In the

Supreme Court of the United States

PHILLIP JEROME LEE,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

c-2

No. 76-5187

Washington, D. C.
April 25, 1977

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Monday, April 25, 1977

The above-entitled matter came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM 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:

JOSEPH P. BAUER, ESQ., Notre Dame, Indiana; on behalf of the Petitioner.

ANDREW L. FREY, ESQ., Deputy Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the 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 76-5187, Lee against United States.

Mr. Bauer, I think you may proceed.

ORAL ARGUMENT OF JOSEPH P. BAUER, ESQ.,

ON BEHALF OF THE PETITIONER.

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

My name is Joseph Bauer, counsel for petitioner, Phillip Jerome Lee.

This case involves issues under the due process clause the the double jeopardy clause of the Fifth Amendment.

In Illinois against Somerville, this Court observed that virtually all double jeopardy cases turn on the particular facts. Therefore, I would like to begin this morning with a brief statement of the facts, because that is essential for an understanding of the issues presented in this case.

In December, 1973, a theft allegedy occurred in the United States Post Office. A few weeks later, in 1974, a Federal information was filed, charging the petitioner with that theft.

Petitioner waived his right to trial by jury. On the day of the trial, and prior to the introduction of any evidence, counsel for petitioner moved to dismiss the information because it failed to allege a vital portion of that information;

that is, that theft requires that the act be committed knowingly and with an intent to deprive the owner of the use of the property.

QUESTION: He had an opportunity to make such a motion earlier in the proceedings, did he not?

MR. BAUER: He might have made it earlier, your Honor. But in fact, as the record indicates, he was second counsel for the petitioner, and he was appointed only seven weeks before the trial. And it clearly could have been made earlier, but it might not have been reasonable to have done so. And there's no contention that the objection here was not timely. Clearly, the Federal rules of criminal procedure provide for objection at any time during the trial.

QUESTION: But my only suggestion is that an attorney who makes a motion that late in the game may well find a trial judge unprepared to pass on it at the particular moment that he makes it.

MR. BAUER: Your Honor, I think there are two responses to that inquiry. One, in certain circumstances, the time may be so late that it would be difficult for the judge to rule. On the facts of this case, however, when petitioner's counsel made the objection, petitioner's counsel cited a single Indiana state case. It would have been very, very easy for the trial judge at that time to have taken a two minute or five minute recess; looked up the single case. The rule was as

simple as can be. Now, that's only known by hindsight.

But I suggest that the alternatives available at that time would have been to look up that single case.

QUESTION: Well, what was going on? Wasn't jury selection about to begin?

MR. BAUER: No, your Honor, this was a bench trial.

QUESTION: Well, wasn't the Court about to commence the hearing of testimony then?

MR. BAUER: What had happened, your Honor, was that the case had been called;the prosecution had made its opening statement which lasted all of about 45 seconds. The defendant's counsel then appeared, and at the very first opportunity on that morning, defense counsel did raise the objection.

Now, as I suggested, your Honor --

QUESTION: Well, Professor Bauer, couldn't he have made the objection before the opening statement on the part of counsel?

MR. BAUER: It's not clear from the procedure whether he could have. As I suggested, Mr. Justice Blackmun, the motion was made before evidence commenced. Therefore, under the tests in this case, it was at a stage before jeopardy attached. Had the motion been acted upon at that time, there would have been no bar whatsoever to correcting the information and having a proper trial. So that the defendant's motion

was clearly made before there would have been any double jeopardy inquiry implicated.

QUESTION: So it is your position that jeopardy had not attached?

MR. BAUER: Well, the Court in the Serfass case says that in a jury trial jeopardy attaches when the jury is empanelled, and that in a non-jeopardy case, jeopardy attaches when evidence commences.

Now, the testimony had not yet begun. So it is our position that jeopardy had not attached at that time. And it seems that in this case, defense counsel had given the court and equally important, had given the prosecution an opportunity to correct that mistake, which was of the prosecution's own creation.

But yet the prosecution sat there and did absolutely nothing. Now --

QUESTION: Petitioner's counsel did absolutely nothing. He didn't object.

MR. BAUER: Well, your Honor, the --

QUESTION: He said that the judge could have gone out and looked at the case right quick. He didn't suggest that to the judge, did he?

MR. BAUER: What petitioner's counsel --

QUESTION: He didn't do anything but file a motion which he can now use.

MR. BAUER: It is true yourHonor that he did not say, after the motion was denied, that the judge should indeed take a recess. I respectfully suggest --

QUESTION: He didn't object at all. The judge says I will pass on it when I get time to look it up.

MR. BAUER: In fact --

QUESTION: And counsel remained silent.

MR. BAUER: In fact, your Honor, although it does not excuse trial counsel, in fact there is an indication in the record that the trial counsel may have misunderstood the ruling of the trial court. There's a suggestion that when all the evidence was concluded, petitioner's counsel thought the the motion had indeed been denied, and not taken under advisement.

QUESTION: What, you mean he didn't understand what the judge said?

MR. BAUER: It would appear so, your HOnor. In the appendix --

QUESTION: Well, how can the judge arrange for the guy to understand what he says other than to say it?

MR. BAUER: I said, your Honor, I'm not suggesting that that would excuse what petitioner's counsel did. I am suggesting --

QUESTION: Well, the record is correct that the judge said specifically, I will pass on this when I get time

to look it up.

MR. BAUER: No question, your Honor.

QUESTION: And counsel said nothing?

MR. BAUER: That's right, your Honor.

QUESTION: Well, could I say he acquiesced in it?

MR. BAUER: I think not, your Honor.

QUESTION: Why not?

MR. BAUER: I think that the objection that counsel made to the sufficiency of the information carries with it implicitly the request that the court will grant a recess and look up the case. Defense counsel did not merely say the information is deficient. Defense counsel cited the court to a specific Indiana case, directly on point, which held that the information of this kind was deficient.

QUESTION: Did he read anything from the case?

MR. BAUER: He read only the citation to the case, your Honor.

QUESTION: That's all?

MR. BAUER: Well, that's right.

QUESTION: Well, why didn't he read the case? He said it was so clear; why didn't he say, the bottom line in the opinion says, quote, end quote. That would give the judge a little something, wouldn't it?

MR. BAUER: It would, your Honor. I think there's a second response to that, Mr. Justice Marshall.

QUESTION: I think one response is that, under your theory, he can make the motion and then there's no way for him to lose.

MR. BAUER: I think the other response --

QUESTION: Am I right?

MR. BAUER: That there's no way for him to lose? Yes, there is a way for him to lose, because it seems to me that in a case like this the Court --

QUESTION: Well, what could the government have done at that stage?

MR. BAUER: The government had a number of alternatives. One is that the government could have joined in the motion of the defense to dismiss the information. A second alternative would have been to make a motion under rule 7(e) to amend the information. A third opportunity --

QUESTION: You mean, the government could have done it?

