In the

Supreme Court of the United States

ROGER CRIST, AS WARDEN OF THE MONTANA STATE PENITENTIARY, DEER LODGE, MONTANA, ET AL.,

Appellants,

vs

MERREL CLINE AND L. R. BRETZ,

Appellees.

No. 76-1200

C3

Washington, D. C.
November 1, 1977

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Washington, D. C.,

Tuesday, November 1, 1977.

The above-entitled matter came on for argument at 10:03 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, Special Assistant Attorney General of Montana, State Capitol, Helena, Montana 59601; on behalf of the Appellants.

W. WILLIAM LEAPHART, Esq., No. 1 Last Chance Gulch, Suite 6, Helena, Montana 59601; Court-appointed counsel for appellee Cline.

CHARLES F. MOSES, Esq., The Terrace, Penthouse, 300 North 25th Street, Billings, Montana 59103; on behalf of appellee Bretz.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 76-1200, Crist v. Cline and Bretz.

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

ORAL ARGUMENT OF ROBERT S. KELLER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. KELLER: Mr. Chief Justice, and Members of the Court:

Jurisdiction has been reserved in this case, a double jeopardy case proceeding out of Montana, and we are proceeding under the provisions of 28 United States Code 1254(2).

The Ninth Circuit Court of Appeals in effect held that Montana statute 95-1711, taken from the Model Penal Code, was unconstitutional. 1711 permits a retrial if the first trial has been terminated before the first witness is sworn, as distinguished from the federal rule that when a jury is empanelled and sworn.

Some of the facts in this case that give rise to the jurisdiction of the Court: This proceded in 1974 in a nine-count information against Bretz and Cline and Mrs. Cline, but she is not relevant to this appeal. One of the counts and one of the gut counts was obtaining money by false pretenses alleged to have occurred between January and February of 1974.

After the jury was empanelled and sworn, the defendants moved, made several motions, but motions to confine

the state to the confines of the information of January and February 1974, and unfortunately a typographical error, it should have been January 1973 to February 1974. It put the trial judge in a dilemma, for two reasons.

The state moved to amend to correct the error, and I bring this up because Justice Tuttle, in the Ninth Circuit, commented that this was just simply a formal defect.

The trial judge was in this dilemma: To permit the amendment meant you were talking an additional year of time against which the defendant had to defend at the last minute; and, secondly, in 1973 the Montana Legislature enacted a comprehensive sweeping Montana Criminal Code of 1973 that repealed all preexisting substantive law effective January 1, 1974. So in essence they were going to court on this particular count -- there were three counts, but this particular one -- on an offense that had been repealed before it was alleged to have been committed. So the trial court was in a real dilemma and sua sponte dismissed the three counts that had the typographical error.

The state, as I indicated, had moved to amend, and this had been strenuously objected to by the defendants, and that is when the court sua sponte dismissed. They then dismissed the remaining six counts, the state did on its own motion, and refiled a new information, corrected the defect, and filed a two-count information. The first count was grand

larceny, and it tracked one of the six counts that the state had moved to dismiss of its own motion, and the second count was obtaining money by false pretenses, with the typographical error corrected, and the jury found -- and there was a new trial -- the jury found the defendants guilty of this obtaining money by false pretenses, one of the counts that had the typographical error.

QUESTION: Mr. Keller, we postponed the question of whether or not we have appellate jurisdiction of this case until the arguments on the merits, rather than nothing probable jurisdiction.

MR. KELLER: Yes, sir.

QUESTION: I gather that your opponent, the appellee, now concedes that there is appellate jurisdiction and you apparently think so, but you don't discuss it in your brief, except to say that --

MR. KELLER: My opening paragraph is the jurisdiction, that's correct, Your Honor, and ordinarily I would say that that is my position, that you are correct, except that in one of the appellee's briefs, Bretz' brief, they contest our jurisdiction, saying that we didn't address the question, and so I felt that under the rules I had to address it both in the opening shot in my brief and in the opening shot in oral argument. If we are all satisfied in jurisdiction, then I want to assure the Court that I'm satisfied that we are under 1254(2).

