In the

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner
v.
NATHAN GEORGE DINITZ

No. 74-928

Washington, D.C.
December 2, 1975

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UNITED STATES OF AMERICA, Petitioner	:	
v.	:	No. 74-928
NATHAN GEORGE DINITZ	:	

Washington, D. C.

Tuesday, December 2, 1975

The above-entitled matter came on for argument at 11:12 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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 R. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN P. RUPP, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530
For Petitioner

FLETCHER N. BALDWIN, JR., ESQ., Holland Law Center, University of Florida, Gainesville, Florida 32611
For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-928, United States against Dinitz.

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

ORAL ARGUMENT OF JOHN P. RUPP, ESQ.

ON BEHALF OF PETITIONER

MR. RUPP: Mr. Chief Justice, and May it Please the Court:

The Government petitioned for a writ of certiorari in this case after the Court of Appeals for the Fifth Circuit had held en banc, with seven judges dissenting, that Respondent's reprosecution had been barred by the double jeopardy clause of the Fifth Amendment.

The procedural context in which Respondent's double jeopardy claim arose is set forth in some detail in our main brief.

In order to provide a basis for discussion of the legal principles that we believe control this case, however, and because the Government's factual statement does not accord precisely with that relied upon by Respondent, I should like to begin this morning by reviewing some of the events that preceded the termination of Respondent's first trial.

Respondent was charged in two counts of a

three-count indictment with having conspired to distribute and with having distributed a controlled substance, LSD. At the time of his arrest, he retained Jeffrey Meldon to represent him and so far as appears from the record, Mr. Meldon continued to represent Respondent without assistance until approximately five days before the trial began. This representation included the filing of several pretrial motions and investigation into the charges and the complaint -- rather, in the indictment -- of the circumstances of Respondent's arrest.

At the time trial, however, Respondent appeared with three retained attorneys, Mr. Meldon, Maurice Wagner and my brother, Professor Baldwin.

After the jury had been selected and sworn in this case, they were excused from the courtroom so that the Court could hear evidence and argument on Respondent's motion to suppress the LSD.

In support of that motion, Mr. Wagner called the Government's principal witness, Steve Cox, the agent who had purchased the LSD.

As Mr. Wagner's questioning of Mr. Cox proceeded, it became apparent that the motion to suppress was without a factual basis and that, indeed, the theory being relied upon by Wagner in support of the motion, in support of his request for a hearing on the motion, would not have

justified -- would not have warranted the suppression of the LSD.

The Court therefore became understandably annoyed with Mr. Wagner, particularly when he persisted in asking questions of Cox that bore no conceivable relation to the motion to suppress under any theory. The Court, not surprisingly, ultimately denied the motion to suppress.

Since the Government's case rests principally upon testimony of Steve Cox, the anticipated testimony of Steve Cox, Mr. Wagner's strategy was to attack Mr. Cox's credibility. His aim was to convince the Court that Mr. Cox's testimony would not be worthy of belief because Mr. Cox had been involved in some way in an extortion attempt allegedly directed at Respondent.

The principal problem with this defense was that there was not a scintilla of evidence linking Mr. Cox with the alleged extortion, a fact that neither prevented Mr. Wagner from proceeding with that line of defense in his opening statement --

QUESTION: Mr. Rupp?

MR. RUPP: Yes?

QUESTION: Was the opening statement made before any testimony was presented --

MR. RUPP: Yes.

QUESTION: -- or at the close of prosecution's

case?

MR. RUPP: It was made before any testimony was presented. The Government, Assistant United States Attorney responsible for the case, made an opening statement of just a couple of minutes on behalf of the Government. Mr. Wagner's opening statement proceeded immediately from that.

We have discussed the substance of Mr. Wagner's opening statement at pages four through seven of our main brief and the statement as whole appears in the Appendix at pages 19 through 29. I do not think that any particularly useful purpose would be served by my reviewing here the substance of the statement.

Even a cursory reading of it reveals, we submit, that the trial court's judgment that Mr. Wagner was bent upon a conscious course of baiting the court in hopes of declaring a misstrial was not only a reasonable judgment but very probably an accurate one as well.

After Mr. Wagner had been excluded from the courtroom, the court was informed --

QUESTION: I understood he was excluded from the courtroom, the building, and told, "Don't ever come back."

MR. RUPP: That is correct.

QUESTION: Is that disbarment?

MR. RUPP: Well, Mr. Wagner had never been admitted to practice before the Nothern District of Florida. He had been admitted for the purpose of this trial only.

QUESTION: So it is just barred, not disbarred?

MR. RUPP: Yes. And not by double jeopardy.

QUESTION: Do you have any other case where a man was told to get out of the building, a lawyer?

MR. RUPP: Well, I cannot cite you a specific case. It is certainly not inconceivable to me, however, that misconduct engaged in by an attorney could reach a point at which it would be appropriate to exclude the man or the woman from the courtroom.

QUESTION: I said the building.

MR. RUPP: Or from the building. Well, from the courtroom --

QUESTION: Well, why does he have to get out of the building?

MR. RUPP: Well, it seems to me that the formulation used by the court in this case to exclude Mr. Wagner from the courtroom may have been too colorful.

His purpose was to exclude Mr. Wagner from further participation in the trial, which is what he did.

QUESTION: It wasn't just colorful. If he came back in there, he would be arrested. That's not just colorful.

MR. RUPP: Had he returned to the courtroom, it is at least arguable that he would have been in contempt of court.

QUESTION: You've got a marshal to make sure he gets out of the building.

MR. RUPP: That is correct and on these facts we submit to you that that was appropriate.

Although, I hasten to add --

QUESTION: You mean, every time a lawyer annoys a judge he should be abolished from the building? Because you said all he did was annoy him. That was your words.

MR. RUPP: I -- what I said was that during the motion to suppress he had annoyed the judge. I think there was good grounds for the Court having admonished him at that point to proceed more properly.

During his opening statement, however, he was rendering the trial chaotic at best. He was refusing to comply with the Court's very clear instructions. He persisted in proceeding with a line of defense which he knew without any factual basis. It was more than mere annoyance at that point. It was a cumulative series of events that occurred in this case and they occurred rather quickly, I will concede, but they seem to me to support the judgment of the Court that Wagner was attempting to trigger a mistrial in this case.

