ORIGINAL

In the

Supreme Court of the United States

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

v.

MERREL CLINE and L. R. BRETZ,

Appellees.

No. 76-1200

Washington, D.C.
March 22, 1978

Pages 1 thru 70

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v.	:	No. 76-1200
MERREL CLINE and L. R. BRETZ, Appellees.	:	

Washington, D. C.,

Wednesday, March 22, 1978.

The above-entitled matter came on for argument at 10:11 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:

ROBERT S. KELLER, ESQ., Special Assistant Attorney General of Montana, State Capitol, Helena, Montana 59601; on behalf of the Appellants.

KENNETH S. GELLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

W. WILLIAM LEAPHART, ESQ., The Leaphart Law Firm, 1 No. Last Chance Gulch, Suite 6, Helena, Montana 59601; on behalf of Appellee Merrel Cline [appointed by this Court].

CHARLES F. MOSES, ESQ., The Terrace, Penthouse, 300 North 25th Street, P. O. Box 2533, Billings, Montana 59103; on behalf of Appellee L. R. Bretz.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in Crist against Cline.

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

ORAL ARGUMENT OF ROBERT S. KELLER, ESQ.,

ON BEHALF OF THE APPELLANTS

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

You will recall this matter was remanded to be rebriefed and reargued on two expanded issues, and the first issue is whether or not the federal rule that jeopardy attaches in jury trials when the jury is sworn is constitutionally mandated.

I think, after reading the briefs in this thing, that we can fairly well agree without arguing that at the time of the Constitution it was not constitutionally mandated, and it was not a part of the Constitution. There were two common law rules at that time, Lord Coke's rule and the double-jeopardy rule; and when we get to as far as Perez, Perez in the touchstone case of manifest necessity says this is not a Fifth Amendment consideration, this is not double jeopardy.

Perez was going into the question of whether or not it's permissible to take away that defendant's right to a jury, once the jury is empaneled and sworn; Lord Coke's rule made it mandatory that you go clear through to verdict.

But it clearly at that time was not a part, nor considered a part of the Fifth Amendment.

It doesn't become that until, in various jurisdictions, in construing the rule of practice or Lord Coke's rule, that were dismissals. There were improper dismissals, and they held the improper dismissal to be tantamount to a jury verdict. And, as a consequence of that, then there was jeopardy under the Fifth Amendment. And the --

QUESTION: The original concept of the common law, there could be no such thing as a failure of a jury to reach a verdict, isn't that correct? They'd lock them up on bread-and-water, and they would come back with a verdict one way or the other.

MR. KELLER: This did happen, yes. You don't see any changes in that until Blackstone does bring out the words, whenever there may be evident necessity, but it took a real necessity, a juror had to die. Hung juries are the things that gave them all their problems.

QUESTION: There was no such thing as a hung jury in the concept of early common law, was there?

MR. KELLER: No. Ironically, no. And in the Commonwealth case, Commonwealth v. Clew? in Pennsylvania, and I'm talking about cases that were all decided back between 1800 and 1820. They upheld Lord Coke's rule, and that jury had gone 36 hours -- 24 without food or drink; two jurors, 75

years of age or older, who had just gotten out of the hospital, were in trouble. And the doctor looked at them and said, if they have some food or drink, something, they can go on. So the judge permitted the jury to vote on it, and the jury said, No, don't give it to them. And obviously they had them hanging on the ropes.

And the judge finally let them off the hook, and dismissed the jury, and then the Pennsylvania Supreme Court held: No, this was improper, and freed the defendants -- they ought not to be. And they took a strict reading of Lord Coke's rule.

This gets commented on, not only later by me, but when I start talking about the Arizona v. Washington case and I wonder if -- whether or not we ought to be here today, in the face of that case, that opinion. But that case recites the reason why you don't keep a jury under that pressure, and certainly there's a humane thought on it.

QUESTION: Was there an earlier time when, even after an acquittal, prosecutions were brought again and again until a verdict was obtained?

MR. KELLER: This is recited back during the reign of the Stuarts, Mr. Chief Justice, and Lord Coke's rule would have come down early in the 1600's, and between that time and 1688, you would have had the reign of two kings, the Stuarts, and at that time, yes, there were re-prosecutions until the

prosecution could get a sufficient case together, and it was horribly abused. You know, the history, as I read it, is as of the Revolution in 1688, they went back to Lord Coke's rule, and we didn't have that occurring any more.

On the second part of your question, if there were an acquittal, would there be a reprosecution, short of the reign of the Stuarts, and I don't know the answer to that, because that comes up near a case that we know of no time when there was ever an acquittal and a reprosecution. And, as a consequence of that, whether it was by rule of court or whatever the rule, as a consequence of the acquittal, then the double-jeopardy application of the common law came into effect. And I can't answer it. I know of no case where there has been an acquittal and a reprosecution. But I wasn't researching from that standpoint, either.

When we researched this and found that the time of jeopardy at common law as at the time of verdict of the jury, there wasn't any question in our mind, one, nobody today is going to go back that far in time and say that jeopardy does not attach until the time of the verdict, as it was at the common law. And we felt that, for the simple reason that we had too much law since then, particularly combining manifest necessity with double jeopardy; and two, fundamentally, it was just unconscionable that you can put a defendant to the blade, you can commit his defenses and still not say that jeopardy

attaches.

But we had real problems in briefing this, in getting the vehicle to come forward from the time of the judgment up to where we want to be today. We didn't know what the vehicle was.

And then came Arizona v. Washington. And the vehicle is the valued-right concept.

Downum in 1963, Justice Tuttle in the Ninth Circuit, in this case said that Downum has to stand for the proposition that jeopardy attaches at the time that the jury is sworn. And the reason that Downum stands for that is because that case involved a case where, after the jury was sworn and before the first witness was sworn, the case ended. They didn't have their witnesses for Counts 6 and 7 and the trial was terminated.

And from that, Justice Tuttle says, Downum necessarily stands for this position. And I submit that when you read Arizona v. Washington today, you have to come out with the same conclusion.

Arizona v. Washington said this was an improper opening statement by counsel, in this case defense counsel, but made at a time between the swearing of the jury and before the first witness.

The fact that two witnesses testified in that case are really incidental to the opinion. The rationale is the valued-right concept goes back to the time of opening statements and that, of necessity, is before the time that the first

witness was sworn.

So, reading this case, as you read Downum, you have to say Arizona v. Washington stands for this proposition. And that means that the only thing that we can really argue today to this Court is that we don't feel that the valued-right concept means all of that, and we're not sure that that's what this Court meant when it said that.

And the reason that I say that is that this Court was particularly careful in the opinion not to say that. Arizona v. Washington was argued the day before we argued the last time, so it was pending during the time that our case was pending, and much of what was said in Arizona v. Washington comes out of the briefs that we submitted in this case. So that we know that the Court was conscious of this case when the opinion was written. And yet the Court assiduously did not say jeopardy attaches at the time that the jury is sworn. So we don't know what we're talking about in terms of valued right, as the vehicle for bringing jeopardy from the time of verdict up to some starting point in time.

If you read the reasons for the valued right in the Arizona case, then you find that it's to avoid financial emotional burden, a re-trial that cons this, you find it's to avoid the prolongation of the period of stigma, and it may even enhance risk that an innocent defendant may be convicted.

That means if you read it literally you could even be

going back to the time that you first select the panel from which you're going to voir dire. We don't know where the starting point is on the valued-right concept.

We do know, it also has been argued under the valued right, that this valued right is a right to a particular tribunal. And that's expressed as early as 1840 in United States v. Shoemaker. It's Lord Coke's rule. You're entitled to this panel, this particular jury.

And it also has been argued that the valued right means that anything that goes to that jury, whether it's in the voir dire questioning, whether it's in the opening statement, anything that does something to that tribunal makes that tribunal valuable.

Serfass, United States v. Serfass, held that the constitutional policies underpinning the Fifth Amendment are not implicated until jeopardy attaches. Serfass also held that this Court has consistently adhered to the view that jeopardy does not attach until the defendant is put to trial before the trior of the facts, jury or non-jury.

And then Serfass held, in two different places, without risk of determinationfguilty, jeopardy does not attach.

Now, if we read the Serfass case in conjunction with Arizona v. Washington, then we're saying that clearly jeopardy does not attach before the time the jury is sworn, and no later than the time that the first witness is sworn. And we have

at least narrowed it down to that point.

If we go back to those points, then, then when we talk about the financial and emotional burden that was expressed in the Arizona case, that's not applicable to that narrow period of time. What difference are we talking about in finances or emotions between the time the jury is sworn and the time the first witness is sworn?