QUESTION: Because the Court of Appeals has held invalid a statute of the State of Montana?

MR. KELLER: That's correct. It never came right out and said 1711 is unconstitutional, it just said the Montana Supreme Court, which was interpreting that statute, was wrong and the effect of it is that it is unconstitutional. Our statute from the Model Penal Code specifically says that jeopardy in essence hasn't attached. You can have a retrial up until the time the first witness is sworn, and the federal rule in the federal system is at the time that the jury is empanelled and sworn, so our statute is unconstitutional, as a result of the Ninth Circuit.

QUESTION: That is a sufficiently clear holding, that it is unconstitutional.

MR. KELLER: Thank you, Your Honor.

QUESTION: But, Mr. Keller, your statute doesn't say that there can be a trial up until the time the witness is sworn. It says there shall not be a trial after the witness is sworn.

MR. KELLER: That's correct.

QUESTION: So the statute literally doesn't do the -- isn't unconstitutional, is it?

MR. KELLER: The Supreme Court interpretation in Cunningham, State v. Cunningham, which was just prior to Bretz, says just exactly what I have said, that the time jeopardy

attaches in Montana is at the time the first witness is sworn, and they are construing so, 95-1711, Justice Stevens.

QUESTION: You think it is then the statute that permits the -- I still have some difficulty. I can understand that that is the rule in Montana, but I'm not quite sure that there is a statute that is unconstitutional.

MR. KELLER: Well, if our statute permits a retrial on a termination of a case prior to the swearing of the first witness but after the jury is empanelled and sworn, then we have a direct conflict with the federal system, and our Montana Supreme Court, in the Cunningham case, held just exactly that, that this is no bar to a retrial, when the Cunningham case was dismissed after the jury was empanelled and sworn and before the first witness was sworn. I have to use Cunningham, and I am sure you are familiar with it in the brief because it was a part of the consolidated petition for a writ of habeas corpus that led to where we are now in this case.

QUESTION: What I am trying to suggest is that perhaps the legislature could have repealed the statute, so you didn't have a statute on the books, and the Montana Supreme Court might nevertheless have made precisely the same holding, then there wouldn't be any -- just say the matter of Montana law, jeopardy does not attach until the witness is sworn. I don't think you would have an unconstitutional statute.

MR. KELLER: I see your point.

QUESTION: You have to argue that by implication, when the Montana statute says retrial may be had under certain circumstances -- may not be had under certain circumstances, yet impliedly authorizes retrial under the circumstances where it doesn't prohibit it.

MR. KELLER: Exactly. That is our position, yes. And the point that we are here on today was addressed head-on and directly in the Cunningham case, when appellee's petition for a writ to the Montana Supreme Court, it was summarily denied, citing the Cunningham case, and it comes directly to this point and puts us in the conflict that we are.

QUESTION: So that is the meaning of your statute as authoritatively construed by the highest court of your state?

MR. KELLER: Correct. Yes, sir.

QUESTION: Thank you.

MR. KELLER: Going directly then past that to the argument itself, we agree that the double jeopardy prohibition in the Fifth Amendment affects both under the federal system and the state system. We don't have any quarrel with that. We agree that there is a point in time at which jeopardy does attach, and the reason that we are here is we don't agree with the point in time that has been set for it.

So the question we have for the Court is the point in time selected in the federal system, at the time that the jury is empanelled and sworn, mandated by the Constitution.

QUESTION: Mr. Keller, let me, before you get too deeply into this, ask you, do I understand that Cline has won a reversal of his conviction?

MR. KELLER: Yes, sir. After the petition for --

QUESTION: Isn't the case moot as to him then?

MR. KELLER: I don't really think so, and I don't know this. My opponent, Mr. Leaphart, represents him and was there for the trial and it may well be that it is not moot. I never raised it and I didn't raise it because it is conceivable that the ultimate reversal by the Montana Supreme Court may permit him to be retried anyhow. They are the ones on his appeal that reversed and set aside the conviction.

QUESTION: But they had the indictment dismissed, didn't they?

