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ORIGINAL

In the

Supreme Court of the United States

THOMAS SANABRIA, Petitioner,	)	
vs	)	No. 76-1040
UNITED STATES, Respondent.	)	

Washington, D. C.
November 8, 1977

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v.	:	No. 76-1040
UNITED STATES, Respondent.	:	

Washington, D. C.

Tuesday, November 8, 1977

The above-entitled matter came on for argument at 11:25 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 P. STEVENS, Associate Justice

APPEARANCES:

FRANCIS J. DIMENTO, ESQ., 100 State Street, Boston, Massachusetts 02109, for the Petitioner.

FRANK H. EASTERBROOK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, for 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 76-1040, Sanabria against United States.

Mr. DiMento.

ORAL ARGUMENT OF FRANCIS J. DiMENTO, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DiMENTO: Thank you, Mr. Chief Justice, and may it please the Court:

This is here on the grant of a petition for a writ of cert to the First Circuit which partially vacated a judgment of acquittal entered in the District Court for the District of Massachusetts. The case presents a double jeopardy issue which arises in this way: In November of 1971, there were a series of raids, so-called, around the suburban communities of Boston, pursuant to search warrants directed to suspected bookmaking establishments. The warrants were issued as the result of a series of wiretaps authorized by the District Court which had been conducted since the previous June. For some reason -- and I don't know the reason -- it was not until ten months later, in September 1972, that an indictment was returned and in this particular indictment, the one now before you, sixteen persons were indicted and eventually eleven were tried, of whom one was the Petitioner Sanabria. It was a one-count indictment, charging a violation of Title 18 United States Code, section 1955,

which, as you know, is the so-called "Bookie Syndicate' Act.

About a month after the indictment was returned, the Fourth Circuit announced its decision in Jordano which you might recall was the case that held that a wiretap was invalid if application for it had been authorized by a person other than the Attorney General or the specially designated assistant, as required by the statute. Then this Court granted cert in Jordano and in the spring of 1973, by agreement among all the parties, including the Government and the defendants, the case was allowed to lie dormant pending your decision in Jordano. And I give you this history because there is some suggestion in the Government's brief and in the record that for three or four or five years defense counsel was plotting ways to attack the indictment.

The case was essentially dormant for a good part of the time and eventually in mid-1974, I believe, this Court upheld Jordano and, as a result, many, many of the indictments that had resulted from the raids were dismissed and this was one of the few surviving indictments, if not the only one. It became immediately apparent to defense counsel that unless we could find some other basis for a Fourth Amendment attack there was simply no defense for these defendants. There was just a ton of evidence if all the bookmaking slips and wiretaps were going to get into evidence.

We thought we did come up with some other Fourth

Amendment grounds but the District Court didn't see it our way, nor did the Court of Appeals. Interestingly enough, we filed a petition for cert here which was held by you over the summer and denied this past September under the name of Plotkin, Petitioner, I believe, versus United States. These were the ten defendants who were convicted. Sanabria was the eleventh and he was acquitted. I am jumping ahead in time. After the trial court denied our motion to suppress the evidence, we realized that the trial was going to be simply an exercise in the protection of the defendant's rights and shortly before the trial began we began casting around for some kind of defense to put on some kind of a plausible defense at the trial.

And, of course, the place to begin is with the statute. The statute, if you will recall, prohibits willfully conducting a gambling business that has to meet three criteria. First of all, the gambling business must constitute a violation of state law; second, it must involve five or more persons; and thirdly, it must be large. It must be in operation more than 30 days or receive a gross revenue of more than $2,000 in any single day. So that an essential element of the offense was to prove that the gambling law alleged in the indictment violated state law. The indictment particularized as the violation of state law Section 17 of Chapter 271, and that section of

the Massachusetts General Laws is directed to games, like horse races, political elections, boxing matches, but not to lotteries, the numbers game, so-called. And thus, the Government had to prove, or we thought the Government had to prove, that the defendant was in the business -- or the business that was being alleged was one that was in violation of Section 17, and that is a non-numbers type of game.

So at the close of the Government's case, when it put Section 17 into evidence, by way of asking the court to take judicial notice of it, we made what I might charitably call a somewhat specious argument. Because the indictment described the business as one of registering bets, which is not, technically speaking, a crime under Massachusetts law. The crime is being found in a place with apparatus for registering bets. But because the indictment described the business as one for registering bets and because it described the gambling business as including a numbers operation, and the numbers operation was not a crime under Section 17 which was specified in the indictment, we moved for a judgment of acquittal. And as I say, the motion was completely unsound. We took a wild shot, but the District Court was not buying it. And at the Appendix, page 7, you will find the District Court holding that the indictment was not effective and denying the judgment of acquittal on that basis.

QUESTION: Am I correct that so far you admit that

you started out in this case to create a condition where you would have what you consider a foolproof double jeopardy point?

MR. DiMENTO: Oh, no. I never dreamed that this case would get this far or that there would be any double jeopardy.

QUESTION: You said you made this specious argument, and all that, on the stand.

MR. DiMENTO: Well, I made a specious argument moving for judgment of acquittal, when the proper motion should have been a motion to dismiss the indictment. That was why the argument was not well founded. Then, after the District Court denied the motion, and properly so, we got down to the serious business of directing ourselves to the evidence in the case, and we moved -- at page 11, I believe, of the record -- to strike for limit the numbers evidence so as not to be considered on the first essential element of the crime, that is that the gambling business must violate state law, in this case violate Section 17, the horse racing statute.

So, what we were asking the court to do was either strike out all the numbers because horse racing had been particularized or limit the numbers evidence, so that it could be received only as further description of the gambling and perhaps go into the state of mind of the defendants, that is that they were professional gamblers and knew what

they were doing.

QUESTION: Your point was that since the indictment hadn't recited in detail each of the Massachusetts statutes that was thought to be violated and a necessary prerequisite for the federal offense, this motion was in order.

MR. DiMENTO: Not quite, Your Honor. My point was that there was one statute which was particularized and that was the statute the violation of which the Government had to prove.

QUESTION: When you say particularized, do you mean alleged?

MR. DiMENTO: Alleged in the indictment, particularly alleged in the indictment.

QUESTION: And it was your view that the indictment to be sufficient to withstand a motion to dismiss had to allege chapter and verse of the Massachusetts law.

