In the

Supreme Court of the United States

Donald Abney, Larry Starks and Alonzo Robinson,

Petitioners,

v.

United States Of America,

Respondent.

No. 75-6521

Washington, D. C.
January 17, 1977

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Washington, D. C.,

Monday, January 17, 1977.

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

APPEARANCES:

RALPH DAVID SAMUEL, ESQ., 4013 Chestnut Street, Philadelphia, Pennsylvania 19104; on behalf of the Petitioners.

RICHARD L. THORNBURGH, ESQ., Assistant Attorney General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent.

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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 first this morning in No. 75-6521, Abney and others against the United States.

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

ORAL ARGUMENT OF RALPH DAVID SAMUEL, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case involves Petitioners' claim that the double jeopardy clause bars their retrial after reversal of their conviction on a duplicitous indictment for violation of the Hobbs Act.

The Petitioners were tried and convicted on a duplicitous indictment which charge, in one count, two separate offenses: conspiracy and attempt to violate the Hobbs Act.

Thereafter, they appealed to the Third Circuit Court of Appeals, which reversed on other grounds, and remanded for retrial.

Three times during the trial, the initial trial of this case, Petitioners moved to require the government to elect to proceed on one prong or the other of the duplicitous indictment. This the government steadfastly refused to do. But for the government's steadfast refusal, this case would not be here today.

Now that the case has been remanded for retrial, the government proposes to retry these Petitioners on the conspiracy prong of the duplicitous indictment. There are substantial problems with retrying these petitioners on the conspiracy prong, one of which is the indictment as now framed simply fails to state a federal offense. The indictment now charges conspiracy to commit attempted extortion, something which simply isn't a crime under the Hobbs Act.

The other problem, of course, is that retrying these Petitioners on one prong of the duplicitous indictment will expose them to double jeopardy.

The Petitioners --

QUESTION: Is there an issue of appealability in here?

MR. SAMUEL: Your Honor, I will get to that shortly.

QUESTION: Well, isn't that the threshold issue of jurisdiction?

MR. SAMUEL: The Petitioners appealed their --

QUESTION: Well, isn't it the threshold issue usually, the jurisdictional question?

MR. SAMUEL: In this case, the Third Circuit Court of Appeals properly, we believe, took jurisdiction of the appeal from the motions to dismiss the indictment. Now --

QUESTION: Do you have some authority for that?

MR. SAMUEL: In this Court the government has raised

the question of jurisdiction, and I will direct myself to that question.

The Appellate Court Jurisdiction Act confers on the Courts of Appeals jurisdiction to hear final decisions of the district courts, a well known act. We believe, and we believe that there is substantial precedent for the idea that the denial of the motion to dismiss on double jeopardy grounds is in fact a final decision, and that the Court of Appeals properly assumed jurisdiction over that question.

This Court, in Harris v. Washington, addressed a substantially similar issue, and held that the Court had proper jurisdiction under 28 U.S.C. Section 1257, the standards of which have been held, or have been approached by this Court on the same basis as the standards of finality under Section 1291.

QUESTION: Was that a criminal case?

MR. SAMUEL: That was a criminal case, Your Honor.

QUESTION: In that the State appellate system had permitted appellate review of the dismissal order, and isn't that really the question here, whether the federal appellate system permits review at all?

MR. SAMUEL: The case is not dissimilar because the federal appellate system permitted review only by a writ of prohibition in the intermediate State court. Here, obviously, the Court of Appeals would have the power to entertain a motion

for a writ of prohibition. So that there was no special appellate statute involved in that case.

QUESTION: Well, but if there's a policy against piecemeal appeals in the federal system, that policy may or may not be followed by the States, and if they have chosen to allow their process to be interrupted by appeallate review on this kind of an issue, that's up to them; but I take it the argument on the other side is that the federal policy is against that sort of thing?

MR. SAMUEL: Well, I think that the discussion by Mr. Justice Frankfurter in the Cobbledick case is particularly appropriate here, where he noted that the right to statutory appeal must not be interpreted in such a way as to deny all opportunity for appeal under -- contemplated by the statutes. In other words, he said exactly: "Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes".

Now, the nature of the protection in a double jeopardy clause is such that it creates the statutory right to appeal.

There is no decision more final than the decision of a trial court cutting off a double jeopardy claim. The only event looming on the horizon of the accused at that point is the second trial. The issues are completely dissimilar. The issues on the question of double jeopardy and the issue

to be tried in the second trial.

QUESTION: Mr. Samuel, you're just abandoning the language of the Fifth Amendment, it doesn't say you can't be convicted, but that you shall not be put in jeopardy. It doesn't say you shall not be convicted.

MR. SAMUEL: Mr. Justice Marshall, I agree --

QUESTION: Are you going to get to that?

MR. SAMUEL: -- with that. That the nature of the protection again is based on the Fifth Amendment, which bars a second trial, and this Court has so held in a long line of cases, from Ex parte Lange through United States vs. Ball, and most recently in United States vs. Dinitz. In that sense it is a very special type of protection. It involves a decision of the district court, whether or not to violate the protection, and there really is no other constitutional protection quite like that.

If any decision is final, this one should be, in light of, for instance, Stack vs. Boyle, where this Court held that the question of bail could be appealed pretrial, because it was a final decision. And that it was collateral and did not merge with the trial issue.

Here we have the same type of situation. The question of double jeopardy does not merge, it is a collateral issue, and the issues -- there are no facts required to be adduced at trial to bear on this issue. All of the necessary

record facts are before the Court.