MR. BAUER: The government clearly, under Federal Criminal Procedure 7(e) --

QUESTION: Well, whose case is it, the government or the defense?

MR. BAUER: The cases in this Court make clear that the responsibility for having a proper trial lies not on the defendant but lies with the prosecution and the court.

QUESTION: That's why you don't have to object?

MR. BAUER: It's not a question of not having to object, but having objected, having performed its responsibility, if there is any duty, the duty already was on the prosecution in the trial court. The defendant fulfilled his responsibility by pointing out to the trial court, and pointing out to the prosecution the deficiency. Now, there were, as I said, three alternatives. One would have been --

QUESTION: Would you have made the same argument if he had not cited the one case?

MR. BAUER: I think the argument would also -- could also be made. But the citation makes it even stronger.

QUESTION: Would you go so far as if he said, I think the indictment is insufficient, period.

MR. BAUER: Well, a mere observation like that, I think, might be insufficient. But here we don't have a mere observation. Here we have a formal motion to dismiss.

QUESTION: Written?

MR. BUAER: An oral motion made in court.

QUESTION: Did the government have any advance notice that this motion would be made?

MR. BAUER: I don't think so, your Honor.

QUESTION: Well, then prosecution counsel was hardly in a better position to have this -- take one of these alternatives that you've suggested that the Court had to decide this issue suddenly presented; is that not so?

MR. BAUER: Mr. Chief Justice, it is true that the prosecution was not given advance notice of the motion. But as I suggest in response to Mr. Justice Marshall's question, the responsibility for having a proper trial is not solely on the defendant; indeed, it is principally on the prosecution in the trial court.

QUESTION: Well, we can accept that. We can accept that without any difficulty. But -- but you're suggesting that this was so clear that everyone should have been able to react right away. If it was so clear, then why, in seven weeks time since counsel had been appointed, had he not made his motion before trial so as to give the government and the court reasonable opportunity to analyze the issue?

MR. BAUER: I simply don't know the answer to that your Honor. We can only speculate. But as I suggested earlier in response to Mr. Justice Rehnquist's question, the counsel, Mr. Swanson, was the second counsel for petitioner. The first counsel had been appointed for the arraignment stage. And then after arraignment, he then asked to withdraw himself when he became associated with the magistrate. Now --

QUESTION: Do you think defendant's counsel, in court at that time, as an officer of the court as he is, as you are, had an obligation to suggest to the court the possibility that delay in acting on that while he proceeded to take testimony might create some serious problems in the

administration of justice?

MR. BAUER: I think had he recognized the full double jeopardy implications at that time, perhaps he might. Trial counsel was a young, inexperienced man, had been admitted to the bar for less than a year. Again, that does not excuse him. But in the circumstances of this case, having been appointed as the second counsel to petitioner, one ofthe things that might have naturally happened upon his appointment under the Criminal Justice Act was that he would have initially commenced doing research on the facts of the case, interview defendant, interview potential witnesses. And although it was not the -- it's clearly not the best trial strategy, it might well be a reasonable thing not to look at the language, the text of the information immediately. Perhaps not even look at the information until the day of trial.

I'm not suggesting that that's the best strategy. But I'm suggesting that that was a reasonable course in the circumstances here.

QUESTION: You mean that when a lawyer defends a case, the last thing he does is read the information?

MR. BAUER: It certainly should not be the last thing he does, Mr. Justice Marshall. I'm suggesting that may have happened.

QUESTION: Is that an excuse?

MR. BAUER: I'm not attempting to excuse Mr. Swanson's

conduct. What I'm suggesting is that in the case at bar, the responsibility for having a proper trial was not solely on the defendant, indeed, it was not principally on the defendant. The principal responsibility was on the prosecution in the trial court.

I would ask the question, not why was Mr. Swanson late in his motion. I think a more appropriate question is, why did the government draft a deficient information, and then instead of asking why did Mr. Swanson wait seven weeks to notice that defect, why did the government wait four months and not even notice it on the morning of trial? When the very defect was pointed out? The prosecution was the one that made the mistake. The prosecution --

QUESTION: If nobody raised the question, and he was convicted, he'd go to jail, wouldn't he?

MR. BAUER: Indeed, he would.

QUESTION: So there's a little bit of responsibility on the petitioner; a little bit.

MR. BAUER: There certainly is. And in fact I'm not suggesting that the mere error in the information is sufficient to cause -- to foreclose a second trial in the situation you've described.

QUESTION: But is there anything in the Federal rules of criminal procedure, or in the local rules of this district court in, what is it, the Northern District of

Indiana, that set a time period within which such a motion could be filed?

MR. BAUER: The Federal rules of criminal procedure specifically provide that the motion is timely at any stage.

QUESTION: At any stage?

MR. BAUER: At any stage. It may be noticed by -- the rule says it may be noticed at any time during the proceedings, any time during the pendency of the proceedings by the court.

QUESTION: So that rule, in your submission, means that if the motion is made after -- granted after the taking of any evidence, then there is an automatic double jeopardy defense to another trial, is that right?

MR. BAUER: No, your Honor, that is not our submission. Our submission is thatthe reason double jeopardy forecloses a second trial in this situation is because the motion to dismiss the information was made prior to the attachment of jeopardy. There were numerous alternatives available to the trial court to continue in the fashion it did. Numerous alternatives available to the prosecution to continue. Yet, notwithstanding those alternatives, the trial court and the prosecution allowed the trial to continue not only into the jeopardy stage, but through the entire evidentiary stage to the very moment when the verdict should have been forthcoming. And then, at that stage, subjected the defendant to a second --

attempted to subject the defendant to a second trial by not rendering a verdict and dismissing at that stage.

Now, in response to your Honor's question, a different situation would be posed if the motion were made at some time, and the Court acted on it promptly. The --

QUESTION: But the -- you tell me the Federal rules of criminal procedure permit the motion to be made at any time, before or after jeopardy attaches?

MR. BAUER: That's right.

QUESTION: And if the motion is made after jeopardy attaches, and is granted, then there's a built in double jeopardy defense to any future trial?

MR. BAUER: No, your Honor, I think not. If the motion is made mid-trial, and acted upon at that time, mid-trial --

QUESTION: Granted.

MR. BAUER: Granted, mid-trial, then we have the situation --

QUESTION: If it's denied, there's no problem.

MR. BAUER: That's clearly true.

QUESTION: No double jeopardy, though.

MR. BAUER: If it is granted at that time, then we do have the situation to which the respondent referred, the Dinitz kind of situation or the Somerville kind of situation, in which one can explain that on one of two grounds: either

that the defendant had indeed requested the mis-trial himself, and the trial court was giving the defendant no more than he asked for --

QUESTION: This is not a mis-trial; this -- the basis of this motion is that the person should never have been held before the court on a defective indictment such as this.

MR. BAUER: But that --

QUESTION: The trial should never have begun; that's the basis of the motion.