Now, I do not believe that the Court has to agree with me on that point in order to find that Respondent's retrial was not barred by the double jeopardy clause. I think, however, that it is a fact.

After Wagner had been excluded from the courtroom, as I said, the Court was informed for the first time that Respondent was not prepared to permit his two remaining attorneys to proceed on his behalf.

The Court was informed of this decision a second time at a conference in chambers the morning following Wagner's exclusion. At the same time Mr. Meldon for the first time -- and not the Court, as has been suggested by my brother, Professor Baldwin -- stated the declaration of a mistrial might be appropriate.

The session in chambers was suspended to permit the parties more fully to consider that as well as other available options and when reconvened Mr. Meldon did in fact move for a mistrial on Respondent's behald, explaining to the Court in a statement which appears at page 41 of the Appendix that, "Your Honor, I have conferred with the Defendant and he wishes to move for a mistrial at this time and after full consideration and an explanation of the alternatives before him, he feels that he would move for a mistrial and that this would be in his best interest."

The Court then asked the Government to respond

to that motion. The Government responded, "Your Honor, we have discussed this at some length and we think that for the reasons you have already set forth in the record, a mistrial might be appropriate in this case and the Government would not oppose the mistrial."

QUESTION: Mr. Rupp, does the record show whether the alternatives that were presented by the judge included the possibility of a continuance?

MR. RUPP: Yes, it does show that. At the session in chambers the morning following Mr. Wagner's exclusion, the Court not only said the various options that were available including the continuance, but also explained rather fully his reasons for having excluded Mr. Wagner.

Now, the Court of Appeals, the majority of the Court of Appeals in considering the possibility of a continuance, concluded that a continuance would not have been proper in this case because of the Defendant's -- Respondent in this Court -- position that he would not permit either Mr. Meldon or Professor Baldwin to represent him at trial so he would have been in a position then of having to get entirely new counsel and sufficient time would have to have been afforded to permit him to get up the speed on the case. It was --

QUESTION: Well, as a matter of fact, when he

was actually tried, he tried it himself.

MR. RUPP: That is correct. Now, that would have required only a minor continuance.

At the time, though, although the Court knew that Respondent was a third-year law student, there was no indication that he was prepared to proceed pro se.

QUESTION: Well, was Respondent given the option of electing to have a continuance?

MR. RUPP: The session in chambers was suspended to permit them to consider not only the propriety of a mistrial at that point, but other options.

QUESTION: Right.

MR. RUPP: The record does not indicate what was discussed by Mr. Meldon, Professor Baldwin and Respondent. I think it is a fair assumption that all available options were discussed.

What we know from the record is that when the session was reconvened, Mr. Meldon stated that he had discussed the available options -- I assume including a continuance, though I cannot say categorically -- and they had decided, that is, Respondent had decided that his best interests would be served by the declaration of a mistrial at that point.

QUESTION: You do have some problem with a continuance, once a jury has been impanelled, don't you?

Because you couldn't simply go to another jury. It would have to be at least during the life of that jury panel that the case was retried.

MR. RUPP: That is correct and I don't know what the life of this jury was, although I perhaps should add a further point here and that is that the Court was concerned about publicity that had attended this case, publicity in the press and at the time that he ultimately declared a mistrial, he referred specifically as posing, in his view, a problem.

When this case was called for trial, an abnormal number of press people appeared and that increased the judge's apprehension.

So that permitting the jury to go free -- that is, not sequestering them in this case, would have posed more serious problems that even the normal case and that is apart from the problem of the life of the jury.

Prior to the second trial, Respondent moved for the dismissal of all charges against him on grounds of double jeopardy and alternatively, to have Mr. Wagner reinstated. Both motions were denied.

The Fifth Circuit appealed his ensuing conviction at a trial in which he proceeded pro se and the Government's petition to this Court followed.

Although this Court has repeatedly refused to

fashion fixed and inflexible rules to govern the consideration of double jeopardy claims, the decided cases do provide some guidelines that are responsive to and reflective of the policy subsumed by the double jeopardy clause.

One of the most fundamental of these guidelines was that referred to by Mr. Justice Harlan in United States versus Jorn and that is, that where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by a defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.

If the Respondent's first trial leave some questions without a satisfactory answer, they do -- they are sufficient to establish, it seems to me, both the appropriateness generally of attaching significance to a defendant's motion to have his trial ended with a mistrial and the correctness of the holding here that any barrier to Respondent's prosecution was removed by his decision to move for a mistrial.

The history of the double jeopardy clause and the instances of its application in previously-decided cases show that the policies that the double jeopardy clause was designed to further conceived of the clause as a buffer between the state and individual defendants and to

protect the individual against harassment and the abuse of the judicial process.

The clause embodies our commitment to repose following an acquittal,preventing excessive trials following a valid conviction as well as multiple punishment for the same offense and maximizing the chances fairly of resolving criminal charges in a single proceeding.

But this Court has also recognized that the double jeopardy clause cannot be used to frustrate legitimate societal interests in punishing those, in bringing to the bar of justice those who are charged with crime and that the interests of society and of criminal defendants are, in some circumstances, best served by permitting defendants to move for a mistrial and permitting courts to grant such motions.

In the United States versus Perez this Court held that a second trial would not offend the double jeopardy clause if the jurors at the first trial had been unable to agree upon a verdict and in United States versus Ball and United States versus Tateo, that a second trial was permissible if the first trial, if the conviction rendered at the first trial, was reversed on direct appeal or in a collateral proceeding.

Permitting a defendant to move to terminate his trial and giving discretion to a court to grant such a

motion in the face of perceived prejudice is consistent with these rules and simply acknowledges the unfairness, the inefficiency of requiring defendants to go forth in the face of perceived prejudice.

There are limits, of course, and the limits have been stated in cases such as Gori versus the United States, Downum, Jorn and so on where the defendant moves from his trial, retrial is not permitted, if the precipitating event is attributable to judicial or prosecutorial overreaching. That is, action by the court or the prosecutor designed to avoid an acquittal by the jury then empanelled.