The government has become apparently quite concerned about the jurisdictional issue, and I note recently that Judge Friendly, in the Second Circuit, has written an extensive opinion in which he discusses the question of jurisdiction.

I would be arguing with blinders on if I were not -- did not take cognizance of the concern of the courts that granting the right of appeal from this type of decision would open the floodgates, and that every criminal defendant would immediately file a double jeopardy claim.

I think that that analysis misses a very important distinction, and that distinction is between the appellate jurisdiction, that is, the question is: Does the appeals court have jurisdiction to entertain and to hear these cases, which we argue on the one hand, and the question of whether or not every defendant has a right to have his trial stayed? Which is really a separate question.

And the practice is today, in the Eastern District of Pennsylvania, where this case arose, that the courts do not consider that every appellant has a right to have his trial stayed, and that the appellant must seek a stay based on the merits of having a substantial double jeopardy claim.

And of course that really has kept the floodgates from opening, because the government has only been able to point to ten cases in which appeals have been entertained in

four years, since Lansdown was decided in the Fourth Circuit, which created initially the -- or held initially that this was the final decision appropriate for appellate review.

QUESTION: Have you calculated the amount of delay that was involved in those ten cases, before they went to trial?

MR. SAMUEL: Mr. Chief Justice, I have not sat down with a calculator and attempted to see the amount of delay involved in those cases. But, given the extensive case load of the federal district courts in criminal cases, I think that ten cases in four years really represents a very small number of cases, and the amount of delay involved is not overbearing, and again the words of Mr. Justice Frankfurter I think are very appropriate, that the "due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes". But even if --

QUESTION: When you reduce it to statistics, then what happened to these ten cases that went up on the interlocutory appeal?

MR. SAMUEL: In most of them, the Courts of Appeals found against them on the merits.

QUESTION: Most of them or all of them?

MR. SAMUEL: I believe there is one in which they found for the petitioners on the merits.

Nevertheless, a judge at some point in the proceedings made a decision, as in these proceedings, that there was a serious double jeopardy question involved, and either a stay was issued or the court took no steps to move forward with the trial.

Now, in the Alessi case, the Alessi II case, which -- on which Judge Friendly has written his lengthy opinion, the case was scheduled to go forward with trial, and finally, I assume that Judge Friendly is the judge who granted the writ of prohibition, stopping the trial in that case. And there there was not -- there wasn't even a double jeopardy claim, it was a due process claim based on a plea bargaining which the defendant had --

QUESTION: And what do you argue from Judge Friendly's opinion?

MR. SAMUEL: Well, --

QUESTION: That it is appealable, or that it isn't?

MR. SAMUEL: That Judge Friendly's opinion in Alessi is appealable to this Court? Or --

QUESTION: Well, what do you argue from Judge Friendly's opinion as to the jurisdiction of the Court of Appeals in this case?

MR. SAMUEL: Oh, I think that the jurisdiction -- that the Court in Alessi did have jurisdiction to hear the appeal, nevertheless, it was not necessary for the judge to enter a

stay or to grant the writ of prohibition in staying the trial.

He must have thought that there was a serious issue that had to be dealt with before doing that.

QUESTION: Well, I take it also that even if there was jurisdiction to review the double jeopardy issue in the Court of Appeals, it doesn't necessarily mean that the duplicity issue would piggy-back on that.

MR. SAMUEL: Well, Mr. Justice White, the duplicity issue, I think is -- well, the duplicity issue and the double jeopardy issue are really one and the same.

QUESTION: Because if it weren't, if the double jeopardy question weren't there, you certainly wouldn't argue that the duplicity issue was appealable by itself.

MR. SAMUEL: In this case the Third Circuit found that there was duplicity.

QUESTION: Well, would you or not?

MR. SAMUEL: Well, I believe that the pendent issue here is the failure of the indictment to state an offense.

QUESTION: All right. Take that one too, then.

MR. SAMUEL: All right.

QUESTION: How about the denial of a motion to dismiss an indictment for failure to state an offense? Now, is that an appealable issue or not? By itself.

MR. SAMUEL: Well, this -- that is not an appealable issue by itself. But this Court has held, in a series of

cases that where a pendent issue is raised with a properly raised appealable issue, that the Court --/if a decision of that pendent issue will have the effect of terminating the litigation, that the Court will reach that issue.

And the reason is that the consideration of efficiency and avoidance of piecemeal review are turned around, once there is a proper appeal. And at that point, those considerations militate in favor of granting the motion to dismiss, or whatever terminating action the Court may take. That is precisely the case that we have here.

Here the district court thought there was a serious double jeopardy claim and granted a stay. It went up on appeal, we believe properly, and we raised once again the failure of the indictment to state an offense, and we submit that was raised properly under Rule 12(b), because it can be raised at any stage of the proceedings, like jurisdictional.

QUESTION: To put it bluntly, if we decide that there is no double jeopardy point here, we then move to the other one?

MR. SAMUEL: Mr. Justice Marshall, I believe that the decisions of the Court support the idea that even though the properly raised issue is decided against, on the merits, or the Court feels that it is not sufficient on the merits, that it can still reach the pendent issue.

QUESTION: So that now any time you fail to get an

indictment dismissed, you just say double jeopardy, and automatically it's appealable?

MR. SAMUEL: I think that there -- the question, as I said before, there's a division in the question between whether or not the Court of Appeals has jurisdiction, and we say that there it does.

QUESTION: Well, would they have jurisdiction in that case?