MR. DiMENTO: No, not that either. And Judge Skinner, the trial judge, recognized that. If it had simply alleged that the gambling business violated state law, that would have been enough. And I think Judge Skinner said that, that what the Government had done was narrowed it, specified section 17 and was stuck with it in the view of Judge Skinner.

QUESTION: In other words, it was kind of a misleading contention on your part that since they didn't have to specify anything, but they did specify one section and,

therefore, you had more or less been misled so that you were prepared to defend only as to that aspect.

MR. DiMENTO: Well, I really didn't think I had to show that I was misled or prejudiced because it is part of the due process that you prove what is charged and you charge what you intend to prove. I suppose that is part of it, but it all goes to the fundamental right to be notified of the crime with which you are charged.

At any rate, the District Court denied our motion to strike the evidence or limit it and then the defendants put on some evidence and then we renewed what I would call our specious judgment of acquittal motion and that was denied. And then there was a recess and the judge came back from the recess and said that he had done some research, he had reconsidered our motion to strike or in the alternative to limit the evidence and he decided to strike the evidence, the numbers evidence. And he says at page 13, and I am quoting: "Section 17 does not include the numbers aspect, so that while I am not going to grant a motion for judgment of acquittal on that basis, I will grant the motion to strike so much of the evidence in the case as has to do with numbers betting."

Then, when the dust had cleared and the numbers evidence had all been taken out of the case, it became obvious that there was no evidence linking one defendant to

the case in any way, linking him to the gambling business. And that defendant was the Petitioner here, Sanabria. So I did what I assumed was the logical thing to do, moved for judgment of acquittal. Of course, what we could have done was to do nothing at all and permit the jury to return a verdict of not guilty, which it would have had to do, because the judge would have had to instruct that they could convict somebody only if he were connected to a horse racing gambling business, and the jury under those instructions would have done the right thing, I assume.

QUESTION: When you moved, you, in effect, waived your right to have the jury return that verdict, you chose to have it determined in a different manner.

MR. DiMENTO: I don't think so, Your Honor. I thought that question had been passed in the Martin Linen case decided only last April, where this Court recognizes that a judgment of acquittal is the equivalent of a directed verdict, and I would assume of a verdict.

QUESTION: But insofar as the Double Jeopardy Clause protections, one of them is the right to go to the jury that is impaneled and have your determination come from that first jury. Don't you think when you make a motion like you do, you waive that right in favor of some preferred method of determination?

MR. DiMENTO: I don't think of it as a waiver. I

think of it as saving the court, the Government, defense counsel and all the personnel involved in the trial a lot of time. Why go through the empty and futile gesture and go through this empty ritual of sending the case to the jury when you know there is only one conclusion they can arrive at, and that is --

QUESTION: But you are not willing to let them arrive at it. You want to short circuit it.

MR. DiMENTO: Oh, I would have been willing. I would have been willing.

QUESTION: But you weren't, because you made the motion.

MR. DiMENTO: Well, because I was following the rules. I am sure the judge would have, if I had by way of a request for instruction asked the judge, the trial judge, to instruct the jury that they are not to convict anybody who is not in the horse business. He would have, when I made that request for instructions, said to me, "Damn fool, why aren't you moving for a judgment of acquittal. I am not going to send this case and sit around until the jury decides up there in the jury room that there is no evidence." He would have, I suppose, sui sponte, entered the judgment of acquittal.

So, I don't think of myself as waiving anything. So, the judgement of acquittal was allowed and then the Government filed its notice of appeal. And I would say the notice of appeal of the First Circuit is the first time and only time the

Government correctly described what happened, because it says "the United States appeals from a decision and order of the District Court excluding evidence and entering a judgment of acquittal and denying a motion for reconsideration." There had been a motion for reconsideration thereafter. And then in the second paragraph of its notice of appeal, the Government says: "It is hereby certified that the evidence suppressed constitutes substantial proof of the charges against the defendant."

Obviously, the Government was trying to fit this into that part of the statute which permits it to appeal from an allowance of a motion to suppress evidence. So, the net result, really, as to what happened here was that there was an erroneous ruling on the evidence -- and it pains me to say that the ruling was erroneous. I thought it was right and I still do. But that's not before you. The First Circuit has decided it was erroneous. -- but a correct ruling on the state of the evidence in granting the motion for judgment of acquittal.

This characterization the Court of Appeals in the First Circuit holds is inaccurate. That court holds that the critical ruling by the District Court was that the indictment failed to charge a violation of Section 1955 on a numbers theory, and that's at Footnote 5 of the Court's opinion, at page 6 of our Appendix to the petition.

But, may it please the Court, that can be said of

almost any erroneous ruling, exluding evidence as irrelevant. When a court decides whether evidence is to be admitted or not, it must necessarily interpret the scope of the indictment, and if it interprets the scope widely it will permit in more evidence. If it narrows the scope, it will narrow the amount of evidence that comes in. But when it excludes evidence on the basis of irrelevancy, that exclusion is no more appealable than if it erroneously excluded evidence because it was incompetent. And here, the Court of Appeals says not that the indictment was dismissed but that it was effectively dismissed. And not that evidence was excluded but that the charge was excluded. It speaks of excluding the charge. And the Court of Appeals says, and this is adopted by the Government, that the numbers charge was a discreet basis for imposing criminal liability. And this discreet basis was effectively dismissed.

Now, we have here what I respectfully consider to be a new vocabulary introduced into the criminal law. Indictments are divided into counts, as we all know, but now, under the law of the Court of Appeals of the First Circuit, counts are to be further divided into discreet bases of liability which I call, in my notes, DBLs, discreet bases of liability.

QUESTION: Implied counts.

MR. DiMENTO: Yes.

And if the law of the First Circuit is to become the law of the land, then the erroneous failure of the trial court to recognize a DBL and a resulting exclusion of evidence will be the equivalent of a dismissal of that DBL, and any judgment that results will be appealed as, of course, only to that DBL.

QUESTION: DBL means?