MR. BAUER: Well, that is indeed true, your Honor. Now, the court has made clear in cases all the way back to 1896 in Ball, that if a person is tried and convicted pursuant to a defective indictment, that that person -- and the indictment has been challenged on appeal, that that person can indeed be re-tried without double jeopardy problems. But in this case, what we have is a situation in which, at the time the motion was made, the defendant had made the motion prior to the attachment of jeopardy. There were a whole host of alternatives available to the trial court, and to the prosecution, to proceeding.

QUESTION: For purposes of your argument as to double jeopardy, do you draw any distinction between the declaration of a mis-trial and the dismissal of the indictment?

MR. BAUER: Your Honor, there is a stronger case

for a dismissal, because a dismissal, as was suggested in the Jenkins case, may well be ambivalent -- ambiguous. It may be arguably a dismissal on the merits. If it is, even though mid-trial, that would preclude a re-trial.

QUESTION: Here it clearly was not a dismissal on the merits.

MR. BAUER: Here it clearly was not a dismissal on the merits. The court characterized it as a dismissal, but in our view, your Honor, whether it is characterized as a mis-trial or characterized as a dismissal, the result in this case must be the same. Because although themotion was made prior to the attachment of jeopardy, the court erroneously allowed the case to proceed into the jeopardy stage all the way up to the would-be verdict stage, and then dismissed -- or declared a mis-trial, without giving the defendant the benefit of a verdict.

What the double jeopardy clause enunciates is a dual policy. It enunciates a policy against repetitive trials. It also enunciates a policy in favor of -- once the trial has commenced, the defendant is entitled to a verdict on the merits.

QUESTION: You said he wasn't found guilty. I thought the judge said, this is about as guilty a man as I ever ran across.

MR. BAUER: Indeed, your Honor, the judge made that observation. And there's no way that we can erase that from the

record. But I would suggest that what the double jeopardy cases provided, starting with Wade against Hunter, is that one of the valued rights that a defendant has is the right to get a verdict. And the observation in this case, no matter how much we analogize it to a verdict, was not a verdict.

One of the most difficult things that a trial court must do in a bench trial is decide on guilt or innocence. And one of the things that we would want to have is that that determination be a deliberate, reflective one.

QUESTION: Mr. Bauer, would your case be different if Judge Eschbach had made findings of fact of guilt, and then dismissed the indictment after that, or waited for a post-trial ruling -- a post-verdict ruling?

MR. BAUER: I think if there had been a formal verdict of guilty, followed by a dismissal afterward, our case would be different. And I would respectfully suggest that the double jeopardy clause would probably, although I am not willing to concede it, but might probably permit a re-trial. That would be somewhere between the Ball case and this case. That situation, however, your Honor, might implicate due process considerations nonetheless.

QUESTION: Well, let's take the double jeopardy for the moment. If you say there could have been a re-trial, I suppose you also then would acknowledge that if there had been a post-trial dismissal on this ground it could have been appealed by

the government.

MR. BAUER: Yes.

QUESTION: It could have been appealed by the government notwithstanding the fact that if the ruling was affirmed, there could be another trial.

MR. BAUER: If -- you mean the ruling --

QUESTION: In otherwords, say Judge Eschbach had post-verdict, had dismissed the proceedings; the government had appealed, saying the error isn't that clear at all. We think the indictment was sufficient. And then the Court of Appeals had affirmed the dismissal. The government could still re-indict, couldn't it?

MR. BAUER: Yes, they could, your Honor.

QUESTION: And it could be another trial?

MR. BAUER: There could be, your Honor.

QUESTION: And even though there's the possibility of a second trial, raising all the fact questions, double jeopardy would not apply?

MR. BAUER: The reason for that, your Honor, was because in your -- in the situation which you posit, there was indeed a verdict from which there is an appeal. And no matter how we analogize it, the judge's outburst here was not a verdict.

QUESTION: So the error you're really complaining of, then, boils down to the fact that Judge Eschbach didn't make the right finding. He didn't allow closing argument.

MR. BAUER: No, your honor, we are referring -- in this case there was a continuum of error. There were errors at the beginning of trial. Well, I should even start before that.

QUESTION: Well, but that rests entirely on the error being so plain. Lots of times a motion like this can raise a rather complicated question, that the judge either has to adjourn the trial, or go ahead subject to ruling later. But you -- would you have a ruling that whenever such a motion is made on the -- as trial commences, the judge has an absolute duty to postpone the taking of evidence until he can rule on it?

MR. BAUER: No, I would not, your Honor, although I would respectfully suggest, what the trial judge should have done was at least declare a five minute recess to determine whether the question was complicated. Now, if indeed the question were one that would take two hours or two days research, in view of the untimeliness of the motion, it might be appropriate to continue the trial at that time; might be. I would suggest, however, that a recess to determine whether it is a difficult question, which recess -- that recess, which would have only taken five minutes, would certainly not be inappropriate. And in fact, I would go beyond that and say, in this case that was not the only alternative at the beginning of trial. It was not only that the trial judge could sua sponte have asked for a recess. But the U.S. Attorney is also a member of the bar of

the State of Indiana.

QUESTION: I just have a lot of difficulty with the notion that the constitutional double jeopardy issue turns on the time and the difficulty of the making of the motion.

MR. BAUER: Well, it is not the difficulty of the motion that is the determinant, your Honor. But what we have in this situation was a motion which, granted with hindsight, was as plain as could be. In fact, Judge Eschbach said, if a law clerk of mind had drafted something like that, I would send him back for a refresher course. It was an egregious mistake.

QUESTION: Well, it's easy to say that after the fact. The trial judges who have to go ahead with trials, you know, it's not that easy. I don't think any motion's that easy.

MR. BAUER: Your HOnor --

QUESTION: If it were so egregious, why did it take the defense counsel seven weeks before he noticed it?

MR. BAUER: Well, your Honor, I've referred to that earlier, and I must respectfully suggest, I do not know the answer. I can only speculate --

QUESTION: Well, perhaps then you overstate when you say it was so egregious.

MR. BAUER: Well, one answer may be, he didn't look at the information at all. As soon as he did look at the information, it leapt from the paper. I didn't suggest that that was an appropriate form of pre-trial strategy. But the

fa ct that it was obvious, and the fact that he did not catch it earlier are not necessarily inconsistent.

QUESTION: If you're correct in your position, perhaps the criminal rules should be amended to provide that any motion not made, at least three days before trial, is waived, the defect is waived.

MR. BAUER: Your Honor, I would suggest that that is -- that that would be an inappropriate response. In addition, I think it is important, in terms of timeliness, it is important to focus on two questions: one, whether it was timely for the purpose of raising it later; a second one, whether it was timely for double jeopardy purposes.