MR. SAMUEL: They would certainly have jurisdiction, we argue, to review any double jeopardy claim. Nevertheless, --

QUESTION: And then they find that there was no double jeopardy claim.

MR. SAMUEL: That's right.

QUESTION: Then they go to the other one?

MR. SAMUEL: The Court has the discretion to do so, it does not have to, there is no requirement.

QUESTION: And where does it get that discretion?

MR. SAMUEL: This Court has held --

QUESTION: From the fact that you allege double jeopardy.

MR. SAMUEL: That's right.

QUESTION: And no more.

MR. SAMUEL: That's right.

QUESTION: Well, that's horrible law.

MR. SAMUEL: But, nevertheless, Mr. Justice Marshall, --

QUESTION: You don't have anything to back you up on that, do you?

MR. SAMUEL: The discretion does not have to be followed. It is simply a matter of discretion, whether or not to reach the pendent issue, whether or not to even consider it.

QUESTION: I thought that this case raised the question, the important question of whether or not you could appeal the denial of the double jeopardy point, without getting involved with the rest of it. Am I wrong?

MR. SAMUEL: Mr. Justice Marshall, the petition --

QUESTION: If we give you relief on the double jeopardy, what do you need the other one for?

MR. SAMUEL: In the petition we raised both issues. We raised both issues --

QUESTION: Why do you need them?

MR. SAMUEL: It is true that if we have relief on the double jeopardy clause, we do not need relief on the pendent issue. Nevertheless, because the indictment in this case does not state an offense, that is, as it is now framed, because it charges something which is not a crime under the Hobbs Act at all, we think that that is such a glaring error in the lower courts that this Court, exercising its discretion, should reach that issue and require that it --

QUESTION: Well, suppose you have a grand jury

indictment with two grand jurors in it, could you bring that one up? Straight?

MR. SAMUEL: Ah, --

QUESTION: No, you would have to go through a trial, wouldn't you?

MR. SAMUEL: Right --

QUESTION: Wouldn't you?

MR. SAMUEL: The finality -- I believe that you would, The finality decision here -- question here is really -- goes to where there is a double jeopardy question, which has been raised.

Now, deciding that the Courts of Appeals have jurisdiction to hear the denial of the double jeopardy claim does not mean that they will hear every double jeopardy claim. It means, because in most cases, where there is a frivolous claim raised, it will be rendered moot. By the time the Court of Appeals reaches the issue, the second trial will have taken place.

QUESTION: Do you also raise the question of a denial of a bill of particulars, or something like that?

MR. SAMUEL: I don't think so. The constitutional protection, the nature of the protection of the Fifth Amendment is a special, very special type of protection. It requires the Court to make a prospective decision as to whether or not the Constitution will be violated.

There is no other procedural constitutional right in criminal law that is quite like that.

Now, should the Court nevertheless find that no double jeopardy -- that no appellate jurisdiction existed in the Third Circuit Court of Appeals to review of this issue, we believe that, nevertheless, the Court of Appeals could have reached the issue under its mandamus power.

There is a long line of decisions which holds that if an appeal was improvidently filed in the Court of Appeals, that the Court of Appeals may treat it as a petition for mandamus if the issue was appropriate for mandamus review, and --

QUESTION: But, Mr. Samuel, here the Court of Appeals did not do that.

MR. SAMUEL: That's correct, it did not.

Nevertheless, we feel that since the issue was one appropriate for mandamus review, or would have been, that the Court of Appeals could have reached it, and, accordingly, since they did pass on the merits, that under the rule in Magnetic Engineering & Manufacturing Company vs. Dings in the Second Circuit, and Hackett vs. General Host Corporation in the Third Circuit, in which cert was denied in 1972, that the Court of Appeals -- that this Court can reach the merits because the Court of Appeals would have had mandamus power to do so. And it could have done it without requiring that the

Petitioners file a writ, a petition for writ of mandamus, the Third Circuit could have done this.

QUESTION: Would that involve a judgment on our part, as to how the Third Circuit should have exercised its discretionary power to grant or deny mandamus?

MR. SAMUEL: The cases, the Circuit Court cases that deal with this, involve questions where there is a patently obvious issue, which is available for mandamus review. I think that in this case we have such a case, and therefore, since it meets the criteria, that the short answer is: Yes, it would require a decision, but that the decision is a formality.

QUESTION: Well, but the court -- you're referring to Courts of Appeals cases, where the same court in which the appeal was filed says "No, we don't have appellate jurisdiction, but we choose to treat it as a petition for mandamus and exercise our jurisdiction to allow it."

If you ask us to do that, it's one level removed, because you would say, we're saying the Court of Appeals has no jurisdiction, but that it should have exercised its discretionary jurisdiction.

MR. SAMUEL: I don't deny that's the case. Nevertheless, the Court of Appeals did reach the merits in this case on an appeal, and that the merits of the case are such that they are patently the kind of issue which mandamus

will reach. That is, that the district court, in denying the motion to dismiss here, held that he had no basis to reach the merits following the Third Circuit's opinion after the appeal of the first trial. He felt that the Third Circuit opinion precluded him from reaching the merits, and made his decision accordingly.

Now, we think that's an abdication of nisi prius jurisdiction, that the issue of double jeopardy had not been argued, brief, or decided by the Third Circuit; and, accordingly, that this is a case appropriate for mandamus review by the Third Circuit on its face.

Turning to the double jeopardy argument itself, the Third Circuit, in reviewing the decision, the indictment, held that it was duplicitous, and noted the evils of a duplicitous indictment. These are confusion and ambiguity. These are well know, they have been set forth in a whole line of cases.