MR. DiMENTO: Discreet basis of liability, my shorthand expression for the Court of Appeals' --

And, the Court of Appeals, however, puts a limit on this DBL theory, by saying that you can have a DBL that has constitutional significance, double jeopardy significance, only where the count is duplicitous, that is, the DBL must be one of the offenses contained in the indictment. The Government takes a more extreme view. Because the Government concedes that the First Circuit was in error when it held that this particular indictment was duplicitous, it now must take the position, if it's going to cling successfully to this DBL theory, it must take the position that a DBL must still be treated as a separate offense for purposes of double jeopardy analysis, even though the count is not duplicitous.

So that, under the Government's definition, I think it is possible to isolate several DBLs in this indictment, in this one count. As a matter of fact, DBL recognition will become a very important part of the skills of every defense

lawyer, because his failure to recognize a DBL could have drastic double jeopardy consequences.

But in this particular count, the charge is that the defendant accepted, recorded and registered on horses and numbers. So you have accepting bets on numbers, recording bets on numbers and registering bets on numbers. There you have three DBLs there. And then you've got skill, speed and endurance of horses. And you can get accepting bets on the skill of the horse and recording bets on the skill of the horse and registering bets on the skill of the horse, and it just keeps going on and on and on. You might get into hundreds of these DBLs. And, it seems to me, that if you are going to incorporate that into our law it should be prospective because, the Lord knows, nobody really recognizes this theory up 'til now and lawyers ought to have a time to learn what these DBLs are and also the District Courts ought to be instructed liberally to grant particulars --

QUESTION: I take it you, from your argument, you agree that if there were to be DBLs recognized that what the judge did here was to dismiss that DBL.

MR. DiMENTO: I don't think he did that, not at all. What he did was to exclude evidence under that DBL.

QUESTION: Oh, no. He excluded evidence with respect to the other charge. And because he excluded the evidence there wasn't any evidence on the other charge.

MR. DiMENTO: Well, he excluded the numbers evidence. The numbers was a DBL, was an identified DBL, according to the Court of Appeals. He excluded the numbers evidence, and by excluding that evidence the Court of Appeals says he effectively dismissed the numbers DBL, so to speak.

QUESTION: Dismissed, not acquitted.

MR. DiMENTO: Yes, effectively dismissed. That's the Government's position.

QUESTION: Well, what's your position? If you are going to recognize DBLs, what is your position? On what the judge did here, dismiss or --

MR. DiMENTO: What he did was exclude evidence, and then on the state of the exclusion of the evidence, on the state of the evidence after the exclusion, he entered a judgment of acquittal.

QUESTION: Well, if as my brother White says, you are going to recognize DBLs -- which your submission of course is you should certainly not do it -- he did dismiss that DBL, the one based upon numbers. Correct?

MR. DiMENTO: No, I don't think so. All he did was say that, "I am going to exclude all evidence of numbers because the only evidence I'm going to let in is the evidence of horses."

QUESTION: Yes, well, perhaps that's --

QUESTION: Well, what happens at that stage of a

trial? Suppose you don't have this DBL element in it at all. There is simply an indictment for a bank robbery and at the beginning of the Government's case the trial judge says, "I am going to exclude all evidence of bank robbery." What's the next step that either of the parties takes?

MR. DiMENTO: Well, I think you've got the problem of a dishonest judge, intellectually dishonest judge, at least.

QUESTION: Let's face it. We've got a whole bunch of judges around the country and my hypothetical isn't -- He may think there is something wrong with the indictment, or perhaps there is something wrong with the indictment. At any rate, he says, "I'm going to exclude any evidence of the crime charged in the indictment."

MR. DiMENTO: Well, Your Honor, what can I say? The defendant didn't appoint the judge. The Government had more to do with the appointment than we did.

QUESTION: But what happens next? Maybe it is a poor ruling on the part of the judge, but what does defense counsel do at this stage?

MR. DiMENTO: Oh, he's delighted. What does the Government do?

QUESTION: The Government is simply sitting there with no move to make. What happens?

MR. DiMENTO: The evidence gets excluded erroneously and then correctly a judgment of acquittal is entered.

QUESTION: On the motion of the defendant?

MR. DiMENTO: On the motion of the defendant.

He might, you know, say, "I am going to let in all bank robbery evidence, but the evidence you have is incompetent. It is all hearsay and I am excluding it on that basis," and he could be 100% wrong, but that's the system.

QUESTION: Then you have a Fong Foo case, don't you?

MR. DiMENTO: Yes, you get pretty close to that.

QUESTION: My brother Rehnquist's example. Let's say he wholly, irrationally and clearly, conspicuously, erroneously excludes evidence and the result is an acquittal, then you have a Fong Foo case, that is an acquittal, and the Government can't appeal.

MR. DiMENTO: I would say that's about as close as you can come, the Fong Foo case.

Also critical to the Court of Appeals' holding was that there should have been an objection to the indictment before trial. But there was nothing wrong with the indictment. Ten people were eventually convicted under the indictment and Sanabria, himself, could have been convicted if the Government had in any way been able to connect him with the gambling business defined in the indictment. And the Government concedes in its brief that there was no support for a pretrial motion to dismiss, if there had been one.

QUESTION: Mr. DiMento, as I understand the law that

has subsequently developed, had the judge made a different ruling on the exclusion of the evidence, your client could have been convicted in this trial on the numbers evidence.

MR. DiMENTO: Oh, yes.

QUESTION: So, he was in jeopardy of conviction on both DBLs.

MR. DiMENTO: Oh, yes, yes. And, even with the numbers evidence out, he was in jeopardy of conviction under the horse aspect, because there might have been some little evidence left in there connecting him with the horses. So he was in jeopardy on both.

But the Government says that although we had no ground for a pretrial motion to dismiss, we should have objected to the indictment beforehand. Now, I don't know of any such objection under the rule as it existed then, but the Government says we should have in some way pointed out the miscitation of Section 37. Our position is that there was no miscitation. Section 37 was a perfectly valid part of the Massachusetts statute, and the indictment was a fine coherent whole. So that, I just don't see that there was any ground for any type of motion before trial. What the Government is really saying is that we should have written a letter to them and say, "Gentlemen, we think that what you really intend to do here is to charge not only a violation of Section 37 but also a violation of Section 7, and I think you had better

amend your indictment or go back and get a new one, because while you will be able to convict ten of the clients here, Sanabria, we are told, has no evidence of engaging in horse betting, so therefore you had better go back and get a different"--

QUESTION: What happens in a case where there are two counts in an indictment and the Government offers evidence under both of them and then the defendant says the indictment really is defective, doesn't effectively charge a crime? And the court says, "I think that's right. I am going to dismiss that count and, of course, I will then exclude the evidence the Government has offered to support this crime that hasn't been charged." It is sort of the chicken and the egg. Here, the court didn't think that this indictment charged a numbers crime. Isn't that true, in this case?