QUESTION: Were either Downum or Gori motions by the defendant for mistrial?

MR. RUPP: No, in both of those cases, the mistrial was declared by the court sua sponte.

QUESTION: We have never held in this Court, have we, after the defendant himself moved for a mistrial, that the reprosecution was barred by double jeopardy in any particular case?

MR. RUPP: No, you have not. What you have said, as I just noted, you have left open a case in which if there were credible evidence of judicial or prosecutorial overreaching, that would present a case in which it would not be appropriate to attach controlling weight to

the fact of a defendant's motion for a mistrial.

QUESTION: How do you read that language as overreaching? As meaning to deprive the defendant of a very possible favorable verdict from the jury?

MR. RUPP: That is correct. It is a sense by the court of the prosecutor, in my judgment, that the case is not going well for the side that that person would wish to prevail and the triggering of a mistrial would forestall an adverse verdict.

QUESTION: That is, by deliberate misconduct on the part of the prosecutor, you mean?

MR. RUPP: That is correct. That is correct.

QUESTION: Could you refresh my recollection just a moment? What were the facts in Jorn? Who moved the mistrial there? Was that sua sponte?

MR. RUPP: It was sua sponte as well, that's right.

QUESTION: That's what I thought.

QUESTION: Mr. Rupp, what happened to the rule that in order to have double jeopardy you not only had to have the jury, you had to call the witness. What happened to that rule?

MR. RUPP: Well, that is still the rule in cases tried to the court. The British rule, of course, is that jeopardy does not attach until the end of the trial. The

rule in the United States has been since Downum, since Gori, that in trials before a jury jeopardy attaches at the moment the jury is empanelled and sworn, although the Court has also said that that is the beginning, not the end of the analysis and I think that is correct.

The wisdom of permitting a defendant to move for a mistrial in the fact of perceived prejudice and not requiring him to go to an ultimate verdict would appear to me to be almost beyond dispute.

As Mr. Justice Harlan noted in the United States versus Tateo, "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."

It is significant, I think, as well, that from the standpoint of a defendant, it is doubtful, as Mr. Justice Harlan noted, that the appellate courts would be as zealous as they are now in protecting against convictions rendered in part on the basis of prejudicial errors if they knew that reversing the convictions would put a defendant beyond the reach of further prosecution.

If retrial were barred following the declaration of a mistrial but permitted following the defendant's successful appeal, I think that the -- what we must expect is the trial courts would deny such motion in the vast

majority of cases and perhaps for very much the same reasons as Mr. Justice Harlan and his court felt, that the result reached in Tateo was necessary.

The majority of the Fifth Circuit Court of Appeals expressly declined to hold in this case that the court's actions in excluding Mr. Wagner were the product of judicial overreaching. That is, action by the court designed to avoid an acquittal.

And Respondent has never contended in this Court or prior to this time that the Court was guilty of overreaching.

Although we have not urged this Court to hold that the exclusion of Wagner was not error, neither is it at all important to the position we have taken in this Court. That is, that Respondent's reprosecution was not barred by the double jeopardy clause.

Even if error, the Court's exclusion of Wagner was not unlike the multitude of other errors that occur during criminal trials.

In fact, I should like to note in this regard that during the conference in chambers the morning following Mr. Wagner's exclusion, Mr. Meldon and my brother, Professor Baldwin, stated that in their judgment the exclusion of Wagner had been proper.

Mr. Meldon stated, after spending considerable

time looking into the law, "It is my opinion and I believe the opinion of Professor Baldwin, that the action of the Court yesterday was well within the discretion of the Court and would not be reversed by the Court of Appeals."

Professor Baldwin subsequently informed the Court, "After a full night's research it is my conclusion that the Court's action was proper."

These are the people, with the Court who were in the best position to assess both the effect of Mr. Wagner's opening statement on the jury and they both concluded that the exclusion of Mr. Wagner at that point at least did not constitute a reversible error, had not been an abuse of discretion.

QUESTION: How much weight do you accord to the fact that the defendant moved for a mistrial?

MR. RUPP: I attach very significant weight to that.

QUESTION: Do you think you would have a different position if the Court itself had, on its own motion said, "In view of the circumstances here, I declare a mistrial"?

MR. RUPP: Declare a mistrial. Ultimately, no. Ultimately I think the same result would be reached.

QUESTION: What would be reached now?

MR. RUPP: Now? Okay. If this case were being

measured pursuant to a manifest necessity standard as we argued in our main brief, we believe that the declaration of a main trial by a court sua sponte at the point at which the mistrial was declared was justified by manifest necessity in the ends of public justice.

QUESTION: Now, that -- and I suppose you would arrive at that result whether you considered the exclusion to be error or not.

MR. RUPP: That is correct. We would arrive at that conclusion.

I think that the Fifth Circuit, the majority of the Fifth Circuit fundamentally misconceived the manifest necessity standard by looking at the circumstances that existed at the time Wagner was excused rather than at the circumstances that existed at the time the declaration of a mistrial was being considered.

By definition, if manifest necessity requires a particular act to be taken, that action is not error, so we wouldn't be talking about error at all in this case.

QUESTION: Let's assume that it was error and then make your manifest necessity argument. Wouldn't it be just that the judge realized that it was error and that there was inevitable error in the record and that rather than waste everybody's time and energy and money --

MR. RUPP: It was best to abort the trial. Yes,

that would be our issue.

QUESTION: That is what you mean by manifest necessity?

MR. RUPP: Yes, that is correct.

QUESTION: I gather that manifest necessity is not the same when the defendant moves for a mistrial, say, as when a prosecutor moves for a mistrial. Is it?

MR. RUPP: No, and this Court recognized that there is a very significant difference when it is the defendant who moves to take the trial away from the tribunal then empanelled, the jury then empanelled, and the court acts sua sponte.

Now, in my response to Mr. Justice White, we believe very strongly that the manifest necessity standard, the sua sponte standard, would have warranted the declaration of a mistrial and would not have barred Respondent's reprosecution in this case.

QUESTION: Your brother argues that the motion was involuntary.

