Well, of course, if, in fact, it goes back, the reason it will go back is because this Court has said there was no double jeopardy.

MR. CARROLL: That's correct, if it does in fact go back, that would be the determination.

But I think that in a sense the government has thrown in a confusing factor by asking whether, in fact, the -- whether, in fact, it would require a new trial or whether a judgment of conviction could simply be entered.

I think that's putting the cart before the horse.

The initial question is whether this Court has jurisdiction to hear the appeal, and whether the Court of Appeals initially had jurisdiction to hear the appeal.

What would happen subsequently is not directly in point. If this Court does reach the merits of this case, however, I submit to you that the ruling of the District Judge was correct under the circumstances, and that, although he was not stating that Ehlert didn't apply to all cases, he was correct in stating that Ehlert did not apply to the particular situation involved in United States vs. Jenkins.

I think the government's appeal is barred by the applicable case law, starting with United States vs. Ball, continuing to Kepner vs. United States, and ending up with Fong Foo and Sisson. The Court has stated repeatedly that an appeal alone is barred by the double jeopardy clause, and if this is true, whether the trial is before a judge or before a jury, and that the test to be used is not whether it was a pure legal ruling or a factual ruling, but whether, on the basis of facts adduced at trial, the judge went to the general issue or guilty or not guilty.

Thank you.

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

Mr. Frey, you have a few minutes left.

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: On the question of whether there has to be a retrial, which seems to be focal here, there is absolutely nothing in our appeal which asks, on behalf of the government, that there be a new trial in this case as a result of the correction of error.

QUESTION: Maybe the other side would want one.

MR. FREY: Maybe they would, and maybe they would be entitled to one; and if they request one and are entitled to one, the double jeopardy clause does not preclude that relief.

But we're not at that stage.

And I think it's important to understand the Mercado case, and to understand that we do not have here an issue of fact in any significant sense.

There is not a shred of evidence in the record in this case, nor is there anything in Judge Travia's decision, that bases itself on actual reliance by this registrant on the law of the Second Circuit, as opposed to constructive reliance on the law.

There's no reference, in fact, to reliance on the law, but to the unfairness of applying it retroactively.

And, as a matter of law, we think Mercado makes it clear that even if he did in fact rely on the prior law of the Second Circuit, he would have no defense.

What the Court said in Mercado was: Upholding the conviction of a registrant who claims to have relied on pre-existing case law would appear to be no more than an application of the settled rule that an erroneous belief that an induction order is invalid, even if based on the advice of counsel, is not a defense to a prosecution for refusing induction; and that one who refuses induction on the basis of such belief acts at his peril.

That's the law in the Second Circuit.

They talked about a possible exception, but it's that exception would be prior to the time of this Court's grant of certiorari in Ehlert, because they said that the grant of certiorari in Ehlert cast Geary into sufficient question that nobody could properly rely on the Second Circuit law.

Jenkins and Mercado were factually situated and in the identical circumstance.

Let me say further, there has been a reference to an offer of proof with respect to the draft counselor, Mr. Bibuld, now, if you will look at page 70 of the Appendix, you'll see exactly what that offer of proof was.

Mr. Carroll said that what Mr. Bibuld would testify to was that after discussing Mr. Jenkins' case with him for some time, Mr. Bibuld elicited from the registrant the fact that he was conscientiously opposed to all wars. And it was

only at this time that Mr. Jenkins became aware of his conscientious opposition to all wars.

Then there was further inquiry into this matter of the offer of proof, and on page 71 Mr. Carroll said, "I think the sincerity of the registrant is in issue."

And later on, on page 73, the Court said, "How is he going to change the facts ... with his testimony?"

Mr. Carroll said, "He's going to amplify on the sincerity of the registrant's beliefs, which I state was tested by the local board prior to any type of permissive hearing by the local board."

And the testimony of Mr. Jenkins went to the question of sincerity, and that was irrelevant to this issue.

I see my time has expired.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 12:00 noon, the case in the above-entitled matter was submitted.]

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