MR. DiMENTO: Yes.

QUESTION: And so, what do you do first? Do you exclude the evidence or do you dismiss the indictment?

MR. DiMENTO: It depends on what position you are in. In this case --

QUESTION: What did he do?

MR. DiMENTO: In this case, he decided that the indictment was perfectly valid. It could not be dismissed. I had moved --

QUESTION: Well, he didn't think the indictment

charged the numbers crime.

MR. DiMENTO: No, he didn't. You speak of numbers crime, however, as though you are speaking of a separate offense.

QUESTION: Isn't it sort of odd to say that the judge entered an acquittal on a crime that he thought the judgment, the indictment didn't charge?

MR. DiMENTO: Well, no.

QUESTION: Did the judge think that a numbers crime was adequately charged in this indictment?

MR. DiMENTO: No, he did not.

QUESTION: Well, how could the judge acquit a person of a -- enter a judgment of acquittal on a crime that he thought the indictment didn't even charge?

MR. DiMENTO: Your premise is wrong. Your question has got a wrong premise. You are talking about a crime. There was no numbers crime, as such. The crime was violating state law, and the judge thought that the violation of state law in the manner, by means of numbers, did not satisfy the indictment.

QUESTION: And that there was no -- although the indictment could have charged a crime that the evidence would have supported.

MR. DiMENTO: Although the indictment could have charged a crime -- If it had been written differently, yes.

QUESTION: Yes.

Well, the Court of Appeals thought that the indictment adequately charged a crime, that this -- to which this evidence was relevant.

MR. DiMENTO: Yes. The Court of Appeals thought the evidence was relevant, and that's the issue.

QUESTION: But left no one in doubt as to what crime was being charged.

MR. DiMENTO: Yes.

QUESTION: And I recall your earlier statement. You conceded that it left you in no doubt.

MR. DiMENTO: I knew what crime was being charged, but I knew also that it had been narrowed and particularized to a violation of horse betting.

And, finally, the Court of Appeals says and the Government adopts the argument, that we gave up our valued right to a verdict, which I think I have covered before. We never, never thought that by moving to exclude evidence and then moving for a judgment of acquittal, we were waiving anything or giving up any right. And I don't see how anybody can fairly say that our decision to move for the exclusion of the evidence or to object to the evidence and then to move for a judgment of acquittal could in any way constitute a waiver of anything so valuable as the constitutional right not to be twice put in jeopardy for the same crime.

QUESTION: Well, it is not a question of not waiving a right to double jeopardy, it is a question of consciously deciding not to go to this particular jury for a verdict.

MR. DiMENTO: Well, only because the rule puts the obligation on defense counsel not to waste the court's time by sending the case to the jury under instructions that will inevitably result in a verdict of not guilty.

QUESTION: But you did make a choice.

MR. DiMENTO: Well, I don't think -- I think I fulfilled an obligation to the court not to waste its time. I don't think I made a choice in the sense that I was sacrificing something from my client in order to gain some benefit. I was simply following the rules, correct procedure, the natural thing to do for a lawyer with more than six months experience.

QUESTION: Well, but you -- the counter -- would have subjected your client to a risk too. As you say, the jury might have come back with a verdict of guilty.

MR. DiMENTO: Oh, yes, they might have come back with a verdict of guilty, but I have to assume that all juries do the right thing.

QUESTION: You said you have had more than six months of experience.

MR. DiMENTO: That's a good point.

Well, in this case, I am confident the jury would have recognized it, because I am confident that the judge, under the instructions of the judge, his instructions would have been so explicit that they --

QUESTION: But, nevertheless, when he entered, what you call, a judgment of acquittal, he had already ruled that the indictment didn't charge a crime with respect to numbers.

MR. DiMENTO: I don't like to use that kind of phraseology. He made a determination --

QUESTION: I know you don't. I don't blame you.

MR. DiMENTO: Well, see if you will accept mine. He had made a determination as to the scope of the indictment.

QUESTION: Yes.

MR. DiMENTO: And the scope of the indictment as determined by him was narrower than that argued by the Government.

QUESTION: I understand that. And the Court of Appeals, however, said the indictment, as it stood, charged a crime to which the evidence of numbers was relevant.

MR. DiMENTO: Oh, yes.

QUESTION: And the judge, at the trial, had said there is no crime charged in the indictment to which this evidence is relevant.

So how could he ever have acquitted him on that crime which was not charged?

MR. DiMENTO: Well, that, may I respectfully say, if we reason it that way, then I know of no ruling excluding evidence that can't be tortured into an appealable result. Excluding evidence on the basis of relevancy.

QUESTION: There are an awful lot of exclusions of evidence with respect to crimes that unquestionably are charged in the indictments.

MR. DiMENTO: I am saying excluding on the basis of relevancy. Once you say that evidence is excluded because it's irrelevant, then you are necessarily defining the scope of the indictment and --

QUESTION: Well, it was excluded as irrelevant to the crime that was, that the judge did think the indictment charged. It was not excluded as irrelevant to the charge which he thought the indictment didn't charge.

MR. DiMENTO: Yes, but, see,you are returning to charge.

QUESTION: Yes, I am. I certainly am.

MR. DiMENTO: I think we can carry it to its extreme by using the example of the judge who has the bank robbery indictment and says, "I am just going to exclude all evidence of bank robbery," and although that is terribly erroneous it still --

MR. CHIEF JUSTICE BURGER: Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The facts of this case are distinctive and simple, and since Mr. DiMento's argument has concentrated on the facts I think I will do likewise, at least for a few minutes before lunch.

The indictment which was filed in 1972 charged Petitioner and sixteen others with operating an illegal gambling enterprise in violation of state law. The indictment on its face stated -- and this language appears at page 16A to the Appendix to the petition -- that the defendants accepted, quote, "bets and wagers on a paramutual numbers pool," close quote. It also charged that the gambling enterprise accepted bets on horse races. In other words, it charged that one crime was committed by two means.