MR. RUPP: Yes.

QUESTION: But I take it your response would be, even if it was, there is no error in declaring a mistrial because it would have been quite valid even if there had been no motion.

MR. RUPP: That is correct.

that is not to say that the motion made by the Respondent in this case was involuntary.

There were a whole range of options which the Respondent could have pursued other than moving for a mistrial. He could have permitted Professor Baldwin and Mr. Meldon, who had represented him until five days before trial began, to represent him at trial.

QUESTION: Let me interrupt you, Mr. Rupp. Is the test, under the language of Justice Harlan in Tateo and Jorn, whether the motion for mistrial on the part of the defendant is involuntary or not, or isn't it whether it is in response to the sort of overreaching by the prosecution that you mentioned a moment earlier to deprive the defendant of a very possible favorable verdict?

Those are two different things, I would think.

QUESTION: Yes, they are. It is -- it seems to me very difficult to suggest, as Respondents have -- and Respondent has -- and require to do, that the guilty plea entered by the defendant in Tateo was more voluntary than the motion for a mistrial entered by the Defendant in this case.

The guilty plea in Tateo was subsequently found to have been coerced. Now, whether Tateo was rightly or wrongly decided, this is -- there is a good deal less coercion, in fact, no coercion in this case.

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The guilty plea in Tateo was subsequently found to have been coerced. Now, whether Tateo was rightly or wrongly decided, this is -- there is a good deal less coercion, in fact, no coercion in this case.

The Defendant, as I was --

QUESTION: Well, Mr. Rupp, when the Defendant makes a motion, does that introduce into the scales an element of waiver?

MR. RUPP: Well, yes, but it is not waiver -- well, let me back off a minute. In a number of cases, this Court has attempted to come to grips with a theory for double jeopardy cases of this sort and Mr. Justice Holmes at one point suggested a continuing jeopardy theory.

Other courts have found that a waiver theory would be appropriate.

I think Mr. Justice Frankfurter appropriately decided that those were rather arid exercises and what the Court should be about in cases of this sort is looking at the policies that are subsumed by the double jeopardy clause.

The circumstances that existed at the point the mistrial was either declared by the Court sua sponte or pursuant to a defense motion and then decided whether the double jeopardy clause was properly invoked.

QUESTION: Well, then does that analysis -- that much significance, then, ought not to be attached to the mere fact that the Defendant made the motion, if the focus is to be on the policies --

MR. RUPP: Well --

QUESTION: -- served by the double jeopardy clause.

MR. RUPP: Perhaps. It seems to me that since one of the policies of the double jeopardy clause is to maximize the opportunity that a criminal proceeding will be brought to judgment in a single proceeding and defendants do have an interest which we acknowledge in having a cause determined by a particular tribunal, the fact that the defendant would move for a mistrial is an indication -- and I think a rather unimpeachable one -- that he regards his opportunity to proceed as overweighed by other considerations.

In this case, it was overweighed by considerations such as the fact that Mr. Wagner had proceeded to inform the jury of a line of defense that he simply could not prove and no evidence along those lines would have been admissible at trial.

The Court had been required to excuse the jury three times in the course of only a few moments. Mr. Wagner had been admonished. The decision by Respondent in this case to try again on another day seems to me to have been a legitimate and reasonable decision under the circumstances and clearly not coerced.

Now, I would also like to mention that even if one concedes that the choice that Respondent had to make in this case was a hard choice, it was a case that was presented to him in no small part because of the misconduct of his own

attorney. This is not a case in which a Defendant sat idly by while events passed him by without him being able to affect them. Here it was defense misconduct that brought this trial to the impasse. And in that regard, I'd like to bring to the Court's attention a recent opinion written by Judge Friendly in which he discusses a situation not unlike the situation with which we have been presented here.

I have given a copy of this opinion, United States versus Gentile and La Posina and I will provide copies to the Court through the Clerk since it is not yet reported.

In Gentile, as in this case, there is substantial -- there was substantial indication that defense attorneys were attempting to use the double jeopardy clause as a sword -- if you will permit me to use that -- engaging in rather sharp practices in hopes of triggering mistrial while at the same time having the double jeopardy clause available to appeal to when the reprosecution occurred.

For the reasons stated by Judge Friendly, for the reasons stated in our main brief, we think that ought not to be permitted to occur.

I'd like to save the few remaining moments.

MR. CHIEF JUSTICE BURGER: Mr. Baldwin.

ORAL ARGUMENT OF FLETCHER N. BALDWIN, ESQ.

MR. CHIEF JUSTICE BURGER: Before you get underway, let me put this question to you.

Given all the circumstances shown by this record and the denial of the motion for mistrial by the judge, do you think there would have been a pretty good case for reversal of his action denying mistrial, had a conviction of guilty followed?

MR. BALDWIN: Had the Defendant been found guilty, your Honor/

QUESTION: That is the only occasion it would arise.

MR. BALDWIN: And there is no attorney present or his chief trial counsel has been removed?

QUESTION: No, no, a lawyer has made a motion for a mistrial and the judge after considering it denied it and then the man is tried and found guilty.

MR. BALDWIN: If, indeed, that occurred in the instant case and if the judge elected as his option to continue on with the trial and to force the only other retained counsel, Mr. Meldon, to proceed, then we would have had a Sixth Amendment right to question issue -- right to counsel issue. We would not at that juncture have had a Fifth Amendment double jeopardy question. That is correct, your Honor.

QUESTION: Well, there would be no double jeopardy in that case at all, would there?

MR. BALDWIN: That is correct.

QUESTION: But you would have -- you say you would have a good case on -- for the judge to grant the mistrial.

MR. BALDWIN: It is arguable that we would have -- at least have a case on the Sixth Amendment right to counsel.

QUESTION: Well, how would you decide the issue?

MR. BALDWIN: I am sorry, your Honor, how would you decide -- ?

QUESTION: How would you decide it? Would you have thought it was error to continue the trial or not?

MR. BALDWIN: I would -- I think -- yes, your Honor, it is clearly error. It struck at the heart of the Sixth Amendment right to counsel.