The principal evil of a duplicitous indictment is that it requires the jury to answer two separate questions with one yes or no answer, something which is almost beyond the scope of logic.

Accordingly, a guilty verduct under such an indictment is capable of various equally possible interpretations. One such interpretation is that the jury found the defendants not guilty of the conspiracy charge. And we believe that

because of the presumption of innocence that we must adopt the most favorable of the equally possible interpretations, that being that the defendants were found not guilty of the charge on which they are now sought to be retried by the government.

That presents a clear double jeopardy situation, and their retrial should be barred.

The government argues in its brief that the act of appealing to the Third Circuit from the first conviction wipes clean the slate and thus prohibits the double jeopardy claim from being raised.

Nevertheless, this is not that type of situation. That is the general rule, and it is a general rule which exists, and we agree with. This is a situation where the Petitioners claim that they were acquitted of the conspiracy charge the first time around, taking the -- adopting the most favorable interpretation of this ambiguous guilty verdict.

Accordingly, appeal from the first conviction cannot have the effect of wiping clean an acquittal. It simply cannot be done.

Once acquitted, the Petitioners are forever barred from having to stand trial a second time on the same charge.

The government also argues that the charge of the district court, at the trial court on the first trial, cured the infirmity of the indictment. The government cites no

law for this proposition. It seems that it is completely unfounded and, moreover, the charge of the court, which is set forth in full, beginning at page 11 of the Appendix, demonstrates beyond peradventure that the charge of the court was just as confusing as the indictment itself.

Accordingly, we request that this Court hold that the Court of Appeals had proper appellate jurisdiction to review the dismissal -- the denial of the motion to dismiss, reverse the Court of Appeals and remand with instructions to dismiss the indictment.

Thank you. I'd like to reserve a couple of minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Thornburgh.

ORAL ARGUMENT OF RICHARD L. THORNBURGH, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Since the government deems the issue of appealability to be the most important of those raised in this case, I would like to defer the statement of our position on the other substantive issues unless, and until, the Court otherwise desires.

It's the position of the government in this case that the interruption of the trial process by the Third Circuit

Court of Appeals was not justified. That Court was without jurisdiction to hear an appeal from an order denying dismissal on double jeopardy grounds before the case was retried, following its reversal.

The right to appeal is a statutory one, not a constitutional right. It arises in this case under the provisions of Title 28 United States Code, Section 1291, which provides for a right of appeal only of final decisions in the district court.

As pointed out in our brief, --

QUESTION: Mr. Thornburgh, is it not correct that the district court has made a final decision on the question whether the defendant must stand trial?

MR. THORNBURGH: I think in the colloquial sense, final decisions are made by the district court in a whole panoply of matters in the course of hearing a trial. The question is whether it is a final decision as the courts have interpreted that phrase under 1291. And I would suggest that beginning with a line of authority that's found in the Heike case, that in matters respecting double jeopardy there has been, with the exception of the cases that bring us here today from Circuit Courts, a recognition by this Court that a double jeopardy claim denial is not final, a final decision for the purposes of being appealable.

QUESTION: Well, how do you remedy the fact that the

man is put in jeopardy? Which is the language in the Fifth Amendment.

MR. THORNBURGH: I would submit that --

QUESTION: How do you prevent a court from violating an express provision of the Constitution?

MR. THORNBURGH: Well, I think, Mr. Justice Marshall, what we are talking about here, and it's important, I think, to state, is not a denial of a right of appeal, but the timing of that appeal; whether that appeal is to be permitted to interrupt the flow of the criminal justice process. There are any number of --

QUESTION: Well, the Constitution says you shall not start that process.

MR. THORNBURGH: And the Constitution says, indeed, that no legally obtained evidence shall be used against a defendant, that he shall not be brought --

QUESTION: Does that say "jeopardy"? And where do you see that in the Constitution?

MR. THORNBURGH: Where do I --

QUESTION: I'm talking about language expressly in the Constitution.

MR. THORNBURGH: Well, that is --

QUESTION: The rules of evidence are not in the Constitution.

MR. THURNBURGH: No, they have interpreted to --

been interpreted by this Court --

QUESTION: But this -- we don't have to interpret jeopardy, do we? We know where jeopardy is.

MR. THORNBURGH: We know where jeopardy is, we know that jeopardy attaches when the trial takes place.

QUESTION: And Congress -- and the Constitution says no jeopardy.

MR. THORNBURGH: But the right of appeal --

QUESTION: And the Court says: we won't put this man in jeopardy. And there is no way of stopping that.

MR. THORNBURGH: There is a right --

QUESTION: Is the right to a speedy trial explicit in the Constitution?

MR. THORNBURGH: Yes, it is, Mr. Chief Justice.

QUESTION: If the court denies a motion to dismiss for want of a speedy trial, is that in the same sense final in judgment as the double jeopardy is final?

MR. THORNBURGH: The Fourth Circuit has so held, and that case is of great concern to the government, with regard to the finality doctrine. I think that with respect to the double jeopardy issue, I recognize that the Courts of Appeals have succumbed to what Judge Friendly refers to as the seductive argument, that the right of not being placed in jeopardy twice is not a meaningful right unless it has a hand-maiden of pretrial appeal to accompany it.

But I think that that represents a misreading of the lines of authority that have been developed in this Court, not only under the Cohen doctrine of collateral decisions, but the State cases which are relied upon by Petitioners here.