After three years of pretrial proceeding and on the sixth day of trial after the close of the Government's case, the defendants moved for a judgment of acquittal on the grounds of insufficiency of the evidence. The judge rejected that motion out of hand as frivolous.

MR. CHIEF JUSTICE BURGER: We will pick up there at 1:00 o'clock, Mr. Easterbrook.

(Whereupon, at 12:00 noon, the Court recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:02 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Easterbrook, you may resume.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF THE RESPONDENT (Resumed)

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

Just before lunch I had read part of the charging portion of the indictment which said that defendants, as part of the operation of a gambling enterprise, accepted bets and wagers on a paramutual number pool.

After the District Court denied the motion for a judgment of acquittal on the grounds of insufficiency of the evidence, the defendants then argued that the indictment failed to state any offense involving numbers betting, although it clearly did so on its face, because it referred to Section 17 of a particular Massachusetts statute. This section, they argued, referred mainly to horse betting, and that Section 7 referred to numbers betting. After the District Court initially denied this motion, it agreed and concluded that the indictment did not adequately charge any offense involving the taking of numbers bets. Having effectively struck through the charge on the face of the indictment, charging numbers bets, the District Court then excluded the numbers evidence as

irrelevant to what remained.

The trial was recessed over night and the prosecutor asked the District Court to reconsider that decision. District Court asked counsel for Petitioner whether he was prejudiced, and counsel said in open court that, indeed, there was no prejudice because he had read the indictment and seen the charge of accepting numbers bets. He asserted, however, that he didn't need to show prejudice, because this was a technical matter.

QUESTION: It is one thing to say you don't have to show prejudice. It is another thing to say you haven't been prejudiced.

MR. EASTERBROOK: I think so. I think the Court of Appeals was right in concluding that you didn't have to, that you had to show prejudice, but in a minimum, having conceded that there wasn't any, it wouldn't make any difference who had the burden to show prejudice or lack of it.

QUESTION: Do you suggest that that's a form of waiver?

MR. EASTERBROOK: No, I don't believe it's a formal waiver of any sort.

QUESTION: Not formal, a form, a kind of waiver.

MR. EASTERBROOK: We haven't relied on it as a waiver. It is simply a statement that there was not, in fact, any prejudice. I would take it as a concession, as

Mr. DiMento said in open court today, that he was making a specious motion.

Nevertheless, the District Court adhered to its ruling and concluded that the indictment would not be read as stating any offense involving numbers. With the numbers theory removed, the District Court then turned to the evidence with respect to horse betting. It found that this evidence was insufficient to show that Mr. Sanabria was involved in the gambling enterprise and it acquitted him on what remained.

The Court of Appeals held that this was the equivalent to dismissing the indictment, insofar as it charged engagement in accepting numbers bets, and it further held that the District Court's disposition of the numbers betting portion of the indictment was not an acquittal because it had nothing to do with relating the evidence to the elements of the offense or to defining the elements of the defense, but was simply a conclusion that the indictment was insufficient on its face.

The Court then remanded for a second trial with respect to the gambling offense, to the extent the gambling offense involved numbers. To the extent it involved horse betting, there was indeed an acquittal. The Court of Appeals held, and we agree, that we could not retry Petitioner on that charge.

Petitioner has argued that the Criminal Appeals Act

does not authorize the appeal that the United States took. This Court has held, however, that the Criminal Appeals Act authorizes any appeal from a final judgment, unless the Double Jeopardy Clause bars the way.

We believe, therefore, that the only question this Court need confront is a constitutional one, and I turn directly to that. We believe that a second trial on the horse betting theory is permissible for two reasons.

QUESTION: On the what?

MR. EASTERBROOK: On the numbers theory, I am sorry.

First, a defendant who has an opportunity before trial to seek a resolution of defects apparent on the face of the indictment, must do so then.

QUESTION: Why was there a defect on the face of the indictment? The indictment was perfectly valid, facially. It charged him with violation of the federal statute and the state criminal law it mentioned was the one that covers horse race betting. And that was not a defective indictment in any sense of the word, was it?

MR. EASTERBROOK: I think there are two answers --

QUESTION: There might or might not have been sufficient evidence to convict him and the court held that there was insufficient relevant evidence to convict him at that -- You don't make a motion before trial on that basis.

MR. EASTERBROOK: No, Your Honor, but I meant that

contention in another way. The indictment on its face charged the taking of numbers bets, and then it referred to a state statute. Petitioner argued that the indictment would have been adequate to charge the taking of numbers bets, if it had either recited Section 7 of the Massachusetts statute or not mentioned any Massachusetts statute --

QUESTION: And just said it violates state law.

MR. EASTERBROOK: Just said in violation of state law.

QUESTION: Because that is a component of the federal offense.

MR. EASTERBROOK: Yes, but the elements of the offense had to do with the statement that it violates state law, and in order to be a sufficient charge the statement that numbers bets were involved.

To the extent that numbers bets were not adequately charged then, the claim is that something went wrong on the face of that indictment, that although the language of the indictment said that numbers bets were being taken and that this was a gambling offense, the statement that Section 17 of the Massachusetts statute was involved was enough to affect the validity of that charge apparent on the face of the indictment. It would have been open to Petitioner then to move before trial to strike through that language as incorrect or inconsistent or in some other way inadequate.

Our argument is that since he didn't do so he then opened up the possibility of a second trial that would otherwise not have needed to be held. I'll get to that in a moment.

The second argument, which is an alternative argument, is that the District Court's decision here removed the numbers charge from the case at Petitioner's request, and that when the District judge granted a judgment of acquittal all that was left was horse betting. The case, therefore, is not significantly different from last term's decision in Lee which held that a defendant could be retried after an indictment had been dismissed in mid-trial at the defendant's request.

The first argument has to do with the timing of Petitioner's motion. Rule 12(b)(3) of the Federal Rules of Criminal Procedure requires that objections to defects on the face of the indictment be raised before trial. The argument that the indictment which concededly recited that Petitioner engage in a betting offense involving numbers did not actually charge that offense is an attack on the sufficiency of the indictment, and it therefore was required to be raised before trial.