The second reason given is the prolonging of the stigma. And that distinction is gone. Surely, we are not talking about a prolonging of a stigma between the time the jury is sworn and the first witness is sworn.

And the last is enhancing the risk of conviction of an innocent man. And that can't happen until the first witness is sworn.

QUESTION: In Montana, is it customary for both counsel to make their opening statements before the first witness is called?

MR. KELLER: No, sir. I want to get to that. And the unfortunate part about it, and that's where you have all of the advantage, I can only tell you of my practice in Montana. And it is twenty years of trial on both sides and on the bench. And it's uncommonly rare that defense counsel says anything in the beginning. I have never heard a defense counsel say anything in the beginning that the prosecution didn't already know. The only thing that they say is something they want that

jury to hear, which the prosecution already knows. And they want the jury to keep a fair mind on something, an open mind, as the sordid facts come out.

QUESTION: And sometimes they want the jury to focus on one point.

MR. KELLER: That's conceivable. You usually pick that up in the voir dire, to tell you the truth. I do. It's there. That's right.

But at least we have reached the point that we are not going to hold constitutionally that somebody is entitled to anything less than a fair jury, so that what you've done to that jury in the voir dire isn't something that's entitled to protection.

And this gets to the point that I was reaching. The real concept of a valued right to me,as any trial lawyer knows, that when that defendant goes through a re-trial, let's say a hung jury so we don't have any problem there, he really has the odds against him. This was brought out in the Arizona case, by Judge Leventhal in the Carsie? case, and Judge Leventhal pegged it. The second time through those witnesses whose weaknesses were developed by cross-examination by defense in the first case, they started to shore-up their testimony. It's not a significant alteration, but it's there.

And I have yet to see the defendant go through a re-trial that everything didn't change. All of the surprise is

gone. The prosecution knows where he's gone after the first dry run. The prosecution doesn't know that in the first case. They have to be prepared against anything this defense counsel will do. The second run there's no spontaneity, there's nothing. That defendant has an impossible burden that second time, he really does.

And this is the reason why -- I thought about this after the argument last time. You know, I argued to you then as a matter of law and as a matter of fact that the defendant is not in jeopardy until something comes out that makes out a prima facie case. And I was arguing from Serfass, without risk of determination of guilt.

But I thought about this afterwards, and I thought, you know, really, from the time that the defense counsel makes his first objection or does not make his objection as a matter of strategy, that defense is committed, that's when they have really gone in and exposed their hand to the prosecution. And from that point on, that defendant does have a valued right to get this matter heard by this jury and by this judge, by whatever, because now, for the first time, when he didn't have to, he has tipped his hand, and now his concern is interest, is there, is important.

Or, as was said in Jorn, in defining this same valued right, if the right is valued it is because the defendant has a significant interest in the decision of whether or not to take

it from the jury.

And I submit until the time that the defense counsel has done something in this case that tips his hand to the prosecution, up until that point it's not the type of interest that's so significant that deserves constitutional protection. But from that point on, it is.

Rather than try and find out in any given case when that is, then at the time evidence is given is -- you know it's right after that in any given case, that that defense --

QUESTION: Well, it could be if, against the usual policy, defense counsel makes his argument to the jury.

MR. KELLER: It certainly could.

QUESTION: It could. Then he is committed?

MR. KELLER: That's right.

QUESTION: In other words, that would work committal, wouldn't it?

MR. KELLER: That's right.

The problem with that rationale is I just, one, don't see that point, --

QUESTION: They don't do it.

MR. KELLER: -- but if we're going to say that that's what it takes to put jeopardy, I expect we'll start seeing it. But that same defense counsel could tell the prosecution three weeks before that: This is what I have up my sleeve.

And I can't imagine him telling it to him three weeks

before, any more than I can see a competent defense counsel tipping to the prosecution --

QUESTION: Well, I think the difference is that, one, he's in the presence of the court and he's stuck with it; and if he just tells the prosecutor, he's not stuck with it.

MR. KELLER: Oh, I see what you mean. Well, that's true, by --

QUESTION: Wouldn't he be?

MR. KELLER: Yes, yes, he necessarily is. He could do it for the record three weeks before if he would want to, --

QUESTION: Right. Right.

MR. KELLER: -- but, as a practical matter, no. He really doesn't. And it isn't a case of giving the prosecution a week to get ready. No defense counsel gives the prosecution five minutes to get ready, if they can avoid it. You don't tell them something they don't know until it's your turn to put on your case, and then it comes. And I just simply, and I have to speak empirically, I don't see defense counsel telling the prosecution anything any sooner than they have to.

When they make an opening statement, they don't tell him anything the prosecution doesn't know; they're just telling a jury what to expect. But the prosecution knows this.

QUESTION: As I understood you earlier, you told us that in your State of Montana it's not the practice to have opening statements.

MR. KELLER: No. I didn't answer that properly, then, Mr. Justice Stewart. It is, but not at the time of -- prior to the taking of testimony. The defense counsel --

QUESTION: Then, when are they made?

MR. KELLER: -- usually reserves his opening statement, he has the right to make it then, and he asks -- he says, "I'm going to reserve". And when the prosecution has rested, and the defense is now ready to open its case, then he makes his opening statement.

QUESTION: I see. After --

MR. KELLER: That's long after witnesses for the prosecution have --

QUESTION: After the prosecution witnesses have all testified, and the prosecution has rested, --

MR. KELLER: That's correct. The case-in-chief is in.

QUESTION: -- then defense counsel makes an opening statement --

MR. KELLER: -- makes his opening statement.

QUESTION: -- to the jury.

MR. KELLER: That's correct.

Now, he has made it before, but he has never --

QUESTION: But that's --

MR. KELLER: -- I have never heard him make it that he tells the prosecution anything. It's only for the benefit

of that jury going through this particular -- the defense knows what the prosecution is going to give; if he did his homework at all, he knows what the witnesses have. And he's telling this jury at that time what to anticipate and, in essence, "to keep your minds open", but he's not telling the jury anything that the prosecution doesn't already know.

And it's that tipping of the defense that I think makes anything subsequent to that valued to that defendant.

QUESTION: When, if at all, Mr. Keller, does the prosecutor make his opening statement, in your practice? In Montana.

MR. KELLER: Well, he makes his statement as such after the swearing of the jury and before the swearing of the first witness. But there is, in various jurisdictions, various judges before the State, there is some opening remark made at the time you first pick the panel of 24 that you're going to cut down to 12. So that they at least know who the defendant is, what he's charged with, and that sort of thing.

QUESTION: Well, that's part of the voir dire, isn't it?

MR. KELLER: Yes.

QUESTION: So he can ask them, "Do you know the defendant?" or the --

MR. KELLER: And the prosecutor who starts first may well be the one -- the judges don't enter that actively in the

questions, the parties do it, as distinguished from the federal court where the judge literally conducts all of the voir dire in our State.

QUESTION: Well, don't the Montana judges, at the time of the filing of the venire into the box, make some very brief statement that: This is a criminal case, and that such-and-such is the charge, and that sort of thing?

MR. KELLER: Yes. And it varies with judges. Almost all of them do at least that. Some will go through a preliminary half-dozen questions, "These are the counsel and the parties; do you know them?" And gets those questions out of the way in general. And if they do, they hold their hand up, and they leave it up to the counsel to interrogate further.

QUESTION: Mr. Keller, when actually is the jury sworn? After selection, or is the panel sworn?

MR. KELLER: It's initially sworn when it's picked, to tell the truth as to the answers that are given, but when -- that's the whole panel.

QUESTION: That's the whole venire?

MR. KELLER: That's correct.

QUESTION: The whole venire. That's before the 12 are chosen?

MR. KELLER: Exactly.

QUESTION: And then after the 12 are chosen, are they then again sworn?

MR. KELLER: Sworn again, yes, sir.

QUESTION: And that is to well and truly try.

MR. KELLER: Right. That's right.

QUESTION: And what we're talking about here is actual swearing --

MR. KELLER: There are three kinds of swearing. The first swearing is that they are going to tell the truth as to the questions asked generally, as to whether they are qualified even to be jurors, in general.

QUESTION: Right.

MR. KELLER: Then they have another oath that they are going to answer the questions asked in this particular cause by counsel, as to their respective qualifications.

QUESTION: Is that each -- each one individually does that? Do you swear each one individually?

MR. KELLER: No, sir. No, sir, never.

QUESTION: No? Okay, I see.

MR. KELLER: In fact, the matter of practice is to swear everyone in the courtroom the first time. It's the first time they've been down to court, and they have to be qualified. Then, from that you pick your panel for that day, and you usually pick 24 for a trial of 12, because you have enough preemptories going in there, you want to be -- when you're all done, you want to have 12 left. You have 20 in there, I take it back.