QUESTION: So it is not just arguable and in your opinion it would have violated his right to counsel.

MR. BALDWIN: In my opinion it would have violated his right to counsel and it would appear that this is the opinion of the en banc court below, the Fifth Circuit.

QUESTION: So in your view, it is fair to judge this case -- or, we must judge this case on the assumption that the judge had committed error in excluding the lawyer.

MR. BALDWIN: Your Honor, it would appear that the heart of this case involves the Sixth Amendment right to counsel. It involves the Sixth Amendment right to counsel because the only retained trial attorney present in this case was the attorney that was removed.

The Defendant had hired one other attorney, not two. He had hired one other attorney to make sure that all

papers were filed until he could retain an experienced trial counsel and this is the heart of the Fifth Circuit's opinion below.

Mr. Chief Justice and May it Please the Court:

The Fifth Circuit, en banc, focused in upon the abuse of the trial process by the judge below and in focusing in on the abuse of the trial process, the Fifth Circuit concluded that the court below cut the heart out of Sixth Amendment right to counsel and that court removed the only trial attorney available to the Defendant over the Defendant's objection and not only removed him -- as Mr. Justice Marshall indicated, but had two marshals gingerly escort him from the courtroom, from the grounds, and left him off in the parking lot across the street.

QUESTION: Is it usual in the Fifth Circuit, counsel, if you know, for them to have a rehearing en banc and then have no oral argument?

MR. BALDWIN: Yes, your Honor, that is the common practice in the Fifth Circuit, to my knowledge.

QUESTION: Reconsideration en banc but not rehearing.

MR. BALDWIN: That is -- as a matter of fact, your Honor, we requested oral arguments en banc and were denied. The motion was denied.

The Government, in this case, stretches two points,

two major points that I would like, in the time that I have, to discuss.

First, that the Defendant, with his second retained counsel, moving for mistrial or at least the Hobson's choice, as the court below noted, in moving for mistrial, waived his right to plead double jeopardy in an appellate court.

And second, aside from that, and barring whether the case involved a waiver or not, assume arguendo it did not involve a waiver. The doctrine of manifest necessity or the ends of public justice prevail.

The two major cases that the Defendant will cite in support of his proposition, aside from the case that I was giving yesterday afternoon, which I will discuss later, are Tateo, and Illinois against Somerville, which I would like to discuss in detail.

In response to his first point, the Government argues that the mistrial was a direct result of the Defendant's motion and when a motion by a defendant is made for mistrial, that assumes to waive any double jeopardy claim that a defendant might otherwise have, regardless of the fact that there might be prosecutorial or judicial error.

QUESTION: Was that discussed before the judge in chambers?

MR. BALDWIN: The question of double jeopardy?

QUESTION: Yes, sir.

MR. BALDWIN: No, your Honor, the question of double jeopardy was not discussed in chambers for the simple reason that we were trying to get the attorney back into court. We talked --

QUESTION: But when you -- couldn't you have said, well, now, look, I don't want to make a motion for a mistrial because I am going to get the double jeopardy problem.

You could have at least raised it.

MR. BALDWIN: Although it is not before you, we did send the judge a telegram that afternoon and a telegram to the Fifth Circuit of the Court of Appeals which was docketed in the Fifth Circuit, 73-1395 and the telegram stated the Fifth and Sixth Amendment objections to the --

QUESTION: Was that before or after the motion was made?

MR. BALDWIN: That was before the motion was made. That was after 2:40 p.m. on the afternoon of February the 15th, 1973.

The motion for mistrial occurred at 10:00 a.m. February the 16th, 1973.

QUESTION: You say the telegram raised both Fifth and Sixth Amendment objections.

MR. BALDWIN: It stated that the judge had created error and the error would involve Fifth and Sixth Amendment.

Although, Mr. Justice Rehnquist, we wished to concentrate upon the right to counsel at that particular time because, as Mr. Chief Justice Burger noted, initially with this hypotehtical, double jeopardy was not at issue at that particular point.

QUESTION: And when you mentioned the Fifth Amendment, did you have double jeopardy in mind?

MR. BALDWIN: We had double jeopardy in mind. We did not wish to use double jeopardy because this was -- or at least the Defendant felt, as you can tell by the record, very strongly that this was an aggressive trial attorney and please keep in mind, your Honor, that the Defendant started with a paid trial attorney and ended as a pauper, with no attorney.

We -- the main --

QUESTION: How is the telegram relevant to this case even outside the record if, on the following day, a motion was made by the defense for a mistrial without raising any of these same questions or reservations?

MR. BALDWIN: The motion made for mistrial, your Honor, the following day we argue, was not a motion at all because there were no options to the Defendant at that particular point in time.

QUESTION: Well, where in the record do we find that counsel stated that ?

MR. BALDWIN: Your Honor, throughout the record, especially page 38 of the record, counsel had time and time again requested the Court to reinstate Mr. Wagner.

Page 38, the Court indicates that he would not.

QUESTION: Well, this is long before the motion for a mistrial, isn't it ?

MR. BALDWIN: This is before the motion for mistrial.

QUESTION: Where in the Appendix do we find the mistrial motion itself?

QUESTION: Page 41.

MR. BALDWIN: The mistrial motion itself occurs at page 41, the bottom of the page where Mr. Meldon requested the Court to move for a mistrial.

It is our contention, however, that by that time there was no available option left to the Defendant. He could not proceed further with his case. He did not have an attorney to proceed with the case.

The Court, at the top of page 41, said that he would not reinstate Mr. Wagner, would not let us go to the Fifth Circuit Court of Appeals. He would not allow the Defendant to continue in forma pauperis.

QUESTION: Mr. Baldwin, on page 38 of the Appendix when you stated that the court's action was proper --

MR. BALDWIN: Yes, your Honor.

QUESTION: -- what action of the court were you

referring to at that time?

MR. BALDWIN: Your Honor, when the Court removed what Mr. Wagner from the courtroom,/we were focusing in upon was, how do we get him back in?

And unless we could walk him back in and then have him arrested, we could think of no way to get him back in. We called the Fifth Circuit and asked whether they knew how we could get him back in.