We have collected at Note 23 of our brief some authorities that support this proposition. Petitioner, therefore, was not entitled to have his contention resolved

during trial at all. Not having attacked the indictment before trial, the judge was required to treat the charge as sufficient.

The court did consider it. In considering it at all, it erred in Petitioner's favor. But the timing of the motion was Petitioner's choice and the judge did reach it, and it gave him the relief he requested. In doing so, it erred a second time, as the Court of Appeals now has held. In other words, this case is here because of a result of two errors the District Court made, each induced by Petitioner.

QUESTION: Well, the Fong Foo case was here as a result of egregious errors that the trial court had made, ending in a judgment of acquittal. And we held that, regardless of those extremely serious, almost irrational errors, after an acquittal there could not be an appeal by the Government because of the Double Jeopardy Clause.

MR. EASTERBROOK: I think there are at least three distinctions between Fong Foo and this case, one of which the technical question of whether this was, indeed, an acquittal, I'll get to in a second part of this argument. The more important distinction between this case and Fong Foo, one that is pertinent to the argument I am making now, is that in Fong Foo the things that led to the termination of the prosecution could not have been raised before trial. The question whether a prosecution's witness was lying, whether the

evidence was believable, whether it was sufficient, and the other things that underlay the District Court's decision in Fong Foo were capable of resolution only at a trial of the general issue.

QUESTION: And the third. You said there were three.

MR. EASTERBROOK: The third issue is --

QUESTION: The third difference.

MR. EASTERBROOK: The third difference-- I am sorry -- is that the defendants in Fong Foo did not ask the District Court to do what he did. They did not, in other words, request the termination of the trial before the jury had a chance to rule on the sufficiency of the evidence. That's one reason why Fong Foo is quite different from cases like Lee and, indeed, from cases like Dinitz in which the defendant, on his own motion, took the case away from the jury and asked for a pre-verdict termination.

QUESTION: In Dinitz, the defendant asked for a mistrial.

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: That's quite different from asking and getting a judgment of acquittal.

MR. EASTERBROOK: I agree. In Lee the defendant moved for an order dismissing the indictment, and the court held that that was the equivalent of a mistrial.

I think it is also the case that if what the defendant asks for and gets is really a dismissal of the indictment, that the same analysis applies, regardless of what the District Court calls it.

QUESTION: You are going to get to Martin Linen, I expect.

MR. EASTERBROOK: I will.

QUESTION: Mr. Easterbrook, on that last point, supposing as you suggest and was suggested this morning, the defendant had not ruled for judgment of acquittal, but had asked for instructions which would have really, in fairness, mandated acquittal by the jury, and the jury nevertheless found him guilty. Then, I suppose, under the theory of the case that the trial judge actually adopted, the trial judge would have been obligated to grant a motion for a judgment, notwithstanding -- or acquittal, notwithstanding the verdict.

Had that scenario taken place, would you contend that such an order by the trial judge would also have been a dismissal?

MR. EASTERBROOK: Well, it wouldn't have been --

Let me answer that in two ways.

First, your hypothetical case, as a case that this Court has already decided, the case of Forman v. United States, in 361 U.S. The Court held that a second trial was permissible

in that case, because the jury did return a verdict of guilty in the teeth of the evidence, as the judge defined it, because the judge wrongly removed from the jury's consideration the correct theory on which it could and should have convicted.

The second answer is that if that kind of thing had happened in this case and the jury had in fact acquitted instead of convicting, that it would not have been an acquittal on the charge to the extent it involved numbers evidence.

Our view is that the numbers charge was removed from the case well before the judge granted an acquittal. When the judge effectively said that there was no numbers charge at all, because the indictment was inadequate to state it, that took the case out. What was left was a horse betting charge. Whether the District judge acquitted it, acquitted by himself or sent it to the jury and the jury returned a verdict of acquittal, is an arguable matter of detail.

QUESTION: You would say even if there were a jury verdict of acquittal that because of the erroneous exclusion of the evidence, that it should be treated as though the indictment had been dismissed on this DBL.

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: I see.

MR. EASTERBROOK: We would dispute, I think, whether you would characterize this as an erroneous exclusion of

evidence. It is clear that evidence was taken out of the case, but it is also, I think, clear that more than that was involved, that before the evidence went out there was a ruling that the indictment was insufficient to state that part of the offense.

QUESTION: We were talking about the indictment and what it alleged. I don't find the indictment in the Appendix or anywhere else.

MR. EASTERBROOK: It's on page 16A of the Petition for Certiorari.

QUESTION: Thank you.

MR. EASTERBROOK: Suppose the case had been identical to the facts in Lee, in which the defendant was charged with taking the wallet of a blind operator of a candy stand in a post office. The judge had concluded, after hearing all of the evidence, that the indictment was insufficient to state an offense because it didn't charge that the defendant intended permanently to deprive Mr. Bilsky of his property. Having said that, the judge then formally excluded the evidence. In our view, it wouldn't make any difference what the judge said or did, having concluded that the indictment was insufficient on its face to charge that offense. It was simply a matter of detail. The defendant's interests were fixed by the reason that the judge terminated the case, and not the means by which he did so. That, I think, is the

rationale underlying the distinction between dismissals of the indictment and mistrials, on the one hand, and true acquittals, on the other. It has to do with the reason why the case terminated, and not the form that the judge used to make that termination come about.

And the reason this case terminated with respect to the numbers offense was simply that the defendant succeeded in persuading the court that the indictment was bad on its face.

The purpose of the Double Jeopardy Clause is to avoid multiple trials at the request of the prosecution. It guards against repeated prosecutions brought to embarrass the defendant, to subject him to anxiety, to increase the chance of conviction of an innocent man, but the premise of this rule is that it is possible to have guilt reliably determined in a single trial. When guilt can be determined in a single trial, holding of two trials is pointless, and an offense against the defendant's rights. But when the premise of this rule does not hold true, the court is allowed second trials in order to produce a single fair trial. So, for example, there can be a second trial after a tainted conviction has been reversed. There can be another trial after a mistrial has been granted because of manifest necessity, or even in the absence of manifest necessity because the defendant requested it. And there can be another

trial, as in Lee, when an indictment has been dismissed at the defendant's request because of a defect on its face.