And they stand up and take the oath, but so do the remaining jurors in the courtroom, because they may well be called into this case, if somebody is out for cause. And that's to answer the questions in this case.

But when you finally get the 12, and the alternates, if there's going to be any, those 12 or 14 stand up and now are sworn a third time.

QUESTION: But this first oath is essentially like the oath given witnesses, merely to tell the truth?

MR. KELLER: Yes, sir. The first two oaths are that, and I don't think anybody has ever contended that that has anything to do with what we're talking about. We're talking about swearing this final body of 12 to --

QUESTION: And that is the swearing as to which it is claimed jeopardy attaches?

MR. KELLER: That's correct.

QUESTION: Only that, not the preliminary swearing.

MR. KELLER: That's the one that I surely construe to mean that -- that's historically the time when that jury is sworn, when --

QUESTION: Well, some have argued that jeopardy ought to attach earlier.

MR. KELLER: Yes. Yes. Because of what is said to that jury in the voir dire that it should.

QUESTION: Exactly.

MR. KELLER: Yes. And our position on that is consistent with the Arizona case, and we cite in our brief Morris, where you are just not entitled to a prejudiced jury. The real function of the selection at that time is to come out with 12 jurors that are fair-minded and impartial. And it may well be that, as a defense counsel, I'd like to have some sleepers on there, that may well be as a prosecutor I'd like that, but it's a far cry to say that it's entitled to constitutional protection.

So, theoretically, we're supposed to be coming out with 12 impartial people, and we have no particular interest in that tribunal other than the fact that they be impartial.

QUESTION: You have indicated that it would make sense to have the point at which jeopardy attaches be when the defendant has committed himself, or it makes a difference in switching the tribunal.

Are the reasons for moving the point at which jeopardy attaches back from the present rule that attaches when the jury is sworn, back to there, significant enough to overcome the interest in having settled law remain clear and definite and certain. There's some advantage, everyone now knows what the rule is. Do you think it's the change?

MR. KELLER: Settled law didn't become settled law until --

QUESTION: No, but it's settled today, I would think.

MR. KELLER: -- until 1963, well over a century and a half, almost two centuries after we started. Wade v. Hunter first enunciated the valued-right concept, a century and a half after we started; and, I might add,in a non-jury case. And now it's settled. But it really didn't become this until '69, because it wasn't settled in Montana, it wasn't settled in any of the States until Benton v. Maryland in '69. It's settled in the minds of the federal judiciary, because it's been around for a long time.

But it hasn't been with the others. As far back -- or as recently as 1935, the ALI is recommending that jeopardy not attach until verdict of the jury, where it was in the beginning. So to us it's not settled.

And my question is, have we afforded protection for this defendant under any guise by saying it attaches at the same time as it does in a non-jury case? Excuse me, sir.

QUESTION: Well, as I understood you, your point is that -- this point of law -- that something happens when the jury is empaneled and sworn. It wasn't ever really part of the double jeopardy clause at all, it was part of quite a different rule that a person is entitled, once a jury is empaneled and sworn, to go to trial with that jury, and to go a final conclusion of the trial in that way.

MR. KELLER: Civil or criminal.

QUESTION: Civil or criminal. And that that has a

different origin from the -- and is unrelated to double jeopardy clause.

MR. KELLER: Double jeopardy -- that is correct.

QUESTION: Mr. Keller, getting back to when you were a judge, I'd think more so than the jury, couldn't defense counsel commit himself on cross-examination?

MR. KELLER: Yes. That's why I agree with the rule attaching to the swearing of the first witness.

QUESTION: I see.

MR. KELLER: Because I think when that first witness for the prosecution starts to testify, the defense counsel commits himself by objecting, even before cross-examination, --

QUESTION: Right.

MR. KELLER: -- by objecting to a question, or, for strategy reasons, not objecting to testimony. At that point he is in this thing --

QUESTION: Once he gets in --

MR. KELLER: -- and that's why I don't have any objection -- and I don't mean it really because of Montana statute, either. Sure, I want to see -- I think we have afforded protection. But just in terms of trying to figure out where this ought to be, and be something that's going to protect the defendant's right across-the-board and not just in a given State, I can see it attaching that soon. Because at that point the defense counsel is starting to put something into this case

that he doesn't want to have to -- he's tipped his hand. If he goes the second time, it's not going to be that way, and I know it's not going to be that way. Judge Leventhal pegged it, and I think any of us that have tried cases know Judge Leventhal has pegged it. That second run is not --

QUESTION: Well, how about a real easy one? How about a real easy one?

MR. KELLER: Real easy?

QUESTION: Yes, didn't he commit himself when he moved to suppress before trial?

MR. KELLER: No, he really --

QUESTION: That's been worrying me for the last week.

MR. KELLER: Yes, I know. I know that he has certainly got to do his work. But he's got to do his work when his client came in the office. And you go back to the time that the information is filed, and you see efforts on that time to question whether or not the affidavit for leave to file is correct, or you question whether or not, before a Justice of the Peace, probable cause was sown, and caused a transcript to be made. And you've argued that. And that's all part of the tools of trade.

But the real question is: has he committed himself then? No, he really hasn't, because if he doesn't do it then, he's not going to be able to do it. So that's just part of the process.

QUESTION: And he could shift it all entirely at the trial? He could change his own strategy by the time of trial?

MR. KELLER: Of course he could.

QUESTION: Why should the so-called valued-right of the defendant to go to trial before the first jury depend entirely on when the defendant's lawyer has committed himself, as you put it?

MR. KELLER: Because I don't think his right is that valued until that point. Lord Coke's rule -- if you've read any of the biographies on Lord Coke, he never gave any reasons for his rules. If they took out all of the rules that he gave with no reason, they would lose 75 percent of the English law.

[Laughter.]

MR. KELLER: But his rules have been good, so how do we find out what the reason is that gave this valued right? And that's where we came into this case, --

QUESTION: Well, what I'm asking you to do is to perhaps do what Lord Coke didn't, and supply a reason for the statement you make that the commencement of the defendant's valued right begins with the point when the defendant's counsel has committed himself. Why should that be?

MR. KELLER: Because once he has tipped his hand to the prosecution on something that the prosecution does not know where he's going to go, then if he gets a re-trial on that

point, there's nothing left for the defense to have. It's just a -- it's already been run. There's no spontaneity. The second trial -- and I used an example where there is a hung jury, so it is a clear rerun of the whole show. And that defendant's chances at that time, Justice Rehnquist, are just simply zilch. There's no secret. The prosecution knows where the defense counsel is going. Those witnesses that were there to testify that the defense counsel shredded on cross-examination, now get the shading that's indicated by Judge Leventhal in the Carmie? case, and it's just a different trial. And the defendant's chances are seriously enhanced --

QUESTION: Yet, with many hung jury cases, that's the classical reason for granting a mistrial and permitting the prosecution to start over again.

MR. KELLER: Yes. I know that. Because there is no reasonable alternative. The alternative, as pointed out in the Arizona case and prior to that, is you're going to put some sort of influence in those jurors to come with some verdict rather than a mistrial, and that's not fair.

But just because we don't like that aspect of it -- I read this in the valued-right definition, or reasons given in the Arizona case, this possibility thatyou may convict an innocent man, that's where it comes. Because it's that chance that he's going to tip his defense, and then it runs again. And that may well be an innocent man.

I don't see anything significant about the defendant's right or anything else until that point when he has tipped his hand.

QUESTION: And you say that never occurs until the first witness is called?

MR. KELLER: It can't occur until that time, unless he wants to voluntarily go out and do something to tip his hand, which would include making an opening statement of what he's tipping.

QUESTION: And he can always save that opening statement in both federal and in Montana courts until he's ready to open?

MR. KELLER: That's correct.

QUESTION: Mr. Keller, can I ask you one more question? You said at the outset that -- of course you didn't have the benefit of Arizona v. Washington when you filed your brief, and that if you had, that kind of decides the whole case. But do you think Arizona v. Washington helps you or hurts you? I'm not quite sure I understand your position.

MR. KELLER: I don't know, either.

[Laughter.]

QUESTION: Oh, okay.

MR. KELLER: I wanted to make that clear. I said that you could read this later the same way Downum is being read to say, well, if it happens when the prosecutor made his opening

statement, that's before my point in time, and we're in trouble. But, on the other hand, this Court had to know this case was pending, and this Court did not say, as it has said in the past, that jeopardy attaches when the jury is sworn.

And when you assiduously did not say that, I have to believe that you're leaving open this very question we're here today on; and I think that hinges on what is the valued right, and when should it have constitutional protection.

Thank you.