With respect to Cohen, that case was really the first breach in the application of the finality doctrine, and when you look at the facts of that case, which involved a shareholder suit upon which the -- with respect to which the district court had to decide a question of costs on the petitioner, and that question was then reviewed in the appellate courts, this Court found ultimately in Cohen, in its decision, that that was one of what they styled a small class of cases, where a determination is made of claims of right which are separable from and collateral to the rights asserted in that particular civil action. That it was too important to be denied review and, in fact, would be lost, itself, if it were not decided at that time.

Its analogue in the criminal area is Stack v. Boyle, involving a determination of bail in a criminal case. Again --

QUESTION: Mr. Thornburgh, just before you go into that, why won't the right not to be tried a second time be irrevocably lost if it is not protected right at this very point?

Why doesn't that reasoning apply here?

MR. THORNBURGH: Well, I think --

QUESTION: In other words, why doesn't Cohen fit this case like a glove?

If one can say that Cohen's theory applies to the criminal side.

MR. THORNBURGH: Because I don't think the double jeopardy issue is separable from and collateral to the rights that are asserted in the action. The double jeopardy issue is part and parcel of the entire package of decisions on factual and legal matters that have to be decided in the case on its trial, and has to be, as in Heike, with the so-called right not to be tried once transactional immunity had been granted, has to await the determination of the trial and all of its issues, so that piecemeal review will give way to a consideration of that entire package upon appellate review.

QUESTION: Of course Heike did not involve a right based on the Constitution, did it?

MR. THORNBURGH: Well, I would submit that at that time it might well have been thought to encompass such a right, because the statute was a substitute for the Fifth Amendment right which prohibits the use of testimony in an incriminating sense. So I think that there is a -- as the Court noted in Heike -- a distinct parallel to the transactional immunity argument and the double jeopardy argument.

Indeed, the Court in Heike noted, and more or less

assumed that a claim of double jeopardy would be treated in the same way. That is, that it would not have the effect of interrupting the process but would have to await the termination of the case itself.

Now, Heike, in a sense, I would submit, if it remains good law today, and we urge that it does, really answers the questions that are raised in this case.

I think what has happened, that the development that brings us to the consideration of the double jeopardy question out of the circuits today, represents the false sense that has been followed in a number of Circuit Courts, which have led them, on the basis of Cohen, into a path of error.

I think, as I mentioned, first of all, they have looked at the seductive argument of the uniqueness of double jeopardy, drawing on cases like Ball and Green, which contain descriptive language about the double jeopardy rights, which are unassailable, but said not in the context of the appealability of a pretrial order denying a motion to dismiss on double jeopardy grounds.

This is an argument that was really first raised in the Fifth Circuit in Gilmore, where now Chief Judge Brown noted that all appeal rights are statutory and not constitutional, and then continued, in dealing with double jeopardy, as follows, and I quote:

"There are many instances in which it is ultimately

determined that constitutional rights have been violated, but the nature of the asserted right, that is to say, a constitutional one, does not distinguish appeallate review of any such question from the assertion of other rights, whether statutory or common law or from a procedural rule; at least so long as a criminal case is pending, review of such matters, as, for example, unlawful search and seizure, unlawful arrest, unlawful detention, unlawful indictment, unlawful confession, must await the trial and its outcome."

The Fourth Circuit, in Lansdown, disagreed, and enunciated a view of Cohen which has found double jeopardy claims to be collateral in the Cohen sense, and engender the line of cases that brings us here today.

The premise on which these holdings of the Courts of Appeals rely has not been examined in this Court since Heike, and, needless to say, it has not occasioned any action by the Congress to extend the scope of review of interlocutory orders.

I think when you examine the rationale in Lansdown, in the Fourth Circuit, against the rationale expressed for denying these rights of interlocutory appeal in Cobbledick, Justice Frankfurter's opinion of 1940, the deficiency in the Courts of Appeals' reasoning appears.

That is to say, in Lansdown the Court said: Even if an appellate court reverses the conviction in a second trial

on the grounds of double jeopardy, a defendant has still not been afforded the full protection of the Fifth Amendment, since he has been subjected to the embarrassment, expense, anxiety, and insecurity involved in the second trial.

Compare this with Justice Frankfurter's language in Cobbledick, where he said to the point: "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship."

That is a painful doctrine, I will acknowledge. But, as pointed out by Judge Brown, there are numerous cases where an error can be made by the district court that will occasion embarrassment, expense, anxiety and insecurity to a defendant who later obtains a reversal of a conviction that was obtained through error.

QUESTION: Well, is it a painful obligation of citizenship, perhaps, to be tried once; but the Constitution makes very clear that it's not a painful obligation to be tried a second time, after you have been convicted or acquitted the first time. That's the big difference between what you read to us and the case now before us.

MR. THORNBURGH: That is --

QUESTION: That of being tried twice. And that's what the Constitution makes very clear is not a painful obligation of citizenship, the Constitution protects against

precisely that.

MR. THORNBURGH: Indeed it does, but the question remains as to whether there is a statutory right to vindicate that constitutional right before the trial has taken place.

There is no question, and I urge again that we not fall into the error that I find myself sometimes in, of thinking that we are talking about whether there exists a right of double jeopardy. What, I submit, we are examining is whether there is a statutory right. Indeed, where there was once no right to appeal in a criminal case, the question becomes: Do we have now a statutory right that encompasses the vindication of a double jeopardy claim prior to trial?