In other words, when a first trial is flawed, a second trial may be held. When a defendant moves to abort his case before verdict, a second trial may be held even if the first one was not flawed. In these cases, it cannot be said that the prosecutor deprived the defendant of his valued right to obtain the verdict of the jury at his first trial.

QUESTION: Mr. Easterbrook, let me be sure I have your position on the Lee case. You are taking the position that if the case had gone to the jury and Lee had been acquitted because of the judge's view of striking evidence, and so forth, that that acquittal could have been appealed as though it were a dismissal.

MR. EASTERBROOK: No, Your Honor, we are not taking that position.

QUESTION: I thought you said it was a matter of detail whether --

MR. EASTERBROOK: Lee was a bench trial.

QUESTION: That's right, it was a bench trial. Had it been a jury trial and gone to the jury --

MR. EASTERBROOK: If it had actually gone to the jury and the jury had returned the verdict of acquittal, in our view, there could be no review, that would be the end of

things.

QUESTION: But why not? Supposing the reason there was an acquittal is because of an erroneous theory of the indictment and an erroneous instruction to the jury which, in effect, excluded, as in this case, the evidence relating to the horse betting or numbers, whichever one it is. What's the difference?

MR. EASTERBROOK: One of the difficulties in reviewing judgments of acquittal has been that judgments of acquittal could be based upon other reasons. The judge may make an erroneous instruction, but the jury might acquit for reasons having nothing to do with the erroneous instruction, simply because --

QUESTION: Under the instruction, they could not convict. Under the instruction, faithfully applied, they could not convict.

MR. EASTERBROOK: But, even so, there is still the possibility --

QUESTION: They might have done it for an irrational reason and you give the defendant the benefit of irrationality, but not the benefit of the -- well, I see.

MR. EASTERBROOK: Not even, necessarily, irrationality, simply disbelief of the proof which might be rational or irrational in a particular case.

QUESTION: No, because by hypothesis, there is no

proof on the only permissible theory on which he could go to the jury. So there is nothing to disbelieve. But you still say that acquittal would not be a dismissal.

MR. EASTERBROOK: Yes, Your Honor, and I think to the extent it can be reduced to simply a claim of jury irrationality that the defendant is entitled to jury irrationality.

QUESTION: But I thought you told me earlier that in this case if it had gone to the jury and the jury had acquitted, that that was a matter of detail and there could be another trial here.

MR. EASTERBROOK: The reason I said that was because in our view what the jury would have acquitted on was only the offense to the extent it involved numbers.

QUESTION: How do you know? I mean if he had submitted -- Maybe they didn't believe somebody -- Just the same example you gave me in --

MR. EASTERBROOK: Perhaps I am not entirely understanding your hypothetical, Mr. Justice Stevens. In your hypothetical, would the judge submit the entire indictment, together with the charge --

QUESTION: He would have instructed the jury that the evidence relating to horse betting, whichever one it was that was stricken, is not be be considered by you. But, having that evidence out, if you still find him guilty of

horse betting, that the only theory on which you can find him guilty is that you find evidence of horse betting, and I've stricken all the evidence of horse betting. And then they say there is no such evidence and they acquit.

MR. EASTERBROOK: In our view the numbers issue would still be alive because the numbers issue never went to the jury at all, under your hypothetical.

QUESTION: No, submits both issues to the jury. I am sorry, I'm not getting the example clear.

MR. EASTERBROOK: It's a confusing case.

If he submits both theories to the jury, then I think the jury's acquittal is final, but if he takes out of the case before it goes to the jury a discreet basis for the imposition of liability, here the numbers offense, then the jury --

QUESTION: How did he take it out in this case, other than by excluding the evidence? That's all he did. And then he said there is no evidence so "I'm going to enter a judgment of acquittal." But if the jury did precisely the same thing, you say it is a dismissal, if I understand you correctly.

QUESTION: Well, he ruled expressly the indictment didn't reach a numbers charge.

MR. EASTERBROOK: Yes, he did. And it was not simply a jury charge issue, it was a case in which a discreet

sequence --

QUESTION: And the jury wasn't free, I suppose, to conclude that the defendants were guilty if they thought they were guilty of a numbers charge.

MR. EASTERBROOK: That's right. As I understand the hypothetical, the numbers charge would never go to the jury, with or without any evidence at all. The jury would be told that the indictment never charged any numbers offense.

QUESTION: Well, suppose the horse betting charge had gone to the jury, and they acquitted on the single count of the indictment.

MR. EASTERBROOK: I think I'd still give you the same answer, that since the numbers charge was gone from the case by then.

QUESTION: But it was gone because he excluded the evidence. He didn't tell the jury anything about the indictment, he just excluded that evidence.

MR. EASTERBROOK: Perhaps, how you come out on this depends in part on where you go in. In our view, it was not gone because he excluded the evidence. He excluded the evidence because it was gone. The evidence was quite irrelevant to the case once he had held that there was no valid horse betting charge at all. Excuse me, that there was no valid numbers charge at all, on the face of this indictment. The evidence was excluded because of what had gone before that

and because of a legal theory that didn't have much to do with sufficiency of the evidence, or indeed with the relevancy of the evidence, but had to do with the adequacy of the indictment. I think that is the key in the case.

QUESTION: May I just ask one more question and then I will stop. I apologize for taking so much time.

Would you agree that on the numbers charge, which apparently that would now be regarded in the First Circuit as sufficient indictment on the numbers charge as well as the horse betting charge, that the defendant was actually put in jeopardy on the numbers charge, assuming two separate theories of liability when the first witness began to testify, or maybe when the jury was sworn?

MR. EASTERBROOK: Yes, Your Honor, we agree that he was, in fact, put in jeopardy. The jeopardy was terminated at his own request by the effective dismissal of the indictment here as in Lee. In Lee, too, although the indictment was -- the information was defective, jeopardy attached at the beginning of trial.

QUESTION: On your theory, would there ever be a case of no double jeopardy in the case of a count of an indictment submitted to a jury by the judge, with respect to which the jury returns a verdict of not guilty?

MR. EASTERBROOK: That would always be a double jeopardy bar to a second trial on the charge submitted to the

jury. There are no exceptions to that in our view.

QUESTION: Do you agree that after the judge ruled on the evidence that there was no way under the sun that the jury could legally convict him?