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

Mr. Geller.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

With the Court's permission, there are two issues in this case that I don't intend to discuss. First is the question of manifest necessity. We noted in our opening brief the record in this case doesn't permit a determination of a number of factors essential to a resolution of the manifest necessity issue. Since it doesn't indicate whether appellees resisted the amendment of Count 2 of the initial information, or whether they objected to the dismissal of that count, or to the dismissal of the remaining count.

In any event, the State appears to have abandoned that

issue in this Court.

The second question that I don't plan to address at any length is whether the State should be free to adopt a rule for the attachment of jeopardy that differs from the rule applicable in federal courts. It is not a matter in which the federal government has a substantial interest.

It is our view, however, that there is little to justify a disparity in the rule as applied in State and federal courts. The double-jeopardy prohibition of the Fifth Amendment, of course, is fully enforcible against the States through the Fourteenth Amendment, and the time when jeopardy attaches would appear to be an essential ingredient of the double-jeopardy guarantee rather than a mere incidental or procedural feature that may be varied without doing damage to the basic constitutional right.

QUESTION: You are more or less just volunteering this, that it's of no concern to the United States as a litigant, I take it?

MR. GELLER: Well, the issue that's of concern to the United States is when does jeopardy attach as a matter of constitutional law, if the Court were to hold that the States may be free to vary it, that portion of the Court's opinion would be of no substantial interest to the United States.

I would like to limit my discussion then to the essential question posed by the Court in its order of December

5th. That is, when, as a matter of constitutional mandate, does jeopardy attach?

And, at common law, as Mr. Keller has indicated, indeed even today in England, jeopardy did not attach until the verdict.

The historical record leaves little doubt that this was the understanding of the Framers of the Fifth Amendment, ad that the double-jeopardy clause was not originally intended to bar the reprosecution of a defendant whose first trial was aborted, for whatever reasons, prior to verdict.

Despite this background, it's settled today that the double-jeopardy clause is more than a mere constitutionalization of res judicata principles, plus a prohibition of government appeals from acquittals. The clause also protects the defendant's "valued right", this Court has said on a number of occasions, "to have his trial completed once it's begun". In other words, a right to go to verdict and perhaps to end the dispute then and there with an acquittal.

Obviously,in order to protect the defendant's interest in receiving the verdict of the first fact-finder and hence avoiding repetitive trials, jeopardy must attach at some point prior to the verdict. The question, then, is: At what point in a criminal proceeding does the defendant's interest in going forward with the trial to its completion, and in not being required to begin anew, become sufficiently substantial

to support the conclusion that jeopardy has attached. And, accordingly, that subsequent trial terminations must be judged under the unyielding requirements of the double-jeopardy clause.

In fixing this point, we believe that the Court should be guided by three considerations.

The first consideration, which was alluded to earlier by Mr. Justice Stevens, is that the time of attachment of jeopardy should represent the bright line. This is an area in which the need for certainty and predictability is especially important; unless the point at which the defendant has been placed in jeopardy can be identified with precision in every trial, judges would be forced to guess as to the propriety of terminating the proceedings prematurely, in a situation perhaps not amounting to a manifest necessity.

An incorrect assessment may lead to immunity for a defendant whose guilt is capable of establishment.

For these reasons, we doubt that the tests offered by the State in this case, which appears to depend, first, upon the sufficiency of the evidence that had been introduced, and now when the defendant's lawyer may have committed himself in some way, or in Professor Schulhofer's recent article, which is relied on by Appellee Cline, which depends in part upon a necessarily subjective view of the difficulties encountered in voir dire, I doubt whether either of those tests would be workable.

Second, we believe that jeopardy should attach at the same point in jury and non-jury trials. As this Court observed in Jenkins, the double-jeopardy clause nowhere distinguishes between jury and bench trials. A defendant's risk of conviction is precisely the same in either type of trial. And whether the fact-finder is the judge or the jury, defendant has the identical Fifth Amendment interest in completing the trial, hopefully with an acquittal once it's begun.

Finally, the point that's selected for the attachment of jeopardy must be responsive to the evils of reprosecution that the double-jeopardy clause is historically designed to prevent. That is, the anxieties, the strain, expense suffered by the defendant who is forced to undergo repetitive trials, and the possibility of manipulation or harassment by a prosecutor, particularly the chance of a second opportunity to convict the defendant, if the first trial is viewed as proceeding unfavorably.

Now, with those three underlying principles in mind, the United States believes that the Constitution does not require jeopardy to attach in any case, State or federal, jury or non-jury, until the fact-finder first begins to receive evidence. Only when the government begins to meet its burden of establishing beyond a reasonable doubt that the defendant committed the crime charged can it truly be said that the defendant faces the risk of conviction. And it's the risk of

conviction that this Court stated in Reed v. Jones that the constitutional concept of jeopardy connotes.

The point at which evidence going to the general issue of guilt or innocence is produced marks a convenient and, we believe, logical boundary in every criminal case, separating pretrial preliminaries, which, concededly, do not deserve the protections of the double-jeopardy clause from the trial itself.

The rule that jeopardy attaches when the fact-finder begins to hear evidence, which is of course the rule that has traditionally been applied in bench trials, fully accommodates a defendant's Fifth Amendment interest. Prior to the introduction of evidence, the defendant's interest in avoiding re-prosecution ordinarily is very weak, it has not yet suffered any of the strains or emotional distress associated with being forced to undergo a criminal trial. Moreover, a defendant has little, if any, stake at that pre-evidentiary stage in proceeding to a verdict in order to preserve any fact-findings that the finder of fact may have made in his favor.

QUESTION: What about his interest in the particular jury that he has chosen, and that is now sworn and is ready to hear evidence?

MR. GELLER: We don't believe that the interest in preserving a particular jury for non-evidentiary reasons is an interest that's protected by the double-jeopardy clause.

QUESTION: What do you mean non-evidentiary reasons?

He wants it because he thinks this is the jury that will do best with the evidence that he's going to introduce.

MR. GELLER: Well, the first objection is that that's highly speculative. At least when evidence begins to be introduced, we can assess what sort of impact it might have on the jury.

QUESTION: It might be speculative, but the defendant has spent a long time in picking the jury, and he thinks he's got a good one, and of course before it's sworn, I suppose you could say if something blew up the trial and there wouldn't be any double-jeopardy attachment. Once it's sworn, the jury process is completed and is sworn, and here is a jury that the defendant's counsel is convinced is going to be a very -- may be a very biased jury; he's convinced it will be biased in his favor.

You can't say that isn't a substantial interest, can you?

MR. GELLER: Well, I can say it's not a substantial interest protected by the double-jeopardy clause. I can agree with you, Mr. Justice White, that it may be a substantial interest of the defendant that's entitled to protection, perhaps even a constitutional protection. And, if, for example, a prosecutor sought to abort the trial after the jury had been selected, but before evidence began, because he thought that the finder of fact would be unduly favorable to the defendant, there might well

be a remedy for a defendant in that situation, either under the jury trial clause of the Sixth Amendment or the due process clause of the Fifth Amendment.

QUESTION: But does the Constitution guarantee the man a favorable jury or a fair jury?

MR. GELLER: Obviously it guarantees him a fair jury.

QUESTION: Well, the defendant is convinced that -- is very convinced that this is an impartial jury, and sometimes his lawyer knows that there haven't been impartial juries, but he thinks he's got one now. And would like to keep it.

MR. GELLER: I'm not disputing that that may be a substantial interest of the defendant. I think the task for this Court is to determine whether that's an interest protected by the double-jeopardy clause, instead of, perhaps, the jury trial clause or the due process clause.

I think there is substantial evidence that it's not an interest protected by the double-jeopardy clause, for one, as you alluded to a moment, Justice White, if the prosecutor had voir dire or when the venire comes into the courtroom, or even after the jury has been selected but before it's been sworn, does something to abort the trial because he thinks that the jury is unduly favorable to the defendant. There is absolutely no double-jeopardy analysis of his actions.

Although there may well be --

QUESTION: But that depends on when you decide

jeopardy attaches.

MR. GELLER: Well, the law has developed in the last 200 years to now the current understanding, which I assume this Court is prepared to reassess in this case, to the jury trial.

QUESTION: Well, but I know, but if you want it reassessed, maybe we should reassess it forward.

MR. GELLER: I think that the Court should reassess the entire area, and decide where logically, in light of the history of the double-jeopardy clause, the point of attachment occurs.

QUESTION: Well, so far it makes more sense -- what you've said makes more sense to move it forward to the --

MR. GELLER: Only if --

QUESTION: -- when you begin voir dire rather than later.

MR. GELLER: Well, I think -- it should be obvious, I think, to the Court at this point that based upon how the Court defines the interest protected by the double-jeopardy clause, it becomes relatively easy to fix the point for the attachment of jeopardy.