QUESTION: Mr. Thornburgh, supposing that a motion similar to the one made in this case was made in the district court, and the district judge, rather than denying it, simply said, "I'm going to take it under advisement. I think it's fairly debatable." And kept it under advisement until the end of the trial.

Do you suppose that the defendant would have had any constitutional right to get a writ of mandamus from the Third Circuit?

MR. THORNBURGH: I think, in all probability, that the judge would have the power to do that. It's frequently done, in my experience, on matters that are raised pretrial or during the trial. And having the power to do so, I would

see no reason why the extraordinary writ would issue in the face of the exercise of that power.

QUESTION: But are you saying there would be no power to issue an extraordinary writ pursuant to Section 1291, the all write Act?

MR. THORNBURGH: Well, I think there certainly would be the power to do so in the egregious case, but it would not reach the question of the power of the district court to defer consideration of such a motion until the end of the trial.

QUESTION: Mr. Thornburgh, assuming not-uncommon 18-month trials, that the double jeopardy claim is made, and if it's appealed,would it not only save the defendant, wouldn't it also save the government?

MR. THORNBURGH: I suppose that such a prospect could result, but I would submit that that's something that the Congress could well take into consideration.

QUESTION: I didn't ask a thing about Congress or the statute at all. I asked you a question of fact. If there was a clearcut double jeopardy point that you and everybody else knew was there, wouldn't it be better to get it over with?

I think the answer is that if it was a good one, you just wouldn't proceed, you'd save your money. But if it was a questionable one, you'd make the defendant go out and pay the money for his lawyer and everything else.

MR. THORNBURGH: Well, I think this Court so held in Roche v. Evaporated Milk Association, where that very point was raised in an antitrust case.

QUESTION: Well, I think Evaporated Milk has got more money than the average defendant.

MR. THORNBURGH: I think that's right, Mr. Justice Marshall. I'm not going to argue about Evaporated Milk against the ordinary defendant or the defendant in this case, but I submit that that kind of an argument, given the statutory framework within which rights of appeal in criminal cases exists, is one that must, of necessity, be decided in the Congress by a balancing of an empirical assessment of Evaporated Milk against the number of cases where appeal has been taken on double jeopardy grounds that is --

QUESTION: Well, what is the --

MR. THORNBURGH: -- frivolous.

QUESTION: -- non -- you don't have any non-legal ground for supporting your argument, like saving money or anything like that?

MR. THORNBURGH: I have a great many non-legal grounds, I think, it's --

QUESTION: But you're not asserting them?

MR. THORNBURGH: I should not assert them?

QUESTION: I say, are you?

MR. THORNBURGH: I will assert them, yes. I think

that the problem here is one of judicial administration. As Mr. Justice Frankfurter noted in the Cobbledick case, the theory of piecemeal review is not consonant with sound judicial administration. I don't want to be involved in parading horribles before this Court on this Monday morning. But one can easily see from the cases that have been decided in the wake of these Circuit Court decisions that relate to the appealability of double jeopardy cases, that we are going to be faced with claims, at least, that will rise to the Circuit Courts and eat up the time that they have available to consider appellate matters, in areas such as the speedy trial provisions of the Constitution.

MacDonald has done that. In Alessi --

QUESTION: Mr. Thornburgh, couldn't we take care of all those by writing a narrow opinion, making it clear we're not deciding that?

If the theory of this is that there is a right not to be tried, expressed in the Fifth Amendment, why wouldn't that provide an answer to that particular risk?

MR. THORNBURGH: Well, I would obviously urge that this Court not open this Pandora's Box, because I can see --

QUESTION: What is your reason -- what is your basic explanation of why the Cohen case does not apply?

MR. THORNBURGH: I think the real difference between this and Cohen is that Cohen involved, as did the bail case,

a kind of a turnstile phenomenon. That is, the costs of the case, the amount of bail, are clearly separable from the type of --

QUESTION: Well, is it your theory that the case can go on without deciding that issue, it doesn't interrupt the proceeding? That's what you seem to say in your brief.

MR. THORNBURGH: Well, it --

QUESTION: Which would be true in the bail situation, but I don't think it would really be true in the Cohen situation.

Wasn't the theory of that that requiring this security for costs would have actually terminated the litigation if the district court order had stood?

MR. THORNBURGH: Well, that was looking at it as a practical matter.

QUESTION: Yes.

MR. THORNBURGH: That may well be so.

QUESTION: And isn't that the same situation here, thatif you allow the order to stand, the defendant loses his right not to be tried a second time?

Why are they different? I am just a little puzzled.

MR. THORNBURGH: Well, I think that again I get back to the point of the easy equivalency of the existence of the double jeopardy right in the Constitution, and the right to pretrial appeal. There are, again I submit, on the basis of

Judge Brown's litany of cases that might occasion equally serious constitutional deprivations --

QUESTION: But you have already agreed that none of those involves a deprivation caused by the trial itself; it is the trial which involves the violation of the man's constitutional rights.

MR. THORNBURGH: I would urge that if we are to look at the practical aspects of the case in Cohen, that we should also look at the practical aspects of the case in a criminal case. That is to say, the double jeopardy right might pale in comparison with a supposed egregious error on the question of admissibility of evidence, of constitutionality, of a particular statute under which the individual is charged, whether he had been given proper warnings, whether he had been tortured or a confession had been extracted from him.

I think if we look at the practical side, a la your suggestion in Cohen, that there are any number of problems which would rise to the level of the double jeopardy claim.