MR. KELLER: I don't know that.

QUESTION: It seems to me that he won everything in the state appeal that he could possibly get in the habeas.

MR. KELLER: I can only say this, as the one entrusted with the prosecution, we don't intend to reprosecute in that case, but I don't know whether it is moot or not. The position of both Cline and Bretz were identical and it made no difference to me if Cline came along or didn't come along. The issue is there and it is certainly there with Bretz, so I didn't explore it at all. It was raised for the first time by the Solicitor General in his brief in this Court and, as a little bit of

background, the Attorney General's Office of the State of Montana was brand new to all of this as of January of this year and none of us was there when this all took place. Both the counsel of the appellees were there throughout it all, so they could probably more promptly answer that.

The first question that we have is the point in time selected in the federal system mandated by the Constitution. The ancillary question is, if it isn't, do we still have to follow it in our state under the doctrine of incorporation.

Historically, and this is conceded in appellees' brief, that the common law of jeopardy wasn't a problem until there had been a conviction or an acquittal, and at the time of the drafting of the Constitution this was the state of the common law.

And I have looked frankly for the source of the federal rule that commences at the time that the jury is empanelled and sworn, and the closest I can come to any suggestions to you is there was a real problem for government appeals up until the Criminal Appeals Act of 1907, and the language in the Criminal Appeals Act was such that it permitted a writ of error to be pursued inter alia from the decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy, but we don't know when that point was as such.

The general rule at that time in the textbooks and encyclopedias was at the time that the jury had been empanelled

and sworn. But the minority view gave a distinction of after conviction or acquittal. There was a dichotomy that gave nothing in between.

So the point that we are raising now had really never been touched then.

The othersuggestion that I have is going back to Perez in 1824, which we have always contemplated as being the start of manifest necessity. If you read it, and as you recall -- and I'm sure you do from yesterday's argument -- this was a case where there was a hung jury, so all of the evidence was in and the case was all over, and Justice Story in a terse opinion is faced with the dilemma what are you going to do when the jury -- you've got a jury and you can't get rid of it, you've got to do something and somehow, as you read that opinion, in essence, it says, giving rise to manifest necessity after the jury is there and they can't arrive at something, there is a manifest necessity to meet the ends of justice.

And from that I have to assume -- and, as you all know, we had a pretty liberal interpretation for a long, long time of what is manifest necessity -- I have to believe that nobody worried about what occurred after the jury was empanelled and sworn, and that just gradually evolved, this cut-off point.

It never was a problem as such. This Court never even addressed it until 1963, and that was in Downum, so we've got a long period of time before the issue even comes up. And Downum

was not only handled as a manifest necessity case -- the issue I am raising wasn't raised, and it was a federal case, to boot. So nobody questioned when Downum just simply came out and said jeopardy attaches when the jury is sworn, empanelled and sworn in a jury case.

QUESTION: Of course, it was not until 1969 that this question could have possibly arisen --

MR. KELLER: Exactly.

QUESTION: -- because it wasn't until then, in the Benton case, that the double jeopardy protection applicable to the states --

MR. KELLER: It goes to the states, exactly, and that is the first time that it really had come to a confrontation. Illinois v. Sommerville is 1973, and that is a state case, but unfortunately for our position, it is a state that has identically the same rule as the federal rule. So Justice Tuttle comments in his opinion that there wasn't a shred of evidence that that distinction made a difference to this court in its opinion in 1973, and I submit that I don't know of any reason why it would have been raised. I don't know why Illinois would raise it.

QUESTION: Mr. Keller, you said you made an effort to find the origin and history of the federal rule of the point made when the jury is empanelled and sworn, what is the history of your statute in your state? Do you know?

MR. KELLER: It was adopted in 1969, is my recollection of it, Judge. It came out of the Model Penal Code, and there was a tentative draft in 1956 and a final draft in 1962. The tentative draft in 1956 has just this terse comment that they see no difference between a jury and a non-jury for the point that jeopardy attaches, and nothing better than that, but at least it explains why they did it, but nothing behind it.