In other words, if the Court finds that the double-jeopardy clause in fact protects defendant's interest in favorable jury selection, then jeopardy should obviously attach at or prior to the selection of the jury.

QUESTION: But you said that one of the interests

protected is to save the defendant from money, anxiety and time of going through it twice. And so you then --

MR. GELLER: Going through the trial twice.

QUESTION: Well, going through a trial twice. Going through a criminal proceeding twice. And it may take a couple of weeks to select a jury.

MR. GELLER: Well, it may be. It may take several weeks to litigate a pretrial suppression motion, or a number of other pretrial preliminaries; but no one has ever suggested that a defendant has a double-jeopardy interest in --

QUESTION: Not yet.

MR. GELLER: Not yet.

[Laughter.]

QUESTION: Mr. Geller, why don't you use the word that's usually used. The judge says, "Is this jury satisfactory to the prosecution?" "Is it satisfactory to the defense?" Usually. Isn't that right?

Why don't you say the jury is satisfactory to the defendant, instead of in favor of the defendant?

It's just a play on words.

MR. GELLER: I don't see any significance in the use of the --

QUESTION: Well, I mean, the point is that they always ask that question. Don't they?

MR. GELLER: I assume that means whether any of the

litigants wants to exercise any further challenges for cause, not whether the litigant believes that the jury that's been selected is going to be favorable to --

QUESTION: Well, you don't believe that in every case the judge turns and says, "Is this jury satisfactory?"

MR. GELLER: Well --.

QUESTION: Doesn't he use those exact words?

MR. GELLER: I'm sure it varies from case to case, Justice Marshall; I'm not familiar with the practice in the trial courts in every State or in the Federal courts; and I don't believe that that --

QUESTION: Well, have you ever seen a trial where the judge didn't say it?

MR. GELLER: Well, I think what's important is not that the litigant hasn't attempted to pick a favorable jury, but that he has attempted, as the Chief Justice said, to pick an impartial jury.

QUESTION: Of course, historically, the double-jeopardy clause was applicable to somebody who had been tried and convicted or tried and acquitted. He couldn't be tried again. And this business of the interest in going to trial before the same jury and so on was engranted onto it, and had quite a different history, didn't it?

MR. GELLER: Well, the history --

QUESTION: If one looks at the Perez opinion, as I

just have, and realized for the first time there's no mention at all in that opinion of the Constitution itself, let alone the double-jeopardy clause.

MR. GELLER: Well, indeed, Justice Stewart, it says that the first trial did not end in a convinction or an acquittal, so --

QUESTION: Precisely. And therefore one can infer from that opinion that he's saying the double-jeopardy clause is inapplicable.

MR. GELLER: I think that's correct.

QUESTION: Where we're concerned here with something else.

MR. GELLER: Well, the purpose of the double-jeopardy clause is to prevent repetitive trials. They may happen by a retrial after --

QUESTION: Well, after a conviction or --

MR. GELLER: -- a conviction or an acquittal.

QUESTION: -- or an acquittal.

MR. GELLER: It may equally happen, I assume, if, partway down the trial, the prosecutor decides to abort it and start again and is again being --

QUESTION: Well, only recently has that thought been engrafted onto the double-jeopardy guarantee.

MR. GELLER: Well, it was not until 1963 that this Court recognized the defendant's interest in not having to go

through a --

QUESTION: That's right, as part of a double-jeopardy interest.

MR. GELLER: Right.

QUESTION: And before that, historically it had been a different interest, perhaps protected by the due process clause.

MR. GELLER: I think that may be right. That's correct.

Although, I must say that when this notion that jeopardy attaches prior to verdict crept into our law is one of the substantial mysteries of double-jeopardy jurisprudence.

QUESTION: Unh-hunh.

MR. GELLER: We haven't been able to determine when precisely the thought became accepted in the United States, and those courts that have applied the notion have not seen fit to explain what the rationale is that they are using to deviate from the common law.

QUESTION: Right. In the common law, as a condition precedent for any inquiry under the double-jeopardy clause, there would have to have been an acquittal or a conviction.

MR. GELLER: That's correct. There would have to be a verdict.

QUESTION: But the government doesn't contend that that's the present state of the double-jeopardy constitutional law in this country, does it?

MR. GELLER: No, it doesn't. We agree that jeopardy must attach at some point prior to verdict in order to preserve the defendant's right not to have to go through unnecessarily a repetitive trial.

QUESTION: And the government does agree that this valued right, whatever it is, is protected by the double-jeopardy clause of the United States Constitution?

MR. GELLER: We do. We agree that at -- once we fix the point at which jeopardy attaches, any trial terminations after that point should be judged by double-jeopardy standards.

QUESTION: Now, if you give it that much weight --

QUESTION: The United States is amicus curiae in this case?

MR. GELLER: Yes, it is.

QUESTION: If you give it that much weight, Mr. Geller, how do you reconcile that with what Justice Black said in Wade v. Hunter, "what has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public interest in fair trials designed to end in just judgments"? If it's totally constitutional, Justice Black's statement is inconsistent, isn't it?

MR. GELLER: I think that the manifest necessity notion that Justice Black was articulating in Wade v. Hunter is also a constitutional notion. In other words, merely finding

that jeopardy is attached and that the trial has been aborted does not end the analysis. In order for the defendant to have been deprived of his Fifth Amendment rights, there also must not have been a manifest necessity for the trial termination.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Leaphart.

ORAL ARGUMENT OF W. WILLIAM LEAPHART, ESQ.,

ON BEHALF OF APPELLEE CLINE

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

The appellants in this case have taken the position that the so-called valued right to a particular tribunal is not of constitutional stature, rather it is a procedural practice which has developed out of English common law. And the appellant has concluded that this valued right to a particular tribunal does not come into play, or does not attach, until after the tribunal has actually heard the defendant's case.

As the double-jeopardy clause, the appellant takes the position in his brief that jeopardy does not attach until after the State has presented some evidence from which the jury could actually convict the defendant.

The Solicitor, on the other hand, has assumed a more moderate position and has urged this Court that jeopardy should attach no later than the swearing of the first witness.

I submit to the Court that this Court's recent opinion

in Arizona vs. Washington contradicts both the position of the appellant and the Solicitor.

In the Arizona case, the defense counsel engaged in some references during his opening statement to inadmissible evidence. And, as a consequence of that reference, the trial court had to declare a mistrial at the request of the prosecution.

On a federal habeas corpus appeal, this Court subjected the trial court's actions to a double-jeopardy analysis, a manifest necessity analysis, and concluded that there was manifest necessity for the declaration of the mistrial.

The import of that case lies in the fact that the incident arose during the opening statements, and that this Court decided that case on the grounds of double-jeopardy, even though the first witness had not been sworn.

I submit to the Court that implicit in the Arizona decision is a conclusion that federal double-jeopardy had attached, at least as early as the opening statement. And of course the opening statement is prior in time to the point which has been suggested by the Solicitor, and it is prior in time to the point which has been suggested by the appellant.

If, as the Solicitor has argued, double-jeopardy interest could not come into play --

QUESTION: The logic of that argument really escapes me. Supposing, before trial started, the police conducted an

illegal search of some kind, and the evidence wasn't introduced until just before the jury retired for a verdict. Would you say, well, that jeopardy hadn't attached because a search occurred before?

I mean, you don't look at the time of the -- the time when jeopardy attaches doesn't depend on when the error was committed, does it?

MR. LEAPHART: No, Your Honor, what I'm saying, or what I meant to say is that the mere fact that the Court looked at the double-jeopardy problem and analyzed the case in terms of manifest necessity meant that double-jeopardy had attached at least as early as the time the error occurred.

QUESTION: Single word, jeopardy.

MR. LEAPHART: Excuse me. Jeopardy. -- had attached at least that early. If jeopardy --

QUESTION: Well, I don't understand the logic, because it actually dismissed the case after two witnesses had testified.

So if jeopardy attaches when a witness testifies, then jeopardy is attached when he made his ruling.

MR. LEAPHART: Well, respectfully, Your Honor, I would submit that the fact that two witnesses had testified in that case is really incidental to the decision, because the --

QUESTION: But is it incidental to the question whether jeopardy had attached?

MR. LEAPHART: No, it isn't. That's what's being argued. But in that particular fact situation, the error was during the opening statement; and that was the sole basis of the declaration -- I think, of the declaration of mistrial.

QUESTION: That's true.

QUESTION: But the judge didn't declare the mistrial until two witnesses had testified.

MR. LEAPHART: That's correct, Your Honor. But I think that the fact that he grounded that decision upon the defense counsel's improper references during opening statement indicates that jeopardy had to have attached at least that early.