And again, reverting to the basic framework within which appellate rights exist, it still does not deal with the question of whether or not the Congress has seen fit to provide, in this type of case, knowledgeable of the developments in Cobbledick, DiBella, Heike, and the like, any kind of pretrial for the denial of double jeopardy, of the type

involved in this case.

I'd like to deal briefly --

QUESTION: Could I just ask one other question? Assume a State system provides for appeal in this sort of situation, without the complication of extraordinary risk that you had in one of those State cases, just say it was a direct appeal to the State system, and the State Supreme Court rejected the claim. Would that be a final decision under -- for purposes of --

MR. THORNBURGH: It has been so held. And I think that's the second thread that has led the Circuit Courts in these cases into --

QUESTION: Do you think there's a greater -- that the requirement of finality imposes a stricter standard on the federal review than it does on the review of State court decisions?

MR. THORNBURGH: Well, they are, if I may say, apples and oranges. The State determination of the federal issue is final because it's the only federal issue. Whereas in the cases that come out of the federal courts, there is a vast catalog of federal issues that could be presented seriatim --

QUESTION: Do you suggest the State decision would not be final within that docket of cases if there lurked the possibility of a search and seizure issue in the case? Or a

Fifth Amendment, or some other federal constitutional issue relating to the merits?

MR. THORNBURGH: Well, having run its course and reached --

QUESTION: No, we are still pretrial, and we just know that there are often federal issues in State criminal trials. And you're saying the existence of those would deprive the order of finality, or are you saying they don't make any difference?

MR. THORNBURGH: Well, I think, again, what we get back to is the difference between the two systems, that if the State has countenanced a threshold arrival of this issue, this federal issue at its highest court level, that this Court is entitled to determine that that is final for State purposes and therefore appropriate under 1257 for appeal in this Court.

But the spectre which you --

QUESTION: Well, just to be sure I have your answer, you do not raly on the fact that there's only one federal issue in the State proceeding; that's not your rationale? It's rather that the State is willing to allow an appeal, so we might as well do the same thing?

MR. THORNBURGH: I think that the former issue has been present in every case that this Court has decided on that issue.

QUESTION: Well, then, I'm asking you: Is that critical to those decisions, in your view?

I think it was in Judge Friendly's view.

MR. THORNBURGH: I was going to say that, but I am not equipped --

QUESTION: It doesn't make much sense, does it, to say that because -- that it would be appealable, if there can be shown there is no potential additional federal issue in the case? That's kind of a --

MR. THORNBURGH: One could conceive of a State equivalent of 2255 or other types of things that might raise constitutional issues, to be sure. But in the course of that particular litigation, litigative track, it is final, and -- for State purposes -- and right for appeal, I would analyze, under 1257 as distinguished from what we're dealing with under 1291.

And I think those State cases are -- really are --

QUESTION: Well, the language of the federal statute is a little more favorable for appeal, because it talks about final decisions, and the other statute talks about final judgments, doesn't it?

MR. THORNBURGH: Yes. I must say I don't know how to assess that. There is, I realize, a treatment of that difference in decisions of this Court, but I can't divine any difference that would produce a more favorable treatment,

or one way or another.

I would urge that the language be treated as its equivalent.

QUESTION: Mr. Thornburgh, in your parade of anticipated horribles, if you lose on the double jeopardy issue, would you also include an issue having to do with the speech and debate clause?

MR. THORNBURGH: That was the reference suggested by Judge Friendly. I don't know, Mr. Justice Blackmun, I don't know.

QUESTION: I suppose you do concede that the lynch-pin of this case is the nature of double jeopardy?

MR. THORNBURGH: I think that what the Courts of Appeals have found to be the lynchpin for deviating from the finality rule in criminal cases has been the nature of double jeopardy. But I -- I don't see -- I urge on this Court that it is not a distinguishable factor from a broad variety of other serious constitutional problems, which might be just as apt candidates for pretrial review if one is to indulge one's self in permitting that kind of review.

QUESTION: Would you take the same position, General Thornburgh, if the double jeopardy issue was that -- not that he was being subjected to another trial, but that he was being subjected to a second conviction for the same crime?

MR. THORNBURGH: I think that it's a distinction

without a difference, in my view.

QUESTION: Really?

MR. THORNBURGH: Well, --

QUESTION: Because, after all, the double jeopardy clause is -- it does talk about double jeopardy, but it certainly aims, it also aims at preventing double convictions or double punishments for the same crime, does it not?

MR. THORNBURGH: Well, that could only be determined after the second conviction had been obtained, and that was what I --

QUESTION: That's what I said.

MR. THORNBURGH: I'm sorry.

QUESTION: Would you take the same --

MR. THORNBURGH: No, certainly, then it is appropriate for review, because the process has played itself out and you haven't --

QUESTION: Well, I understand that. But, before the trial, before the second trial, the claim is, the defendant says "I don't mind -- I'm not objecting to having go through trial; I object to the fact that I am threatened with another conviction for what I claim is the same crime as I was convicted last week for."

MR. THORNBURGH: That I must revert to seeing a distinction without a difference, because the claim is anticipatory until the trial plays itself out. He may be

acquitted. The trial may abort for some other reason.

I don't think that that is a particularly persuasive addition to the argument with respect to exposure to trial.

QUESTION: Mr. Thornburgh, if the question of appealability should go against it -- you have only a minute or two, I notice -- are you going to say anything about the merits?

MR. THORNBURGH: I would like to take my remaining time to address the merits briefly.

The case as presented by the Petitioner states that because of the duplicity of the indictment it is difficult, if not impossible, to determine what the verdict was in the first trial.