They said the only way we can think of would be through an interlocutory appeal which they would not take unless the judge -- trial judge would join in.

In the alternative, walk him back into court, which he would not do.

Consequently, we threw up our hands and, in effect, concluded that there is nothing more we can do. The Court was proper, at least at that juncture, in terms about trying to have Mr. Wagner reinstated. The whole --

QUESTION: The Court was proper in having excluded Mr. Wagner ?

MR. BALDWIN: No, your Honor, that is an unfortunate sentence, at least the way it came out.

QUESTION: But it came out the same way from the other counsel also.

MR. BALDWIN: That is correct. The other counsel felt that way.

QUESTION: The action of the Court yesterday was well within the discretion of the Court and would not be reversed by the Court of Appeals.

MR. BALDWIN: My main concern at the time, your Honor, and the purpose for the statement was to attempt somehow to get Mr. Wagner in. I did not know how to do it. I don't know how to do it today.

QUESTION: Well, the only relevance, so far as I am concerned at the moment, of what you said then was that if you and your cocounsel thought that the action of the Court was proper, how could you say that -- how could you continue to press for the reinstatement of Mr. Wagner and say you thereby were deprived when the Court denied that renewal of your motion of all options ?

MR. BALDWIN: Your Honor --

QUESTION: You agreed the Court's action had been proper. That is an awkward way to put it but I think you understand my point.

MR. BALDWIN: Yes, your Honor.

Let me go back, if I may, for a moment. You must keep in mind that as we spoke -- talked in the Fifth Circuit below -- once the -- if I may use the term -- the wrath of the trial judge focused upon Mr. Meldon after Mr. Wagner had been removed, on page 33 of the record, the judge said, "Mr. Meldon, in effect, you are going out, too, unless you

can convince me that you didn't have anything to do with it. I am going to treat you the same way I have treated Mr. Wagner."

And although the Court uses the terms in the minutes below, "disbarred Mr. Wagner," as the Government points out, "barring" would have been more proper but the Court certainly could have disbarred Mr. Meldon.

Mr. Meldon acted or from here -- from the point page 33 on, when the focus shifted to Mr. Meldon, he acted under a cloud. From page 33 on --

QUESTION: Did you say the judge could disbar him?

MR. BALDWIN: He said he could, your Honor.

QUESTION: Well, there is a case that says he can't, In Re Abes.

MR. BALDWIN: Yes, your Honor. If --

QUESTION: I just want you to remember that.

MR. BALDWIN: -- he could disbar him if there are circumstances that would support disbarment. Disbarment, we would argue --

QUESTION: But Abes says you can't disbar him without a hearing.

MR. BALDWIN: You must -- that is the final resort. Contempt would -- as the Fifth Circuit pointed out, there are other grounds for punishment of -- ways to punish an attorney short of the drastic act of disbarment.

I would also point out, in response to Mr. Justice

Powell's question, that from page 33 of the record on, your Honor, the Defendant -- I'm sorry, Mr. Meldon kept asking to be removed from the case. Yet this will be the same attorney that ultimately will move for a mistrial. He stated immediately that "I don't want to proceed. The Defendant doesn't want me to proceed."

He was, at that particular juncture, excess baggage, as it were.

Now, the Government argues that once -- that the trial court was never placed on notice of these other factors, that Mr. Meldon did not want to proceed, that he wasn't prepared, being the only other hired counsel that he could not proceed and I would point out to you, as the decision en banc seemed to stress, that this is an ongoing act, that it wasn't necessarily at the point in time at which Mr. Wagner was removed that we focus or that the court focused, it was the continuing act that culminated in the next morning, in the removal of the jury by dismissing that jury and what was the ongoing act?

First, it was the removal of Mr. Wagner, the afternoon of February the 15th, that would involve Sixth Amendment questions.

Secondly, it was the refusal of the trial court to, one, even consider options as far as the removal was concerned which goes to the heart of Jorn, simply a removal and secondly,

when it came ultimately to the court's attention that Mr. Wagner was, indeed the only trial counsel available, the court refused to take additional steps, or any steps, to correct that initial error.

Now, although the Government says it was unforeseeable, it was quite foreseeable because we had a length of time, at least 18 hours, in which the court could have considered alternatives to the drastic act of removing that first jury.

QUESTION: Mr. Baldwin, as I read the transcript on page 41, right before the motion for mistrial or where the court is in chambers the next day, the judge gives the impression, at least, of being openminded as to other possibilities.

He says, "Have you gentlemen any further thoughts about how we should proceed in this matter?

And then Mr. Meldon comes forth and says, "Your Honor, I have conferred with the Defendant and he wishes me to move for a mistrial."

MR. BALDWIN: Yes, your Honor, that is correct.

Although the judge had earlier, at page 40 of the record, indicated that he was thinking of moving or considering moving for a mistrial because the ends of public justice, neither the Government nor the --

QUESTION: Be that as it may, it was the Defendant

that moved for a mistrial.

MR. BALDWIN: No, your Honor. Well, the Defendant mouthed a motion for the mistrial through an attorney who was no longer capable of representing the Defendant.

At the top of the page the court really stressed its position by saying it would not enter any orders allowing Mr. Wagner to return. It would not consider curative alternatives.

QUESTION: Well, you were associated with Mr. Meldon in the trial of this case in the district court and you are here now telling us that he was no longer capable of representing him?

MR. BALDWIN: When the -- Mr. Meldon said, your Honor, that he did not want to represent the Defendant once Mr. Wagner was removed.

Mr. Meldon told the court and it is in the record, that he did not prepare the opening statement. He did not prepare the trial.

QUESTION: But he did make the motion for mistrial.

MR. BALDWIN: He made the motion for mistrial, that is correct, your Honor, that is --

QUESTION: And he made it after conferring with the Defendant.

MR. BALDWIN: There is -- he argues that he -- he does state that he conferred with the Defendant.

I would suggest, your Honor, that if, indeed, there is a question of a valued right such as double jeopardy, that the trial judge himself in light of the facts -- of the peculiar facts of this particular case, should himself have conferred with the Defendant as to whether the Defendant wished to waive this right.

QUESTION: None of our cases have ever held that.