If it hadn't attached, at the time the opening statements were made the trial judge could have dismissed the case immediately upon the request of the prosecution --

QUESTION: Well, how about the several other cases where defense counsel did not make an opening statement?

MR. LEAPHART: Hypothetically, Your Honor? Where the defense counsel reserves?

QUESTION: Yes.

MR. LEAPHART: And you're asking when would jeopardy attach in that?

QUESTION: Yes.

MR. LEAPHART: If I may backtrack, I'm not suggesting that the Arizona case specifically sets the time when jeopardy

attaches, as the opening statement. I'm just saying that, as a minimum, it said it had to attach at least as early as the opening statement, if I --

QUESTION: But supposing this prejudicial argument had been made during the voir dire? Which could have happened, he could have made some prejudicial remark. Would you say jeopardy therefore had to attach during voir dire?

MR. LEAPHART: No, Your Honor, I think that the triggering factor is going to be the point in time at which the particular tribunal comes into existence. We're talking about valued right to a particular tribunal.

And I'm not going to argue to this Court that jeopardy can attach, that the valued right has any meaning, prior to the time that that particular tribunal is even in existence.

I think that that's the event which triggers the valued right.

QUESTION: But what is it in Arizona vs. Washington that makes you say this comes into existence at the point that the jury is sworn?

MR. LEAPHART: I don't think the case goes that far, Your Honor.

QUESTION: Well, I don't, either.

MR. LEAPHART: I think it only goes as far as saying that it has attached at least at the time of the opening statement. It doesn't say how far in advance of that time.

Well, I don't think, then, you've satisfied me as to my brother Stevens' earlier question, that, supposing in mid-trial, after several witnesses are sworn, the trial judge grants a motion to suppress evidence as a result of illegal conduct that took place four or five weeks before the trial?

Now, surely, you're not going to say that the jeopardy attached at the time that search-and-seizure took place, are you?

MR. LEAPHART: No, Your Honor, I'm not. I don't think that's consistent with the valued-right concept. Obviously, the jury, the particular tribunal was not in existence at the time the motion to suppress was made. But what I'm saying is what I think Arizona stands for is that if jeopardy had not attached prior to swearing the first witness, I don't think the trial judge would have even had to concern himself with the defendant's valued right to proceed. He could have declared the mistrial without any concern at all for manifest necessity.

QUESTION: But he granted it when two witnesses had been sworn, and testified.

MR. LEAPHART: Well, I think that he was merely taking the prosecution's motion under advisement while he had a chance to look up the law on the matter. And I don't think that the prosecution --

QUESTION: But, in the meanwhile, jeopardy had attached?

MR. LEAPHART: Well, --

QUESTION: At least --

MR. LEAPHART: I believe, Your Honor, in the State of Arizona it had attached at the beginning of the opening statement. But I don't think that the Arizona law controls when federal double-jeopardy attaches. Arizona falls right in between the two points that are being argued in this case.

But I don't think that's a controlling factor in that case, in the Arizona vs. Washington case.

QUESTION: But I think all you're saying is that the trial judge, who had to make the ruling, was considering the fact that jeopardy had attached at the time of the opening statement, but that was -- it was either as a matter of Arizona law or perhaps it's his understanding of the Constitution.

But that really doesn't control.

MR. LEAPHART: Well, it may have been his understanding of the Arizona law, Your Honor, but for purposes of the Arizona decision in this Court, that was a question of federal law. Because this Court in Jorn and in Serfass has stated that the attaching of jeopardy rule indicates the point in time when constitutional policies are brought into play. And I don't think we can have the State of Arizona or the State of Montana or any other State telling the United States Supreme Court when constitutional policies are brought into play.

That's why I say I think it's implicit in that decision by the mere fact that the Court engaged in a double-jeopardy analysis there is implicit a conclusion that federal jeopardy had attached.

There are, I think, two other points which have been raised by my adversaries, which are answered in the Arizona opinion. First of all, the appellant has taken the position that the valued right to a particular tribunal is not part of the double-jeopardy clause, that it's a common law rule of procedure. And I would bring the Court's attention to Justice Stevens' unequivocal statement in the Arizona opinion, where he points out that the double-jeopardy clause embraces the defendant's valued right to have his trial completed by a particular tribunal.

I think, in light of that, there's no question but --

QUESTION: And that -- well, that goes back to Jorn, which in turn goes back to Hunter, doesn't it?

MR. LEAPHART: That's correct, Your Honor. I think that that --

QUESTION: And it doesn't mean that it's sound, necessarily. I mean, it doesn't mean that the two concepts don't have different historic origins.

MR. LEAPHART: In fact, I would agree with that, I think they do.

QUESTION: Right.

MR. LEAPHART: But that it has been engrafted onto the double-jeopardy clause.

QUESTION: Right.

QUESTION: You say Reed v. Hunter was a jury case or --

MR.LEAPHART: Reed v. Hunter was a court martial case. And I think that there can be certain analogies drawn between that and a jury trial, because the defendant in a court martial does have some say in the picking of the fact-finder. At least, as I understand it, he can exercise his challenges for cause, and I think he can also exercise one preemptory challenge.

QUESTION: He didn't in World War II.

QUESTION: No one has ever done it.

[Laughter.]

MR. LEAPHART: I don't know, Your Honor.

QUESTION: Because it's not healthy.

[Laughter.]

QUESTION: But there's no real analogy between the composition of a court martial and the composition of a jury at a trial?

MR. LEAPHART: Just to the very limited extent that the defendant does have some say-so in picking the fact-finder.

QUESTION: Theoretically?

MR. LEAPHART: Yes.

The Solicitor seems to argue, at least in his brief, that the double-jeopardy clause, the sole purpose of the double-jeopardy clause is to protect the defendant from multiple exposures to the risk of conviction. And certainly the double-jeopardy clause does protect that interest.

But I think that this Court, in a number of opinions, up to and including the Arizona opinion, has taken great pains to point out that the clause also protects the defendant's valued right. And when the Court says the valued right to proceed before that particular tribunal, that includes at least three other interests. It protects the defendant from the danger of having to engage in a prolonged period of financial and emotional burden; it protects the defendant from a prolonged period of stigma, which results as a consequence of pending criminal charges; and finally and very importantly, it prevents the State from using the jury as a prosecutorial tool. That is, replacing one jury with another jury, when it appears that the State will be unable to convict.

On three separate places within the Arizona opinion, the Court states that every and any mistrial declaration inevitably affects the defendant's constitutional right under the valued-right concept. And I emphasize the words "any and every mistrial declaration" because I think that the use of those words points out that the interests which are being protected do not hinge upon, in any way, the swearing of the

first witness.

We are talking about interests which come into play as soon as that particular tribunal has been empaneled. The fact that a witness is sworn in really has no consequence in terms of the interests which come under the valued right.

QUESTION: How in the world can a man be convicted if no evidence is put in?

MR. LEAPHART: Well, he can't, Your Honor.

QUESTION: Well, then, how is he in jeopardy?

MR. LEAPHART: Well, I'm saying that this Court has interpreted that --

QUESTION: Even though we discussed that the last time, but nobody has raised that point this time.

MR. LEAPHART: Well, in terms of actually being convicted, he's not in jeopardy, but I think this Court has interpreted the double-jeopardy clause as including a valued right to proceed before the jury is first empaneled. And I think that that interest attaches immediately upon the empaneling of the jury. Where we're talking about something broader than just the mere risk of conviction.

QUESTION: Well, we're talking about the possibility of two or three minutes, too, aren't we?

MR. LEAPHART: Well, I think that depends on the particular case we're talking about. It's conceivable that the jury could be empaneled on a Friday afternoon, you'd have

a weekend recess, opening statements may take a long time, the defense counsel as well as the prosecution may make motions.

QUESTION: And it also could be a case that was tried early on Monday morning.

MR. LEAPHART: That's correct. And it may be a matter of seconds.

QUESTION: And both sides waive opening statement.

MR. LEAPHART: That's correct.

QUESTION: So that wouldn't be much good, would it?

MR. LEAPHART: I -- what wouldn't be much good, Your Honor?

QUESTION: The one minute.

MR. LEAPHART: Well, conceivably the prosecutor can still stand up and move to dismiss the jury, even though he's only got one minute to do it. I think his motives are going to be pretty transparent, but he can do it.

QUESTION: I'm talking about in the average trial. The difference, you say it has to be one witness sworn.

MR. LEAPHART: Well, no, I'm arguing against that position, Your Honor. I'm just saying that I don't think that --

QUESTION: Oh --

MR. LEAPHART: I don't think the fact that a witness has been sworn --

QUESTION: I mean that's the government's position.