QUESTION: Do you know what other states or how many other states, if any, have the same --

MR. KELLER: I know only of two for sure, and I don't know of the other. We tried to research for that point and ran into a quagmore. I know that Kentucky has from the Model Penal Code. Arizona did, and I don't know if they still do. New York did, and they just now held their own statute unconstitutional following the federal rules, so I don't know if I want to cite that as authority. And Pennsylvania had something comparable to it but not from the Penal Code. And beyond that I have no idea.

One of the reasons for it is in going through state statutes, the way this thing is drafted, you have to look for a negative, you can't find something as to when does jeopardy attach. You have to go read several statutes to come back to find out what it does mean in that state. But I do know for sure that there are two others along with us today that have it.

QUESTION: Kentucky and --

MR. KELLER: Arizona.

QUESTION: Arizona.

MR. KELLER: The Sommerville case, in any event, followed down and just said, without giving a reason -- as I am sure you have noted in the brief, we have emphasized this throughout -- never has there been a reason given for the rule that is involved in the federal court, and there was no, as you pointed out, no reason to question until Benton. But the language in Serfass in 1975 is significant to us, and I don't want to be out of line of trying to quote something that was said that is out of context. But the defense has relied upon Serfass because it followed Sommerville and it followed Downum. We rely upon it because now for the first time the Court has really looked at the point at which jeopardy attaches. And as you recall in Serfass, this was a point in time prior to even having the jury empanelled. So the comments are somewhat relevant, but I don't want to take advantage of them. Nevertheless, eight of you concurred on this opinion, and this is what we read from it as an aid, as an aid to the decision of cases in which the prohibition of the double jeopardy clause has been invoked.

The courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of attachment of jeopardy. And it goes on to say in a jury case, when a jury

is empanelled and sworn in a non-jury when the first witness is sworn.

The Court has consistently adhered to the view that jeopardy does not attach and the constitutional prohibition can have no application until a defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge.

The constitutional policies underpinning the Fifth Amendment's guarantee are not implicated before that point in the proceedings at which jeopardy attaches. As we have noted above, the Court has consistently adhered to the view that jeopardy does not attach until a defendant is put to trial before the trier of the facts.

This is by no means a mere technicality, nor is it a rigid mechanical rule. It is, of course, like most legal rules, an attempt to impart content to an abstraction, and you can appreciate why we like this language.

Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy, and that is specifically our point.

We take the position that, as a matter of law, no jeopardy attaches until the witness says something incriminating. If at the time the jury was empanelled and sworn, the prosecution rested, as a matter of law the case would have to be dismissed. If at the time that the first witness is sworn, the prosecution rested, the case as a matter of law would have to be

dismissed. It really means that in terms of when jeopardy attaches, that it varies with each case. The first witness in a homicide may be a pathologist. He doesn't have anything to do with guilt, he just wants to identify the corpus dilecti. So somewhere in there there is a risk of determination of guilt.

Our position is that our point in time is sooner than jeopardy actually attaches, and the federal system is even sooner than our point in time, and it is an aid to the court, just exactly as Serfass said that it was, an aid to the court that we use.

QUESTION: If we were to follow or adopt your reasoning on this point, it wouldn't change the rule in the federal system, would it?

MR. KELLER: I think that it would, and --

QUESTION: In other words, you are saying that as a matter of constitutional law, your concept of jeopardy is part of the bill of rights and incorporates the double jeopardy clause and that it would be applicable both in the federal and the state system?

MR. KELLER: That's correct. The only reason I answer your question in the affirmative is the Criminal Appeals Act in essence permits the government to proceed before jeopardy attaches. It doesn't have a cutoff date, such as ours does. Ours is prior to the first witness being sworn. Yours is in the language before jeopardy attaches. It has been assumed, I

have to believe, that this has always been when the jury was empanelled and sworn. If this Court now adopts our rationale, I have to assume that the government would be able to proceed in a federal case up to at least the time the first witness is sworn.