MR. BALDWIN: There are lower court cases, your Honor --

QUESTION: I said, "None of our cases."

MR. BALDWIN: That is correct, your Honor.

I do have in brief lower court cases that do suggest and hold that.

But I -- the heart --

MR. CHIEF JUSTICE BURGER: We'll resume there, Mr. Baldwin, at 1:00 o'clock.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:00 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Baldwin, you may proceed.

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

It is important for me to stress the fact that the error in the instant case couldn't be cured at any time prior to the dismissal.

The failure of the trial judge to cure that error, the en banc decision states, was the culmination of an abuse of judicial discretion.

The abuse of judicial discretion was the combination of the removal of the trial counsel coupled with the refusal to consider alternatives to that drastic act when alternatives were presented to the court and ultimately avoiding the trial.

As the trial court itself noted in its order in the Petitioner's appeal page 35a, Dinitz was essentially without counsel.

Certainly he was essentially without counsel because the court had just escorted counsel to the parking lot.

QUESTION: Yes, but the trial judge thought he was correct in doing so and everybody in sight agreed with him, including the remaining counsel.

MR. BALDWIN: The trial judge -- you are correct, your Honor, thought he was correct in doing so but upon

reflection, when it was brought to the court's attention, that there are other ways of curing the error, short of aborting the --

QUESTION: He didn't think it was error. Nobody suggested it was error then, did they?

MR. BALDWIN: No, your Honor, but the experienced trial judge, I submit, should not have reached the point where he would have removed the attorney for an act that is not considered to be very drastic at all.

As a matter of fact, in footnote 11 of the panel decision below, the majority of the panel concluded that perhaps it was a fact distinction between the trial judge, a fact misunderstanding between the trial judge and the defense counsel.

Keep in mind that from the record the trial judge never allowed the defense counsel to examine the FBI agents that he had called on proffer.

The jury was out of the room at the time.

On two occasions, at the same point in time, the defense counsel made an objection. The trial judge would not permit the objection to be made.

There is no way of knowing what the objection would have been.

QUESTION: Are you suggesting now that on this record it shows that the statements made in the opening

statement by defense counsel were supportable statements?

MR. BALDWIN: It is difficult to say, your Honor. The --

QUESTION: I hadn't thought so, from looking at the record.

MR. BALDWIN: There is nothing in the record to indicate that the jury was ever apprised of these statements. The Government very promptly had the jury removed on three different occasions; the last time that the jury was removed [was] never to return.

The statements occurred on proffer when the judge asked the attorney to now present what he was going to tell the jury. The only statement that the jury heard was, "This is the case of the Incredible Witness."

The Government promptly stopped him from going further. The jury was sent -- removed.

So there is no evidence in the record at all, your Honor, that the jury was infected in any way whatsoever other than the coming in and out of court on three different -- or two different occasions.

QUESTION: When the motion for a mistrial was made by the defense counsel, would you agree that the judge was presented with a dilemma that was not easy to dissolve?

MR. BALDWIN: Clearly, your Honor, the judge --

QUESTION: That is indicated by the responses of

yourself and your cocounsel expressing the view that the judge's action up to that point had been correct.

MR. BALDWIN: The judge, admittedly, was faced with a dilemma but it was a dilemma of the judge's own creation. It wasn't the Defendant's creation. The judge removed an attorney for no apparent reason and then said, what do we do now?

QUESTION: For no apparent reason?

MR. BALDWIN: It -- it -- as far as the jury is concerned, the --

QUESTION: As far as the jury is concerned.

MR. BALDWIN: Yes, your Honor.

QUESTION: But not without reason.

MR. BALDWIN: Well, certainly, it is difficult to say that you -- a trial should be aborted because the trial attorney offends the sensibilities of the trial judge, which is precisely what happened here.

QUESTION: Is that the only way you characterize this conduct of counsel, that he merely offended the judge?

MR. BALDWIN: I can't see where the conduct of the counsel in any way affected the jury, which I think is the key.

QUESTION: Then why did both of you concede to the court separately that the judge's action was correct?

MR. BALDWIN: What I had in mind, what I was trying to tell the court and at two different occasions asked the

court to reinstate was that here on -- from this point on, we don't know what to do. We want that attorney back in the courtroom. He has been paid for. The Defendant is now a pauper. We don't know what to do.

We get no relief from the Fifth Circuit. The judge refuses to allow any type of an appeal on the question and the judge refuses to reinstate him, which were the two options.

As far as we could see, and the voice inflection is not there, the judge was correct. We didn't know how to get him back into court.

QUESTION: Well, the judge then rested on the matter overnight, as I recall this record.

MR. BALDWIN: Yes, your Honor.

QUESTION: And then the next morning came back and asked you if you had -- you and your cocounsel -- if you had any suggestions or words to that effect.

MR. BALDWIN: We were --

QUESTION: Did you then advance some alternatives to him?

MR. BALDWIN: Your Honor, we -- before going in asked him would he reconsider and reinstate Mr. Wagner?

He refused.

The alternatives advanced to him appear at the top of page 41, not at the bottom of page 41 and the only

alternatives at that juncture, your Honor and today, as far as I can tell, the only alternatives open, which goes to the Chief Justice's issue of dilemma, was either reinstate the counsel unless the judge could give clear and convincing reasons for why he dismissed him in the first place, or, in the alternative, allow an appeal at that point, an interlocutory appeal, to determine the correctness of the judge's action.

QUESTION: Well, couldn't he continue the trial as it was?

MR. BALDWIN: He could have continued the trial as it was, admittedly and that would not have produced a double jeopardy issue.

QUESTION: And if he continued the trial, the court would hear argument that it would call for an automatic reversal on the Sixth Amendment.

MR. BALDWIN: I'm sure --

QUESTION: According to your article, is that your argument?

MR. BALDWIN: My argument would have to be that we would hope that that would cause a reversal under the Sixth Amendment's right to counsel.

QUESTION: And you would get, what? A new trial?

MR. BALDWIN: If the judge had continued the trial --

QUESTION: Then you'd get a new trial.

MR. BALDWIN: Then we would have gotten a new trial.