I have suggested your Honor that had the motion only been made after conviction and appeal, although it would be timely at that stage, that would certainly not bar a re-trial. But we do not have that situation here. Here we have a motion that is not only timely, in the sense that the Federal rules of criminal procedure provide. It is also timely in the double jeopardy sense. It is timely because it was made before jeopardy attached, giving both prosecution and trial court a number of alternatives to proceeding in a fashion in which double jeopardy would attach.

QUESTION: But this is -- this is -- it's only a only a coincidence that this is a bench trial. Suppose the jury had been empanelled and sworn, and then this motion had been

made. What would you have -- what would the situation be then?

MR. BAUER: Well, that would -- excuse me, your Honor. That would be closer to the Somerville case.

QUESTION: Double jeopardy would have attached?

MR. BAUER: That's right. And then, in fact, I think the inquiry would have to be at that stage considering the reasonableness of the alternatives, would a recess be appropriate.

QUESTION: Well, what good would a recess be after jeopardy had attached?

MR. BAUER: Well, if indeed a -- had the jury been empanelled, and the motion was only made at that time --

QUESTION: I should have said, empanelled and sworn.

MR. BAUER: Empanelled and sworn, jeopardy attaches under the Serfass rule. If the defendant then had made the motion only then, I would suggest that once again, as this Court has suggested in recent cases, what the trial court would have to do is waive the alternatives. It may be at that time, since the jury was already sitting there, that a recess would be inappropriate.

The fact is, in this case, it was not a jury case. And the important thing to focus on is, what are the alternatives? A recess would have been so simple. Why did

the trial court judge not just say, okay, a single case has been cited to me. Let me take five minutes to look it up. Why did the prosecution just sit there and do nothing.

QUESTION: Mr. Bauer, may I ask you again: how can one be sure that this was not a deliberate bypass when counsel for defendant made no objection to the procedure the judge followed? The judge made it very clear he needed to look up the law. Counsel was present, and he remained silent. If you'd been the judge, wouldn't you have felt that you had the acquiesence of counsel in proceeding with the trial?

MR. BAUER: It might have been that the judge thought that the counsel was not objecting, although there is reason to believe that the counsel misunderstood the trial court's ruling. But leaving that aside, if the trial court -- if the defense counsel had been deliberately attempting to use this as a device to have double jeopardy apply, then it would have made sense for him not to make the motion until evidence commenced. Then it would have been a double jeopardy situation. What defense counsel was doing was making the motion at a time before jeopardy attached, giving the trial court and giving the prosecution full opportunity to save themselves from an error completely of the prosecution's making. It was the prosecution that drafted that faulty information, not the defendant. So the defense counsel gave them every opportunity to rescue themselves, not only pointed out the defect, but cited an Indiana State

case. And what did prosecution do? Sat there and did nothing. Alternatives: he could have joined in the motion to dismiss. He could have moved to amend. He could have suggested a recess. The cases in this Court make clear that the duty should not be on the defendant to not only raise it but continue to raise it and protect his rights.

QUESTION: Mr. Bauer, why do you consistently say he needed a recess? There was no jury there. They didn't need a recess. They could have argued it right there.

MR. BAUER: Okay, they could have argued it right there.

QUESTION: Why didn't they?

MR. BAUER: Well, I think the question is, why not ask the government?

QUESTION: Why didn't they?

MR. BAUER: Why not ask the government that?

QUESTION: Why didn't he? It was his motion, why didn't he argue -- continue to argue, and say, if your Honor please, I think we ought to decide this now. Let me read this case to you.

MR. BAUER: Since I was not in that courtroom, I cannot tell you, your Honor.

QUESTION: I see.

MR. BAUER: But it seems to me under the facts of this case, that's not a reasonable requirement. The alternatives

were so clear, the duty of the government is there. And to say, because the defendant didn't jump up and say, your Honor, I want to stop. Now remember, this was a bench trial. The judge was not only going to be the person who ruled on the motion; he was going to be the one who was the trier of fact.

QUESTION: Well, I suppose one reason the defense counsel might not have pursued it too vigorously was that he wouldn't have gained very much if he had gotten the indictment amended right there on the spot. What does he gain?

MR. BAUER: Well, he gains then the possibility that that case is the only case that the defendant has to sit through. One of the things that the double jeopardy --

QUESTION: Well, under your view of the law, that's true anyway.

MR. BAUER: No, it is not, your Honor. In my view of the law, if in this situation, the judge does not render a verdict, then no second trial can be held. One of the protections of the --

QUESTION: Do you admit the indictment -- I mean, the information, could have been amended?

MR. BAUER: Not only do I admit it, I ask why didn't the government do it? Rule 7(e) makes it clear that they --

QUESTION: So if it had been amended, then your man would be in jail for good, wouldn't he?

MR. BUAER: I don't admit that, your Honor, because --

QUESTION: You don't admit what the Judge said?

MR. BUAER: I suggest that the judge --

QUESTION: The judge said, this is a guilty man.

MR. BUAER: I suggest that the judge had an outburst, had an outburst of frustration, because the judge had let that whole trial go ahead; the judge recognized finally he had made a mistake.

QUESTION: I can't go into what was in the judge's mind, and I don't think you can, in characterizing what he did. We have the record of what he said; that's all we have.

QUESTION: Going back, may I just make one other observation -- going back to the posture of defense counsel at the commencement of -- right before evidence was taken. It seems to me that what he did gave him two bites at the apple. Because if he just sits there with error in the record, and there's a verdict against him, he knows he can have it set aside. But if he doesn't have the amendment made, and he just lets the case go to verdict, he wins.

MR. BAUER: May I respond to that?

It seems to me that that is the presupposition which the government proceeds on in their entire brief, that this man would have been convicted. And it seems to me that what Wade v. Hunter says is, anytime a trial commences, there is always the possibility that man may be acquitted. And although in this case the odds are 99 and 3/4 percent clear

that he would not have been acquitted; the judge's outburst, I must concede, is as close to a verdict as one can get. It was not a verdict. I think that this Court cannot allow the outcome of these cases to turn on whether or not the judge does give some kind of an outburst like that in the nature -- the quality of that outburst. Either there is a verdict or there isn't. If there is not a verdict, it seems to me, then one has the right to assume that if there had been a verdict, that verdict might have been one of acquittal as well as conviction. And had it been one of acquittal, then the government's presupposition is wrong. Because then there could clearly not have been a re-trial.

QUESTION: Mr. Bauer, let me ask you a foolish question. This case comes here as an assimilative crime, doesn't it?

MR. BAUER: Yes, your Honor.

QUESTION: Do you think the case would be any different if it had been a routine Federal offense, rather than a State offense brought into Federal court because of the location of the situs of the crime?

MR. BAUER: The -- I can appreciate the difficulty of the government that under the Assimilative Crimes Act, there is a responsibility then not only for knowing the Federal statutes, but what may sometimes be difficult state statutes. It would be a clearer case for us in terms of the default of the

prosecution had it not been a state -- an underlying state crime.