I think a search of the record, particularly the charge of the court in this case, with its final words to the jury being emphasized, makes it clear that what the government was doing here was not overreaching, as the Petitioner alleges, but underreaching. They were setting a task much greater for themselves, which I would certainly not want to do, of securing convictions on both of these offenses. The trial judge defined the statute in terms of conspiracy or attempt, and then proceeded to charge on the necessity of convicting for conspiracy and attempt, even going to the length in his last words to the jury of pointing out that both

of those offenses had to be -- result in conviction.

I don't think that we can ass-me that the jury did not follow those instructions. The colloquy which is relied upon by counsel for the Petitioner was not communicated to the jury, and I think what we must do is to look at those instructions that were given to the jury, and they clearly indicate that they were under a charge to convict of both offenses, conspiracy and attempt.

And in that event, it strikes me that we need proceed no further.

With respect to the statement of an offense, the so-called pendent claim, if one refers to the brief and our analysis of the Hobbs Act charge, it seems clear that the Act -- what is charged is that the acts amounting to attempted extortion were performed in furtherance of a properly alleged conspiracy. And that there was no failure to charge in the terms of the Hobbs Act.

So that I think that when we do get to the merits, after this trial regarding the appealability pretrial, that we find, indeed, that if this is the type of claim that is going to inject itself into our appellate process willy-nilly on a piecemeal basis, we will suffer considerable delay and misuse of appellate time.

Thank you.

QUESTION: I take it your position is, though, that

even if the double jeopardy issue is appealable, the others aren't?

MR. THORNBURGH: Absolutely not.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Samuel, you have about five minutes left.

REBUTTAL ARGUMENT OF RALPH DAVID SAMUEL, ESQ.,

ON BEHALF OF THE PETITIONERS

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

Turning first to the last comments of the Attorney General:

The indictment here is reproduced at page 9 of the Appendix, and it only takes up a short -- excuse me, I may have -- page 5 of the Appendix. It only takes up a little bit more than a page. And it really is very instructive to read that indictment, because that indictment does not charge, properly charge a conspiracy, it does not charge any agreement; it charges a conspiracy and attempt by attempt. There is no language in there to suggest in any way that these defendants agreed to commit an attempt. The charge is they attempted, it doesn't say that they attempted together, that they agreed to attempt, that they conspired in any way, except the single, bare word "conspiracy".

For that reason, we believe that the indictment fails to state an offense, because now, with the attempt

portion of the charge deleted, it charges a conspiracy to commit attempted extortion, which we have noted is not a crime under the Hobbs Act.

The charge of the court cannot, we submit, correct the deficiencies of the duplicitous indictment. The charge, at page 22 of the Appendix, talks about the charge against each individual defendant.

Now, here we have two separate charges, the court lumps them together as the charge.

He then goes on, on page 26 of the Appendix, "the offense charge", lumps them together again. And so forth, throughout the remaining part of the charge of the court.

Now, the position of the Petitioners is that where there are two separate charges, where there is a duplicitous indictment, to lump them together as one creates something which is incognizable by the jury. The jury is considering something which is completely separate from the two crimes charged. They are asked to consider something which is not within the province of the criminal law.

Turning back to the appealability question, I think it's important to note that the Petitioners here are not trying to get into the Third Circuit, they are not testing their right to appeal. They were there. The question is, did the Third Circuit have appropriate and proper federal jurisdiction to consider their claim?

And that, I think, is an important question.

In reaching that question, the question of finality becomes very important, whether or not it is a final decision.

And in Stack vs. Boyle, a very similar situation to this, where bail was considered to be a final decision, and reviewable pretrial. And whether or not the trial went on before the appellate court reached that made no difference. The fact is that the appellants in Stack vs. Boyle had a right to have the appellate court reach the question of whether the bail was excessive.

In Harris vs. Washington, here I think Harris is a very important case here, albeit it did arise in the State courts; but it was a motion to dismiss on double jeopardy grounds in the trial court, which was denied. A writ of prohibition was entered by the Court of Appeals, and reversed by the State Supreme Court. So this Court had before it only one issue: whether or not the denial of a motion to dismiss on double jeopardy grounds was a final judgment, in the words of that statute, for purposes of review?

And, as we have pointed out and the government agrees, the criteria for final judgment, final decision, are the same and have been held to be the same.

QUESTION: Wouldn't it sometimes be true -- at least sometimes -- Mr. Samuel, that whether or not the bar against double jeopardy was applicable would not clearly appear until

at least the start of the second prosecution? I'm thinking of an Ashe v. Swenson kind of a case.

MR. SAMUEL: I'm not sure that I understand the question exactly, but the --

QUESTION: I'm thinking of a collateral estoppel kind of a case.

MR. SAMUEL: Where --

QUESTION: Where it might not be clear until the --

MR. SAMUEL: It's certainly clear --

QUESTION: -- at least the prosecution began to put on its case.

MR. SAMUEL: It's certainly clear where the government seeks to retry on the same indictment.

QUESTION: Yes.

MR. SAMUEL: Where there is a question of collateral estoppel, it seems to me that if the indictment is properly framed so as to adequately advise the defendant of the charge against him, that it can be -- that the defendant at that point can make the double jeopardy claim, and --

QUESTION: He can make it, but no court can very intelligently decide it. That was the -- what prompted my question.

MR. SAMUEL: I'm not sure that I have that much familiarity with the potential possibilities here to discuss that, but that's not the case here. Here we have attempted

retrial on the same indictment. And, accordingly, we request that the Court grant the requested relief.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

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

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