QUESTION: And -- but now your man goes free.

MR. BALDWIN: The man goes --

QUESTION: That's your position.

MR. BALDWIN: Yes, your Honor, the man goes free.

QUESTION: So you get more this way than you would have gotten the other way.

MR. BALDWIN: Only because the Fifth Amendment demands that, your Honors; since 1824 the Fifth Amendment has demanded that. It is another constitutional right involved here.

It is an abuse of discretion by the trial judge.

You are absolutely correct and the Chief Justice was --

QUESTION: How can the abuse of discretion make you agree to a mistrial?

MR. BALDWIN: There was nothing else to do. We didn't --

QUESTION: Well, you just said, you could have gone on to trial.

MR. BALDWIN: -- want -- the Defendant did not want us to go on to trial. The question was, could the judge --

QUESTION: Well, if the Defendant didn't want to go on trial, what did the Defendant want?

MR. BALDWIN: The Defendant --

QUESTION: A mistrial.

MR. BALDWIN: No, your HOnor, the Defendant did not.

QUESTION: Well, that's what you told the court.

MR. BALDWIN: That,s what --

QUESTION: You said you had talked to the Defendant and he had agreed that he would make the motion for a mistrial.

MR. BALDWIN: There is no evidence that the Defendant actually agreed to the motion for the mistrial. The Defendant --

QUESTION: Well, I must take your cocounsel's word. He said so.

MR. BALDWIN: That is correct, but he said --

QUESTION: Well, are you going behind what your cocounsel said? You first want to go behind what you said. Now he wants to go behind what the cocounsel said.

MR. BALDWIN: You have to take it in context of who the cocounsel was at that point. Look, the judge had removed an attorney and the judge had also removed a theory of defense. The cocounsel could not present a theory of defense.

QUESTION: Was the Defendant there when the statement was made?

MR. BALDWIN: No, your Honor.

QUESTION: He wasn't there?

MR. BALDWIN: The Defendant was not in chambers when the statement was made. No, your Honor.

QUESTION: Did you object to that?

MR. BALDWIN: It happened so fast -- no, your Honor, Mr. Meldon did not object to that. Didn't -- didn't -- No.

In the brief time I have remaining, there are two cases that I would like to focus in upon. The Government cites Tateo versus United States as a case that would be controlling in this matter.

Very briefly, I would like to focus in upon Tateo, if I may, to tell you it is not similar to the instant case in that in Tateo, regardless of the courtroom conversation between the judge and the attorney, as Solicitor General Cox pointed out in the brief for the Government in that case, the Defendant could still go to the jury with effective assistance of counsel.

The Defendant had a choice. He could have disregarded the judge's attitude and then appealed the sentence, assuming he was found guilty, or he could have gone to the jury and ended it then and there in an acquittal.

The jury had in no way been infected by the statement of the judge to the trial counsel.

Indeed, the only thing that Tateo presents, perhaps, is the deprivation of a fair sentence, not the

deprivation of a fair trial and as this Court pointed out in footnote 11 in Jorn, it stressed in footnote 11 in Jorn, that since Tateo was not foreclosed of options, one going forward or two, appealing -- one, going forward, the jury had in no way been infected.

The case in Tateo is different because in the instant case, the Defendant had been crippled since his trial attorney had been removed from the case.

One other case that the --

QUESTION: On the other hand, he had not been crippled by the opening statement remarks made by counsel. You have to draw that distinction.

MR. BALDWIN: He had not been crippled by what, your Honor? I'm sorry.

QUESTION: By counsel's statement, the opening statement to the jury which the judge found offensive and unsupported.

MR. BALDWIN: He had not been crippled by that, no, your Honor, as far as I can tell.

QUESTION: So you say the one thing worked to his benefit. The other to his detriment.

Or, the one did not work to his detriment, but the other one did.

MR. BALDWIN: The Court very carefully removed the jury and the Court did not focus in upon that particular

statement when the Court had counsel ultimately removed.

The Court focused in upon the fact that the evidence was not admissible and that counsel had not discussed it with the FBI agent.

QUESTION: Well, was not the statement about the case of the "Incredible Witness" made before the jury?

MR. BALDWIN: It was made before the jury, yes, your Honor. But the Government promptly objected and the Court in its order, in Appendix A to the Government's Petition, does not mention that in any detail but, again, focuses in upon the FBI and the fact that the defense counsel was going to impugn the integrity of the chief Government witness in this particular case.

The Government also cites for support, assuming arguendo, that ends of public justice are involved in this case, Illinois versus Somerville.

I suggest that Illinois versus Somerville is not similar to this particular case.

In Illinois versus Somerville, the judge found himself with an incurably defective indictment. The Defendant had absolutely nothing to lose in that particular case, as the Attorney General of Illinois, William Scott, pointed out, that under Article 1, section VII of the Illinois Constitution, the question was now one of jurisdiction.

The judge no longer had jurisdiction over the case.

What did the Defendant have to lose?

He could have gone to the jury. If the jury had found him guilty he would have received an automatic reversal.

In this particular case --

QUESTION: Well, if the jury had found him not guilty, I thought that he could have been retried.

MR. BALDWIN: It -- there is doubt in the Attorney General's opinion brief that he could have been retried. That is, even though it is jurisdictional --

QUESTION: So he had that to lose -- the right to go to trial with the original jury and hope for a verdict of not guilty.

MR. BALDWIN: Well, it clearly was a gamble, your Honor, that he could not have been found guilty by that jury. He could have only been found innocent by that jury.

In the instant case, if the Defendant had retained his trial counsel; if the Court had not removed his trial counsel, he could have gone to that jury and ended the matter then and there.

It must be kept in mind that the two distinctions in Somerville are, first of all, there were no options realistic in Somerville. Therefore, Jorn, that demands as the panel suggested below, curable options to be first considered before drastic action such as abortion of a

trial occurs remains intact.

For these reasons it is respectfully requested that the decision of the en banc Fifth Circuit Court of Appeals in this case be affirmed.

Thank you.

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

Do you have anything further, Mr. Rupp?

MR. RUPP: Nothing further, thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:17 o'clock p.m., the case was submitted.]