But here we're not talking about a difficult State crime. We're talking about the simple crime of theft. And every first year law student learns, your Honor, that theft includes not only the taking, but taking with intent to know. The prosecution here, the members of the U.S. Attorney's office, are members of the bar of the State of Indiana. And it seems to me reasonable in this case to assume that, although they are not required to know every bit of Indiana statute, they can know what the Indiana theft law is. That is not putting an undue burden. And if the prosecution, if the U.S. Attorney's office, drafts a faulty indictment or faulty information, and allows that to continue for four months; if at trial it is pointed out, even under the Assimilative Crimes Act, I respectfully suggest that a U.S. Attorney knows Indiana theft as well as an Indiana District Attorney.

QUESTION: I'm not sure that I clarified this point before. But since defense counsel was a member of the bar and an officer of the court, I'm not sure what your answer was when I asked, did he have an obligation, as an officer of the court, to alert the judge to the consequences that you now argue for, namely, that there would be a double jeopardy before the judge went ahead?

MR. BAUER: Your Honor, if he knew it, I have no

question but that he should have. And if he didn't --

QUESTION: You mean this is something he discovered by research after the event, too?

MR. BAUER: If he found out about it five weeks before trial, and then waited to the day of trial, I suggest that, as your Honor, I think, is implying, that that is inappropriate, not only inappropriate, but unbecoming an officer of the Court.

So the simple answer is, if that happened, yes. And going beyond that, if he knew when he made the motion that failing to rule on it at that time would raise the problem we're discussing this morning, again, there's no question but that as an officer of the court, he should have. But I'm suggesting that the record is bare as to whether he did. I have not spoken to him. I've never discussed the question with him. So the two of us can only speculate as to what he was doing.

QUESTION: Very well.

MR. BAUER: Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE RESPONDENT.

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

This is the latest in a line of cases extending

back to the United States against Perez in 1824. It involved the question of the permissibility of re-trying a defendant whose first trial terminated prior to a finding of guilt or innocence by the finder of fact.

It is, in our view, perhaps the easiest to decide of all of those cases, because it is governed by a clear and simple consideration, that it was the defendant who sought the pre-verdict termination, and he got what he requested.

Now, before turning to the body of my argument, I just want to make one point about the facts just to be clear. There are two places in petitioner's brief, page 17 of his opening brief, and page 4 of his reply brief, he says that the defendant objected to proceeding with the trial.

Now, we've been over this a little bit this morning. I can't find in the Appendix anything that remotely resembles an objection to proceeding with the trial. What happened was, he came in, waited until the trial began, and the prosecutor had made his opening statement. He then raised his objection, and the court upbraided him for the untimeliness of raising it, and explained the difficulty of dealing with the motion at that time.

Now, on page 8 of the Appendix, there is a statement that is somewhat ambiguous, and I just wanted tosay what we think it means. It's near the top. Mr. Swanson, the defense counsel, said --

QUESTION: Nine?

MR. FREY: Page 8 of the Appendix.

He says, I realize this is probably a little bit out of order, but I think it should be considered by the Court at this time.

Now, we do not take that to be an objection to proceeding with the trial when the judge later on refused to grant the motion at this time, but rather an apology on the part of counsel for the fact that he was so late.

QUESTION: What about the next sentence? I was in the case after the time had passed for such a motion to be made?

MR. FREY: I wondered about that.

QUESTION: So I think you ought to refer to that too, shouldn't you?

MR. FREY: Well, I don't think that it has any -- first of all, I can't find in the rules -- Mr. Justice Stewart asked about that earlier -- I could find no reference in the local rules --

QUESTION: -- but it certainly explains, I should think, on the face of it, why it is he didn't make it until he did.

MR. FREY: I don't believe -- first of all, there is no rule of court in the Northern District of Indiana.

QUESTION: Well, assume there isn't. He may have

been wrong. What was he, eight months at the bar, something like that?

MR. FREY: Well, I think that whatever -- I don't know what the explanation is for why he didn't raise it. I know of no rule that would have prevented him from raising it sooner, and no requirement that he should wait until the trial has commenced to raise it. I merely want to be sure that there is no ambiguity on the fact that he did not object to proceeding with the trial once the judge had tentatively denied his motion subject to reconsideration at a later point after a recess.

QUESTION: Well, isn't a motion to dismiss an indictment in a sense always a motion -- an objection to proceeding with a trial?

MR. FREY: Well, no, it could be made in the form of a motion in arrest of judgment, in effect.

QUESTION: Well, a motion to dismiss an indictment before the trial has commenced.

MR. FREY: That's an objection to proceeding with the trial, in a sense, yes. But -- and it can be made at any time. We don't dispute that he could make it in the middle of the trial, under the rules. The question is whether for double jeopardy purposes his delay in making the motion is -- the timing of his motion is significant.

QUESTION: Well, the timing of his motion might be

very significant, and yet, there may be no rule that requires him, after the judge says, I'll pass on that later, to say, judge, I want you to pass on it now. I would -- it would take a fairly bold attorney, I would think, in many courts, to suggest that.

MR. FREY: Well, I don't think it would take a -- after all, as I will get to when I get into the body of my argument, to us the critical factor in these cases for double jeopardy purposes is that the defendant has the choice whether to proceed with the trial or whether to stop the trial. Now the defendant may say, your Honor, there is a double jeopardy problem in this case. I don't want to be subjected to a trial on a faulty information, because if I'm convicted, the result will be that I will have to be -- and that set aside, as I know it must be, the result will be that I will have to be subjected to two trials. He can say that.

On the other hand, as Mr. Justice Stevens pointed out, he may very well prefer to go ahead with the trial. And the --

QUESTION: The defendant never has it within his own power to stop the trial. That's entirely up to the judge. The judge can just say, I'll reserve ruling on all that stuff. We've got witnesses waiting. We're going to go ahead.

MR. FREY: Well, that's in effect what the judge did here. He tentatively denied the motion subject to

reconsideration later on. The question is, what significance is to be attached to the fact that the defendant made it at the particular point that he did make it.

Now, we start our argument from a premise that is unchallenged by petitioner, and indeed, that is not subject to serious challenge, having been conclusively settled many years ago in the Ball case. If a defendant is placed on trial on a defective indictment, and that trial leads to a conviction, that is subsequently set aside because of the defect in the indictment, the double jeopardy clause does not bar a second trial.

Now, this is so despite the fact that the second trial will subject the defendant to continuing embarrassment, uncertainty, anxiety and insecurity, will renew the ordeal that the trial itself may represent, and will subject him to the added expense that further defense ordinarily entails. All of these considerations -- I don't mean to minimize them, because they principally underlie the strong policy of the double jeopardy clause against multiple trials in criminal cases -- have been placed in the scales by this Court, and they've been found to be outweighed by the even stronger societal interests in fair trials ending in just judgments.