MR. LEAPHART: That's correct.

QUESTION: That's right, it's one witness sworn.

MR. LEAPHART: Right.

QUESTION: And you say no, once the jury is empaneled.

MR. LEAPHART: Correct.

QUESTION: And that could be just a few minutes.

MR. LEAPHART: Between those two points?

QUESTION: Right.

MR. LEAPHART: Yes.

QUESTION: It could be.

MR. LEAPHART: Could be.

QUESTION: Mr. Leaphart, I'm still a little puzzled. Let me ask what I asked the last time: What are you here? Isn't Cline out of this case now entirely, and isn't the case moot as to him?

MR. LEAPHART: Your Honor, Mr. Cline is out, out of jail. I have not briefed the question of mootness. As I answered last time I think that Mr. Cline's interest in this case lies in the fact that should this Court reverse the Ninth Circuit Court of Appeals, there is the very clear possibility that the State, if it wants to, then can reprosecute him on some of the other seven counts which were involved in this case.

He has a very definite interest in seeing that the decision of the Ninth Circuit Court of Appeals is affirmed. He is the appellee in this case. I am here merely representing him. The State is the one that has chosen to appeal, and from

that I gather they still have an interest in prosecuting Mr. Cline.

And this Court -- I can't cite the cases to you right now, I've got them in my briefcase if you would like, but the case -- the Court has held on two different occasions, I think, that the remedies available under the habeas corpus statute are broader in scope than merely releasing a man from prison; that it can rectify the situation at hand.

QUESTION: Well, we're familiar with those cases, but I just wondered what substance is left in your case.

MR. LEAPHART: My time is up. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Moses.

ORAL ARGUMENT OF CHARLES F. MOSES, ESQ.,

ON BEHALF OF APPELLEE BRETZ

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

May I suggest to the Court a different area for discussion? Justice Stewart brought up the issue of the origin of the valued right. I think that the Fourteenth Amendment to the Constitution is one of the important issues in this case. I think the question that is raised here, where it says that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, that the history of that amendment in 1866, while through the Adamson case of Justice Black, which started the incorporation

theory, is a relevant issue here.

Should the Court adopt a position under the Fourteenth Amendment that the State should follow case-by-case, jot-by-jot under the incorporation theory.

QUESTION: Justice Black wrote a dissenting opinion in the Adamson case.

MR. MOSES: Yes, he wrote a dissenting opinion, and what he did in the dissenting opinion, Mr. Justice Rehnquist, was to set forth all of the congressional proceedings where Bingham, the Congressman in 1866, said, "I sponsored, or I wrote this Fourteenth Amendment because of the case of Bern vs. Baltimore", which said simply that the first eight Amendments applied only to the federal government.

So that the construction of the Fourteenth Amendment, I think, has a measure of important here.

The reason that I say that, because if it is in origin a privilege or immunity that is not rare or abstract, but is something that is recognized by the courts, then that is something that should be enforced under the Fourteenth Amendment.

I raise that issue because I think that then the federal and the State would have the same privileges and immunities, it would be consistent with the supremacy clause, as we understand it, the law of the land, the bench and the bar would know exactly what the rule was. And I think that that's

important.

The reason that I mention that is because of the second issue under the Fourteenth Amendment, and that's not the privileges and immunities but is the due process section.

QUESTION: Right.

MR. MOSE: And it seems to me, as I read the cases, that we will apply to the States through the Fourteenth Amendment those constitutional rights the Court deems fundamental, and thus apply federal statutes.

It's a selective incorporation, as I see it. It seems to me that Benton vs. Maryland, which is an important case on the issue of jeopardy, raises that issue of selective incorporation.

In other words, what we're saying is that under the due process of the Fourteenth Amendment, is that double-jeopardy is a fundamental right. We can agree upon that. But that's notthe end of the inquiry.

Is the time it attaches simply non-constitutional baggage? If we're going to be selective in our incorporation of the first eight Amendments.

And of course that raises the question of whether it is implicit in the right given. I like to use the word "parsing" or pick apart. Jeopardy attaches when the jury is empaneled and sworn. If you just say "jeopardy attaches" and leave out "when the jury is empaneled and sworn", then I think

the language is meaningless, it doesn't make sense.

You're going to have to say that jeopardy attaches either when the jury is empaneled and sworn, to make it complete, or when the State says it does, or when the first witness.

So that I think it is implicit even under the selective incorporation rule.

There's been a lot of opposition to this incorporation doctrine. Justice Stewart has written upon it. One of the things I think has to be decided is whether we're going to reject the incorporation theory entirely under the Fourteenth Amendment. And I think that's relevant to this particular decision.

The first eight Amendments are only applicable to federal proceedings, period. Any schoolboy knows that.

States -- you may adopt a rule that States may adopt any standard they wish, subject only to the strictures of their own State law or Constitution and the fundamental fairness test.

You may want to adopt that.

Now, if that's done, it seems to me that we have a chancellor's foot standard, and we're going back to Palko and Twining? I think those are the issues, in my judgment in this case, is the application of the due process clause, whether we're going to have complete incorporation, selective incorporation or rejection of the incorporation doctrine.

One of the difficulties, if I may add this to my

argument very briefly is that there is great uncertainty in the law. Lawyers don't know how to advise their clients. Lawyers don't know how to argue before the courts, because they simply do not know what the law is. That's why I think there should be some certainty in the law.

We had in Montana, for instance -- take Winship on Reasonable Doubt, its requirement. In Montana we don't have that rule. We have a different rule: a high probability of its existence, as to one of the essential elements.

Which rule do you follow?

We have the presumption of innocence, we have the
?
U. S. vs. Castles, which is a federal case in which I was involved in, we have a statutory sciences wavier provision in my view.

We've had difficulty in -- I've had difficulty in another State, with Brady vs. Maryland. The Court has simply said: We do not accept Brady. We don't accept it. Because our statute doesn't provide for it.

It took two months to try, almost, and the case was finally reversed on the basis that the Supreme Court finally straightened out the district court on Brady vs. Maryland.

We are eliminating -- have legislation to eliminate search-and-seizure in the State of Montana. It almost got by in the last legislative session.

QUESTION: What do you mean by that? Eliminate search-

and-seizure.

MR. MOSES: Well, eliminate the provisions of the Fourth Amendment. I want to be very dogmatic about that, I'm not talking about eliminating the remedy of the exclusionary rule --

QUESTION: You said eliminate search-and-seizure.

MR. MOSES: I'm saying eliminate search-and-seizure. Now, that's my opinion, my judgment.

QUESTION: So there would be no searches and no seizures in Montana?

MR. MOSES: There will be no penalty as far as due process is concerned with respect to how the evidence was obtained, in the courts in Montana.

QUESTION: No exclusionary rule, is that what you mean?

MR. MOSES: No exclusionary rule.

It may be a good idea, but the rule is, the question is that we go from the very basics, discovery, reasonable doubt, presumption of innocence, burden of proof, search-and-seizure, the rule in the State of Montana is entirely different. And we don't know, as practicing attorneys, what rule do we follow? Do we follow the federal rule, because it is a matter of constitutional importance under the supremacy clause? Or do we follow the State statute?

It is a difficult problem from my point of view.

Now, finally, to end my statement, because I wanted to address the Court's attention simply to the Fourteenth Amendment, let me end by saying that I disagree with my friend, Mr. Keller. In the last two years I have decided that I make all opening statements at the beginning of the case. I just had a murder case with the battered-woman syndrome, and I wanted the jury to hear about the battered-woman syndrome at the earlist possible time, before the shooting in the back testimony came to the fore. I had a good reason for it.

But I am now almost exclusively making opening statements.

Secondly, it is true in the practice in Montana that the judge is now permitted to give instructions to aid and assist the jury in the fair consideration of the case as they sit there. And that is a good idea. And that occurs before the first witness is sworn.

My conclusion to the Court is this: The rule, I think, is of constitutional significance. As a matter of fact, what I'd like to do, if I may, -- let me read you an opinion and order that I think would be appropriate in this case.

"The double-jeopardy clause of the United States Constitution is a fundamental constitutional right. Jeopardy, as we have said, attaches when the jury is empaneled and sworn. Anything in the Constitution or laws of any State to the contrary notwithstanding, the decision is affirmed."

That's what I would propose.

Thank you, gentlemen.

QUESTION: Let me ask you just one question. When you spoke of a judge giving instructions, you're speaking of preliminary limited instructions about the burden of proof and the order of trial, not a complete instruction on the law of the particular case?