MR. EASTERBROOK: I am sorry, Your Honor, I did not follow that hypothetical.

QUESTION: Once the judge ruled on the evidence and excluded the evidence, is there any way under the sun that the jury could legally convict the Petitioner?

MR. EASTERBROOK: I think a conviction in those circumstances would be in the teeth of the evidence and would have to be reversed by the Court of Appeals.

QUESTION: It couldn't legally be done.

MR. EASTERBROOK: Or set aside by the trial court.

QUESTION: But it is almost impossible for him to do it, once the judge properly instructed the jury.

MR. EASTERBROOK: It has happened. The Forman case is one of those examples.

QUESTION: Yes, because you and I are too weak. We have been practicing more than six months, too.

But, my point is that once the judge took the evidence out of the case, wasn't the judge then, without more, obliged to instruct the jury, practically, to acquit?

MR. EASTERBROOK: Yes, Your Honor, I believe he was.

QUESTION: And if he had done that, jeopardy.

MR. EASTERBROOK: Mr. Justice Marshall, I think the answer to that is the same answer that I had given to Mr. Justice Stevens, that by the time we got there the numbers offense had been taken out of the case entirely, and that what would remain to go to the jury and, indeed, what remained on which the District judge here entered his judgment of acquittal, had nothing to do with numbers at all.

QUESTION: Would the judge have had to instruct the jury that there is no way to convict this man?

MR. EASTERBROOK: He would have had to instruct the jury that there was no way to convict this man on the charge that remains.

QUESTION: Then, what's the difference? The only difference is that technically defense counsel asked him to do it, which he would have done it without the motion.

MR. EASTERBROOK: Your Honor, the motion that in our view is the material one was not the motion for the judgment of acquittal. It was the motion to take the numbers theory out of the case. Once that had been done, the acquittal followed quite naturally. But the dispositive point, in our view, is the time at which the numbers theory came out. Let me suggest an analogy that we use in our brief. Suppose this indictment had been in two counts -- and we understand the Petitioner does not contest that it could have been -- one

count charging conducting a gambling enterprise by taking horse bets, the other count charging the conduct of a gambling enterprise by taking numbers bets.

The district judge would have done two discreet things here. He would have charged that the first count of the indictment, charging the taking of numbers bets, was insufficient on its face and dismissed it. Then he would have submitted a second count to the jury, a second count dealing with the taking of numbers bets. The jury would have acquitted on that. In our view, this is the same case as that hypothetical. It makes no difference to the defendant so far as his double jeopardy interests are concerned whether there was one count or two. And, although in our view once the numbers, once the horse betting count went to the jury that's a final, unreviewable disposition of the numbers argument.

QUESTION: Really, what you want us to say that the prosecutor can draw any kind of indictment he wants.

MR. EASTERBROOK: The prosecutor has substantial discretion in drafting an indictment and I --

QUESTION: He doesn't have the discretion to draft an illegal, unconstitutional --

MR. EASTERBROOK: Oh, certainly not, Your Honor, but I think it is agreed, at least between the parties here, that a two-count indictment in this case would have been

proper.

And, I think, insofar as the Double Jeopardy Clause is concerned, it doesn't make any difference whether it is in one count or two.

In Green v. United States, at 555 U.S., page 190, Note 10, the Court took up exactly this kind of question. The question in Green was whether it made a difference in part that first and second degree murder had been expressed in one count rather than two. And the Court said that the situation is the same as though Green had been charged with these different offenses in separate but alternative counts of the indictment. The constitutional issue at stake here should not turn on the fact that both offenses were charged to the jury under one count.

The same is true in this case. The constitutional issue should not turn on the fact that both theories of liability were charged in one count. The interests of the defendant are the same either way, and the issue on which the district judge eventually entered its judgment of acquittal had only to do With the numbers betting theory of liability. Excuse me, had only to do with horse betting and not numbers betting. If I make that mistake once more, it is going to be exceedingly embarrassing.

I repeat that the problems here are largely of Petitioner's making. There was no fatal flaw in the indictment.

The first trial was not infected with error. Petitioner took a perfectly adequate trial, brought it to a halt, persuaded the judge that he had not been adequately charged and aborted the trial without obtaining the verdict of the jury. All of this was unnecessary. The timing was Petitioner's choice. The error was introduced at Petitioner's urging.

We, therefore, believe that because he urged and the District Court to err twice, once in timing and once in taking the numbers offense out of the case, he should not now be entitled to absolute immunity from prosecution.

We, therefore, believe that the Court of Appeals correctly held the Double Jeopardy Clause does not bar Petitioner's second trial.

QUESTION: Didn't the Martin Linen case -- correct me if I'm wrong. I might be, we've had so much double jeopardy recently. -- didn't the Martin Linen case, in effect, hold that the grant of a motion for an acquittal was the equivalent of a jury verdict of acquittal?

MR. EASTERBROOK: Yes, Your Honor, it did, and we do not contest that holding here, although I argued the Martin Linen case on the other side.

But the gist of my argument has been that two things happened here. One, with respect to the horse betting theory of liability, ended in a true judgment of acquittal, although entered by the judge. It should be treated as if it

were by the jury, and we can't retry Mr. Sanabria on horse betting.

QUESTION: It is difficult to conceive of how you can have an acquittal of part of a count, but I know that's what this whole case involves.

MR. EASTERBROOK: For the same reason, I think, that you could have acquittal on Count One of a two-count indictment if this charge had been broken up into two counts.

QUESTION: But that depends on reading the indictment in the way that you have suggested, does it not?

MR. EASTERBROOK: It does. And it depends on characterizing what the district judge did in the way the Court of Appeals characterized it. But we think the reading is correct and the characterization is fair, and the rest of the argument is down hill from there.

QUESTION: Mr. Easterbrook, just one other question on appealability. At the outset, you mentioned that, as you view the Criminal Appeals Act, an appeal lies wherever it -- a second trial would not be barred by the Double Jeopardy Clause. And you stated the Court had, in effect, so held. Are you referring to what I characterized as dicta in the Wilson case?

MR. EASTERBROOK: I am. I think it was an alternative ground for the decision and it must be seen as a holding.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:32 o'clock, p.m., the case in the above-entitled matter was submitted.)