Now, in veiw of the decision in Ball, it seems quite clear -- and I think my colleague, in effect, conceded it -- that had the court erroneously denied petitioner's motion to dismiss the information, the double jeopardy clause

would not have barred a re-trial. Petitioner's argument is that because the district court ruled correctly and dismissed the information in this case, he cannot be re-tried. But if the court had erred and denied the motion to dismiss, he could have been re-tried.

To state the proposition --

QUESTION: You mean after a finding of guilty?

MR. FREY: After a finding of guilty.

QUESTION: And then the defendant appeals?

MR. FREY: Or -- this --

QUESTION: And then he appeals the denial of his motion.

MR. FREY: Or an arrest of judgment is granted --

QUESTION: Well, he appeals the denial of his motion.

MR. FREY: That's right.

QUESTION: And so at that time he is in the ballpark.

MR. FREY: That's correct.

QUESTION: But suppose -- suppose the judge had found -- entered a formal conclusion that the defendant was guilty, but then granted the motion; sort of an arrested judgment motion.

MR. FREY: Yes.

QUESTION: And then the government had re-indicted

him, just like they did here.

MR. FREY: I think there's no difficulty whatsoever with that.

QUESTION: Why? What's the difference in terms of double jeopardy?

MR. FREY: Between what?

QUESTION: Well, the indictment has been dismissed, and the government re-indicts him; wants to try him again.

MR. FREY: No problem.

QUESTION: Well, why? Well, I know you don't think there's any problem in this case, either. But why do you think there's any less problem in the latter case?

MR. FREY: Where an arrest of judgment is granted? I think it's settled. In effect, that's equivalent to what happened in Tateo where the district court, in a collateral attack, it first set aside --

QUESTION: I'm not talking about an appeal --

MR. FREY: No, no, but in Tateo there was appeal. There was a collateral proceeding in the District Court. And the District Court set aside its judgment of conviction. And then a fresh indictment is brought, or the defendant was brought to trial again on the charge. And he claimed double jeopardy, and the court --

QUESTION: But the -- in my example, the matter the

court operates on, or addresses itself to, after verdict, is something that the defendant instituted before evidence had been taken. And he never renews it, never pushes it, and the judge just delays acting on it until after the verdict.

Now what difference does that case -- what's the difference between that case and this one?

MR. FREY: I don't see how a defendant can have more double jeopardy protection, Mr. Justice White, in these situations. After all, in the case in Ball itself, I believe, and in many --

QUESTION: Well, I'm not saying he's got any. But I don't see the difference between the two cases.

QUESTION: I think the other side would say that the difference might be that in the interests that's been emphasized in some of our double jeopardy decisions, the interest in the defendant of having the first trier of fact reach a conclusion, reach a verdict --

MR. FREY: Well, yes --

QUESTION: There is that difference.

MR. FREY: Oh, I am -- I'm proceeding next to that point, because that, to us, is the critical factor in this case that differentiates it, if it's differentiated at all, from Ball. But that does not have to do with a post-verdict. I thought that Mr. Justice White was asking for the difference between an arrested judgment and an appeal leading to a reversal

of the conviction. And if that was his question, we see no difference. Of course, if it comes before a verdict, then you have -- mid-trial, then you have the problem that this case presents. And I will get to that --

QUESTION: Well, on an arrest of judgment, you'd be tried on an indictment with a different allegation, would you not? Just the same way you'd be on an appeal and reversal.

MR. FREY: That's what happened in this case, yes.

QUESTION: Are you suggesting there's another ground for there being no double jeopardy here, namely, that he's being tried for a different crime?

MR. FREY: No.

QUESTION: No.

MR. FREY: But I want to make one point about Ball, because my colleague's response to Ball was to say that -- and my colleague's response to the problem that if his motion had been denied, he could have been tried again after a reversal on appeal or a motion to arrest judgment, was to say that he made it before trial. It should have been granted before trial. But of course that's true in Ball, and that's true in most of these cases, that the motion is made before trial; the district court erroneously denies the motion, as he initially did at the outset of this trial; the trial proceeds. The defendant is subjected to the trial, and after the trial is over and he's convicted, the conviction is set aside because

of the defect in the information or indictment.

QUESTION: What about the point that it could have been amended?

MR. FREY: Well, I agree, it could have been amended. I don't think that's dispositive for double jeopardy purposes. And as I will point out shortly, if the defendant wanted to avoid going through a second trial, he could have suggested an amendment, and then he would have had only one trial.

QUESTION: I'm not for putting that burden on him. But I mean, if it had been amended at that stage, he could have been convicted.

MR. FREY: He could have, yes.

QUESTION: There's a possibility he could have been convicted.

MR. FREY: I agree with that, Mr. Justice Marshall.

QUESTION: And we wouldn't be here today.

MR. FREY: That's correct.

QUESTION: But isn't his argument sort of in the alternatives, that if/we regard the motion as timely, and it's before jeopardy has attached, then the judge had a duty to rule on it then. But if the judge decides to wait until the trial gets started, then he has a right to a verdict by the first trier of fact.

MR. FREY: Well, I think --

QUESTION: You kind of have to deal with the two things separately.

MR. FREY: He makes the two complaints, and I think there are answers to both of them, which I do hope I will --

QUESTION: Get a chance to make. And when you do, with respect to the second branch of the argument, I'd like to know whether the government is at all asking us to re-examine the Jenkins holding. Because it seems to me that's your toughest hurdle, is the language of Jenkins. I think Jenkins is the case.

MR. FREY: Well, we don't think -- we're not asking you to re-examine Jenkins. We don't think it's necessary in this case. Because we think it's clear in this case that this was not a finding on the merits by the trial court in the defendant's favor, which is what Jenkins suggests may not be reviewable. This was clearly a termination based on a defect in the institution of the proceedings, and in no way going to the merits; there were no findings of any kind.

QUESTION: But the reason it was not reviewable in Jenkins was because of the necessity of further proceeding with respect to the facts.

MR. FREY: Well, there are -- there is a necessity for further proceedings whenever a trial is terminated prior to verdict. This is a pre-verdict termination case,

which Jenkins was not. And this is a case like Gori and Somerville and Jorn, and then the whole line of --

QUESTION: This fits into the mistrial category, then?

MR. FREY: Well, that's -- we think there is no material difference.

Now, to come back to Mr. Justice Stewart's point, this case focuses on the difference, if any, between Ball and cases in which there is one added element, that is, that the trial was terminated prior to a finding of guilt or innocence.

Now, that fact, the pre-verdict termination, implicates only one interest other than those already considered in Ball, that is protected by the double jeopardy clause, and that interest is the valued right of the defendant, as this Court has described it, to receive a verdict from the fact-finder at the first trial.

This Court has long recognized that a defendant who asserts his valued right by objecting to a termination of the trial can have his objection overriden only upon a showing that the trial court reasonably viewed the termination as manifestly necessary.