MR. MOSES: In essence, that is correct, Mr. Chief Justice. What the judge does now under the current practice is simply give the jury those necessary instructions that it feels is appropriate to guide the jury under the -- as it sits there. For instance, the presumption of innocence rule, and that "you may not form or express any opinion as to the merits of the case, that you are the sole judges of the credibility of the witnesses", things of that kind. So they really know what they are supposed to do.

But that occurs after the jury is empaneled and sworn and before the first witness takes the stand.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

QUESTION: May I ask this question?

MR. MOSES: Yes, sir.

QUESTION: My recollection is the information in this case was dismissed solely because of a typographical error in date.

MR. MOSES: No, sir.

QUESTION: What was it dismissed for?

MR. MOSES: That was only one -- that was only one of the grounds for dismissal, Mr. Justice Powell.

QUESTION: That was the ground for dismissal of one of the counts.

MR. MOSES: Of one of the counts, yes, sir.

QUESTION: Right.

MR. MOSES: There were five other counts that were good.

QUESTION: Right. Well, Judge Tuttle characterized that, as I recall, as a tactical stroke. Were you counsel at the time?

MR. MOSES: I was counsel at the time, and it was not a tactical stroke, sir.

QUESTION: May I ask what prompted you to wait until after the jury was sworn?

MR. MOSES: You have -- let me tell you exactly what happened. I had raised the issue as to the -- whether the offenses or any of them stated a criminal offense, as to all of the counts. I had raised substantial objections, and they were overruled without the court ever reading the brief. And once the jury was empaneled and sworn, I raised that same issue again, the same issue. And I still contend that there were not sufficient grounds to state a public offense as to all of the

counts.

At that particular time I think they moved to amend, to have a particular date; and of course I objected.

But my objection -- and I also requested at that time that we go to the Supreme Court and have this all resolved, but the Supreme Court, when the application was made by the Attorney General to go to the Supreme Court after they refused to allow the amendment and some other changes, the Supreme Court refused and said: Go back and try it.

Then they came into court and said, "We're going to dismiss them all, all of them". I think there were five other good counts at least, they were going to dismiss them all and start in again. And the record is plain that I objected in writing -- I'm sorry, I didn't object in writing. The record is clear that I objected at that time.

So it was not, to that extent, a tactical maneuver on my part, Mr. Justice Powell. I was there because the charges were not any good in my judgment. I wanted to go to the Supreme Court to prove that. The Supreme Court wouldn't hear it. And during that course of time, they moved to amend and, of course, I objected then to them doing anything.

That's the way it occurred.

QUESTION: Mr. Moses, just to follow up on Justice Powell's question: In your judgment, if the case had gone to trial on the original counts, and there had been a verdict of

guilty, would there have been reversible error in the record on that basis?

MR. MOSES: In my judgment, yes.

QUESTION: And then what would have happened? Then, if that had happened, then there would have been a reversal and a new trial, wouldn't there?

MR. MOSES: You bet. That's exactly correct.

QUESTION: So your client would have had to stand trial twice, if your position is --

MR. MOSES: That is precisely correct.

QUESTION: Well, then, how is your client, in terms of double-jeopardy policy and valued right and all the rest of it that we've been talking about, how was your client hurt at all by having the dismissal take place right at the outset of the proceedings, instead of going through a whole trial and appeal and ending up in the same place?

MR. MOSES: I have a personal prejudice about that, sir. In my opinion, being the trial counsel, the reason overall that it was dismissed, they had five other good charges, the reason it was dismissed is that the prosecution thought they had a lousy jury. I thought we killed them on voir dire as to what the issues were, and then we had a good jury. This is at the Capital, where you have State employees and things of that kind, and in selecting the jury I thought we had a good jury. I think the prosecution thought they had a

lousy jury.

QUESTION: You didn't ha-e a good enough jury to insist on your right to -- did you try to go to -- did you want to go to trial on that -- I'm trying to remember now.

MR. MOSES: Yes.

QUESTION: You did, yes.

MR. MOSES: Yes, I was insisting we go to trial. I raised my objections, I -- the judge turns me down.

QUESTION: I thought you moved to dismiss.

QUESTION: I thought you moved to dismiss the --

MR. MOSES: Oh, yes. I moved to dismiss because of the fact that they didn't state a public offense.

QUESTION: Right.

QUESTION: And you objected also when counsel for the State wished to correct his error.

MR. MOSES: Oh, yes. Yes, sir, I sure did.

That's exactly what I did. It was my judgment at that time that those counts did not state a public offense, and --

QUESTION: I understand that.

MR. MOSES: -- I moved to dismiss at every stage of the proceeding. If I had jeopardy in mind, I would have waited until the first witness was sworn. I wouldn't have raised the issue then. It would have been silly.

QUESTION: Unh-hunh. But you were not insisting on going to trial, very understandably, you were doing everything

you could to get the indictments dismissed so you wouldn't go to trial.

MR. MOSES: You bet. Yes, I was trying to get --

QUESTION: Right.

MR. MOSES: -- at every stage of the proceeding I was objecting, and that was my purpose.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Keller. You have three minutes left.

REBUTTAL ARGUMENT OF ROBERT S. KELLER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. KELLER: Wade v. Hunter, Justice Murphy with Justice Douglas and Justice Rutledge agreeing in dissent, said in the first paragraph: "We agree with the court below that in the military courts, as in civil, jeopardy within the meaning of the Fifth Amendment attaches when the court begins the hearing of evidence."

I don't think there's any question in that court martial that you weren't talking about a jury or picking a jury. That was prior to 1951. And you just know they didn't have juries.

QUESTION: Right.

MR. KELLER: That's correct.

The only other points are just in passing, any opening statement that my colleague, Mr. Moses, makes to a jury

doesn't tell the prosecution anything, period. I know that it doesn't. And he might have a battered-woman syndrome, he might have anything else, but he doesn't tell the prosecution anything. Not without appeal, frankly, so no problem there.

QUESTION: Mr. Keller, may I ask you a question, please?

Just on the point that Justice Powell and I were inquiring of your adversary, what is the State's position on whether or not there was manifest necessity? Just so we have it clear on the record.

MR. KELLER: At that particular time?

QUESTION: Yes.

MR. KELLER: I didn't think that there was a manifest necessity issue, --

QUESTION: You're not contending that there was?

MR. KELLER: -- I can recall Justice Rehnquist asking me, maybe you might and would disagree, and that's well taken. But at that particular time, and we didn't participate in the trial of this --

QUESTION: Right.

MR. KELLER: -- at that particular time they had three counts that were defective just because of a typographical error. What Mr. Moses is talking about is he thought all nine were defective, aside from the typographical error, just as a matter of law.

QUESTION: That they didn't charge criminal offenses under Montana law.

MR. KELLER: That's right. But as to these three counts that had to get thrown out, they charged an offense that wasn't an offense any longer.

QUESTION: Right.

MR. KELLER: The law had changed in Montana, Criminal Code of '73 took effect on January 1, '74, and these three counts said the crimes in 1973 language occurred in January and February of '74.

Well, they could go to trial, they could go anywhere and they could never convict on that.

QUESTION: So you say as to those three --

MR. KELLER: They did make a good point, and Judge Bennett will never make the mistake again. He'll grant the amendment, have the trial, get reversed, and we'll try it again. We won't talk double-jeopardy. And we know --

QUESTION: So, is it clear then -- I just want to be sure I understand. Is it clear, then, in the State's view that the trial judge had power to amend the counts, and there was no necessity for dismissal; is that what you're saying?

MR. KELLER: I don't think that he did have that power. I think that change was substantive and our statute at that time prevented a substantive change.

QUESTION: Unh-hunh.

MR. KELLER: You were going to charge the defendant with picking up an extra year of time to defend, on its face, --

QUESTION: Well, --

MR. KELLER: -- not really; but you were, on its face, it was there.

QUESTION: Let me ask the same question again. In your view, was there or was there not manifest necessity for dismissal of the charges?

MR. KELLER: To dismiss those charges?

QUESTION: Yes.

MR. KELLER: I think there was, on those three, but not on the remaining six.

QUESTION: I see. So the remaining --

MR. KELLER: That's where the hangup came, and he got convicted ultimately of one of the three that was corrected. He got charged at the second trial with one of the six that wasn't affected, and one of the three that was corrected, and found guilty of one of the three that was corrected.

QUESTION: Unh-hunh.

MR. KELLER: The prosecution at that time didn't want to go ahead on those six, because they weren't that good. But they would have sure come under Ash v. Swenson, it would have been collateral estoppel, used as a wedge, because it all took this same period of time, they all had to do with one woman and one transaction, literally. They were spread-eagle

at the time, whether they knew it or not.

And it may not have been a tactical tool, but it sure was an awfully smart move.

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

MR. KELLER: Thank you.

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.]

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