In Gori, in Downum, in Somerville, the defendants asserted their desire to go to verdict by objecting to the mid-trial termination. This Court was then confronted with the difficult question, in each of those cases, whether the

ends of public justice sufficiently supported the decision of the trial judge to deny the defendant the opportunity to submit his case to the jury at that trial and possibility to terminate the controversy then and there by means of an acquittal.

Jorn was a similar case because, in effect, the defendant was deprived of any opportunity to register his objection to the termination.

But in this case, petitioner never disclosed the slightest interest in obtaining a formal finding of guilt or innocence from the judge at the first trial; understandably enough, in our view. Nor when he made his belated motion for dismissal following the prosecutor's opening statement, and it was tentatively denied subject to later consideration, did petitioner express any objection to proceeding with the trial.

Now, here, in urging that the double jeopardy clause barred a second trial, petitioner expresses two grievances that he says justify the result he seeks. The first arises fromthe fact that although the challenge to the information came after commencement of the trial, jeopardy had not yet attached. Thus petitioner argues, he was forced to undergo a trial that was doomed from the start because of the defect in the information. Inhis view this procedure necessitated his undergoing two trials when the first of these was avoidable.

This argument, parenthetically, is virtually the exact opposite of the defendant in Illinois against Somerville,

who insisted that his first trial was hardly pointless, even though it could not have led to a valid conviction, in view of the possibility of a valid and binding acquittal.

Petitioner's second complaint is that having been forced to undergo trial on the defective information, he was then deprived of the benefit of a finding, guilt or innocence.

There are two fatal flaws in his argument. The first is that the situation here was largely his fault because of the tardiness of his challenge to the information. And I don't mean tardiness in the sense of non-compliance with Rule 12, but for double jeopardy purposes in the sense of the situation that was created.

QUESTION: Well, what if this motion had been filed two weeks before the scheduled date of trial?

MR. FREY: That would make no difference, your Honor.

QUESTION: And hadn't been acted on, and the judge did the same things he did here?

MR. FREY: In view of our alternative and principal argument, it would make no difference.

QUESTION: So you're not really relying on the point you just made.

MR. FREY: Well, unless the Court rejects our principal argument. I mean, we don't think it's necessary for us to win the case that there is this added factor, but

some people may.

QUESTION: You want to win the case?

MR. FREY: Well, yes.

The second point, and the one that's more crucial in our view, is that petitioner never objected to having the trial go forward, nor to its termination by grant of his dismissal motion prior to a finding of guilt or innocence. Petitioner seeks to excuse his silence by contending that the burden rests on the court, or the prosecutor to prevent the evils to which he now says he was subjected.

This position might have merit if it could fairly be said that no defendant would ever wish to be placed on trial on a defective indictment, or that trial having commenced, every defendant would wish to proceed to verdict.

QUESTION: Can I interrupt you right there? Why isn't that same argument applicable to Jenkins? Because there the defendant did not object to the dismissal or discharge a t the time the Judge made it without all the necessary findings hadn't been made?

MR. FREY: Well, it wasn't a pre-verdict determination in Jenkins. And I think it's --

QUESTION: Well, but that's the issue is whether it was, because the court held, as I read the court's opinion, that the reason it wasn't appealable was, there were some more factual determinations necessary. Now, why isn't that

just exactly like this?

MR. FREY: Well, I don't think this fits -- that is, the judge though he was completing the trial, and that he was making a finding on whether Mr. Jenkins had committed the offense or not. I think it's quite clear, although the government contended in Jenkins that that finding was based on an erroneous view of the law, nevertheless, he did something which was quite similar to what the judge did in Martin Linen, that is, he determined that, as he understood the law, Mr. Jenkins had not committed an offense. Now the government came along and said, well, it doesn't matter; we can appeal because he's made all the findings of fact that are necessary to support a judgment of conviction. And the court said, no, it's true he made most of them, but there is one missing which is critical to the case.

QUESTION: Why isn't that just like what Judge Eschbach did? He says, I think this fellow's guilty, but I won't enter a formal --

MR. FREY: Well, we don't rely on the fact that he said, I think he's guilty, as being a verdict. So that I think you can -- I think that adds atmosphere to the case. But in effect what Judge Eschbach clearly did was to stop the trial before it had reached its completion, and to grant the dismissal of the --

QUESTION: The completion in what sense? I mean,

all the evidence was in.

MR. FREY: Before determination had been made whether --

QUESTION: Whether as a matter of fact, the man was guilty.

MR. FREY: -- petitioner had robbed the news dealer or not.

QUESTION: Which is exactly what was left out in Jenkins, wasn't it? The final facts of determination.

MR. FREY: I don't think so.

QUESTION: You think Jenkins would have come out differently if Judge Travia had done what he did in the middle of the trial rather than at the end?

MR. FREY: Well, I'm not sure -- I don't know what -- I don't know that Judge Travia could have done what he did in the middle of the trial. You mean, if he had stopped the trial before the prosecution had completed its evidence, and the defendants --

QUESTION: Well, suppose the prosecution's evidence -- he had said, it seems to me from these 2nd Circuit cases that there is a defense on the merits to this thing; I'm just going to dismiss the indictment.

MR. FREY: Well, we're getting into labels. In effect, he called what he did a dismissal of the indictment. But in fact, what he did was not to determine the facial

validity of the indictment in any sense, but to determine that the defendant was not --

QUESTION: Well, Jenkins and Wilson are both written in terms of labels, and in terms of black and white lines rather than balancing of equities, it seems to me. And there's an advantage and a disadvantage to doing that.

MR. FREY: Well, I don't -- I know that you wrote the opinion for the Court in Jenkins, and I know that there may be some advantages. But I understand the Court's decisions, and I think it was stated in Serfass and it was stated in Jorn and has been stated several places in this Court's jurisprudence, that it isn't the label that's attached, but the functional analysis of what it is that the judge in fact did. And that was the case in Martin Linen, most recently, earlier this month; the Court's opinion said, we look at what the judge did. The action was, in fact, an acquittal.

QUESTION: Well, I was referring to Jenkins and Wilson.

MR. FREY: Well, our feeling is that in the case where the Court makes a determination on the merits, we have a different problem. I mean, I would like to re-argue Jenkins, but I don't think that's timely this morning. I think there is a material distinction between the case in which the judge, whatever he calls it, makes a determination that the defendant

is not guilty of the offense, and the case in which, prior to verdict, he determines that there is a facial defect in the indictment.

Now, if I can come back to the petitioner's two complaints. I would venture to say that most defendants would be delighted with the prospects of having a first trial that could result in a valid acquittal but not a valid conviction, and at which they would be given a complete preview of the prosecution's case.

Of course, not all of them would necessarily, but I think some of them would.

Moreover, it seems likely that many defendants in petitioner's position at the conclusion of trial, having heard the judge's tentative assessment of the evidence, would prefer not to have a formal finding of guilt entered. In other words, many defendants would consider that what happened at petitioner's trial gave them the best of both worlds.

The fact of the matter is, that different defendants will have different desires, and there's only one way that we can know what a particular defendant's desires are in a particular situation, and that is, if he tells us. If he makes no objection, it can reasonably be assumed that the course adopted is not objectionable to him. He should not later be heard to say that he retroactively objects to the course that was pursued when such an objection conveniently

immunizes him from any exposure to conviction and punishment for his crime.

To sum up, the position we urge is that the double jeopardy clause bars a second trial in the following circumstances. First, when the first trial has ended in a valid judgment of conviction. Second, when the first trial has resulted in an acquittal by the finder of fact. Third, when the first trial has been terminated prior to verdict, as it was here, provided the defendant has objected to the pre-verdict determination or been deprived of any opportunity to object, and the termination was not manifestly necessary.

QUESTION: -- where he is not objecting?

MR. FREY: No, I'm talking about the instances in which the double jeopardy clause does bar --

QUESTION: Excuse me, I understand.

MR. FREY -- and that would require an objection on his part.

QUESTION: Thank you. I understand. Excuse me.

MR. FREY: And fourth, when the defendant has been forced to seek a termination of the first trial on account of irreparable judicial or prosecutorial overreaching designed to obstruct the rendition of a fair verdict at that trial.

In other cases, a second trial generally is not barred by the clause, in our view. Andparticularly pertinent here, a second trial would not be barred when the defendant

has sought or agreed to a pre-verdict determination, rather than asserting his valued right to receive the verdict of the fact finder then hearing the case.

This general approach has, we submit, several substantial virtues, and few, if any, drawbacks. It is simple to administer, and it provides a clear rule of decision for the vast majority of cases of pre-verdict termination.

The Court must ask the question, which will dispose of most of these cases, did the defendant object to the termination? If he did not object to the termination, the double jeopardy clause would not bar a re-trial. Only if he did object to the termination must the Court go on to the more difficult question of whether there was, in the particular circumstances, manifest necessity.

Now, our stress upon the defendant's role in causing or accepting the pre-verdict terminationof this first trial is --

QUESTION: And you would apply this rule even though he initially hadn't asked for it himself?

MR. FREY: Well, if the prosecutor asks -- I'm not sure that I follow your question, Mr. Justice White.

QUESTION: Well, suppose the trial judge on his own motion, for some reason that the defendant hasn't focused on, dismissed the indictment --

MR. FREY: Well --

QUESTION: -- during trial.

MR. FREY: Well, the objection --

QUESTION: And the defendant doesn't object?

MR. FREY: He doesn't object: we would apply that rule, yes. If he does object, then we would have to --

QUESTION: You don't think that's contrary to Jorn?

MR. FREY: No, I don't think that's contrary to Jorn, because in Jorn there were two factors that were critical: the one that's most pertinent here is that Judge Ritter simply stopped the trial and discharged the jury before anybody had a chance to say anything. Now in those circumstances, I don't think we can assume that the defendant acquiesced in, agreed, wanted the trial to stop.

QUESTION: So Jorn is just unique.

MR. FREY: Well, it's fairly unique. Fortunately, judges don't often act with that degree of abruptness.

QUESTION: Mr. Frey, can I ask one other question? The fatal defect, or one of the -- the critical point is the defendant did not object to the pre-verdict termination. Now in stating that, are you emphasizing the fact that he made the motion, or are you emphasizing the fact that the time the judge ruled, after all the evidence was in, he didn't say in effect, please don't grant my motion?

MR. FREY: Well, there -- both factors are pertinent.

He could have protected himself. If he made the motion as he did here, and the District Court tentatively denied it subject to reconsideration. And then the District Court, after the taking of the evidence and the recess, returns and says, I'm sorry to see that this information is woefully deficient under Indiana law, and I'm going to have to dismiss it, the defendant could say, your Honor, I don't want my motion acted upon at this time. I will make it in arrest of judgment if you find me guilty. I want a finding of guilt or innocence. I've been through this trial, and I want a verdict in this trial.

And if the defendant did that, then the judge said, well, I'm sorry, I can't be bothered, or so on, then I think, unlike Somerville -- and we've suggested this in our brief -- there would not be manifest necessity for the termination. And I think under those circumstances, the double jeopardy clause would bar a second trial.

The difference between this case and Somerville is that in Somerville it happened at the beginning of the trial, and the interests of public justice weighed very differently, because the witnesses, the jury and everybody -- and the defendant, and all the parties were going to be subjected to a lengthy proceeding.

QUESTION: In this case, the only thing the petitioner did was to file a motion before trial?

MR. FREY: Well, it's not what he did that we think

is significant, but what he didn't do.

QUESTION: Well, but I mean, what else did he have to do?

MR. FREY: Well, if he --

QUESTION: Suppose he had not filed a motion before trial?

MR. FREY: He could file his motion at any time.

QUESTION: Suppose he had not filed a motion before trial, and the judge, after the trial, had dismissed the information on his own?

MR. FREY: That would have been -- there would be no bar to a re-trial in those circumstances, in our view.

QUESTION: Why? Because the defendant did something?

MR. FREY: Well, there would be a question. If the defendant said --

QUESTION: No, the defendant didn't say anything.

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

QUESTION: Because as I understand, the usual rule for the defendant waiving his double jeopardy point is that he did something on his own.

MR. FREY: Well, normally, the --

QUESTION: But he didn't do anything here during the trial. Nothing.

MR. FREY: Well, but what we rely on here is the

fact that he did nothing. He complains now that he didn't get a verdict. But he didn't ask for a verdict. He was perfectly pleased, as far as the record shows -- and he certainly accepted the judge's grant of his motion to dismiss the information.

QUESTION: What -- could he have stopped it?

MR. FREY: Well, as I said, Mr. Justice Stevens --

QUESTION: All he had to do was to say, I think it would be better if you just found me guilty.

MR. FREY: Well, he -- the contention is that it was still an open question whether the --

QUESTION: The judge says, I'm going to dismiss this indictment because -- he says, oh, no, you have to find me guilty; I won't stand for that.

MR. FREY: Well, it's not a question of finding him guilty. It's a question of finding him either guilty or not guilty. What's critical in these cases is the possibility that the defendant will be acquitted. That's what all the argument back and forth was in Somerville. And in your dissent, Mr. Justice Marshall, and in Mr. Justice White's dissent, the stress was on the fact that the defendant might have had a valid acquittal at that trial, and he wanted that chance to have that, and that was taken away from him. While in this case, he might have had a valid acquittal had he asked the judge to rule, and make a finding of guilt or

innocence, but he didn't; he didn't want it. Nothing was taken away from him in terms of the valued right, which is at the core, in our view, of the proper disposition of these pre-verdict termination cases.

So for those reasons we ask the Court to affirm the judgment of the Court of Appeals.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:31 o'clock, a.m., the case in the above-entitled matter was submitted.]