QUESTION: But you would also be assuming, would you not, that when Benton v. Maryland said that double jeopardy was incorporated into the Fourteenth Amendment, it met all of the bag and baggage of the federal prohibition, rather than just the general outline of it?

MR. KELLER: Yes, I understand that is a view that has been espoused. I don't support the view, no. I believe that that said we have the double jeopardy prohibition under the Fourteenth, just as you do in the federal system, but I don't believe that that means we have to take the rule, as Justice Tuttle put it, the supervisory rules of the court as a constitutional mandate. So we have to take the double jeopardy prohibition as a fundamental guarantee under Benton, but I don't think it means we have to take the rules that went along.

QUESTION: Therefore it is conceivable at least, isn't it, in line with my brother Rehnquist's question, that the Court might hold that the Constitution tolerates the Montana rule without at the same time holding that it requires the federal rule to be the same?

MR. KELLER: Yes.

QUESTION: In other words, the Court has held that the guarantee of a jury trial under the Federal Constitution guarantees a 12-member jury in federal cases, but tolerates a smaller jury in state cases, state criminal cases?

MR. KELLER: I'm with you. My problem in answering your question is I was a step ahead of you. My colleague already posed the question as we were getting ready for this, so we had gone one step further and expect some enterprising government lawyer to bring one up, if you go our way, that after the jury is empanelled and sworn before the first witness is sworn and, within our limited knowledge, I didn't know how to stop him, so I just really wasn't answering your question.

QUESTION: What do you suggest happens significantly between the empanelling of the jury and the swearing of the first witness?

MR. KELLER: Nothing. I mean I went to a matter of law and not as a matter of practice, and nothing significant happened. As a matter of practice, the federal district judges in our state just before they swear that jury, now we hear everything that has to be heard and get rid of these motions, because under the federal system once a jury is sworn we start. At the state level, we have until the first witness is sworn to get rid of and dispose of all these things. As a matter of practice, nothing can be done to that jury as a matter of law within those two periods of time that can have an effect upon

the defendant.

QUESTION: Well, what about the opening statement of the prosecution?

MR. KELLER: He can do that, but what does that do in terms of jeopardy? Statements of counsel are not to be considered.

QUESTION: I was addressing my question to your point that nothing happens --

MR. KELLER: Oh, I see.

QUESTION: -- that would have an effect upon the defendant.

MR. KELLER: Yes. Things can occur, I have to concede and --

QUESTION: Can the counsel proceeding with an opening statement have an impact?

MR. KELLER: Certainly it might, but if you don't go any further than that, jeopardy doesn't attach because that is statements of counsel. Yes, you certainly can have opening statements. In fact, it is what made this particular case almost ingenius. Using both a blending of the federal and state rule, they were able to make their motion after the jury was empanelled and sworn, which in the federal system they would have had to make before the jury was empanelled and sworn. And they made it between the two periods of time. The last thing they wanted was a motion to dismiss. That puts them at a real disadvantage. So

when they make the motion that they made in the manner that they made it, it truly was ingenius because they have got jeopardy attaching under the federal rule and they still can make their motion before they have commenced under the state rule.

I really looked for a basis for this, and the only thing that I can find that is -- I really don't like to use the word "weakness" in our position, but that I guess for the lack of a better phrase -- a weakness, the only weakness I can come to is the valued right concept, and the valued right concept has been espoused. It has been espoused by Members of this Court as recently as 1973.

I want to submit that the valued right is a valued right to get the case tried, as distinguished from the valued right to this particular jury. In fact, if you take the position that it is a valued right to this particular tribunal, then somehow it puts this Court in a position of saying that the defendant has a constitutional right to a defect in the system. The only way that you can have a jury that is not impartial is because of a defect in the selection. The whole process is geared to an impartial jury.

Now, all of us know as trial lawyers that you can have a good or bad jury, you can have a feeling that you have a good or bad jury, but that is not quite the same thing as the United States Supreme Court espousing that you have a constitutional right to a defect in the system, to a good or bad jury, and for

that --

QUESTION: Is that a fair statement of their argument? Couldn't you phrase it just the other way, that the defendant might be convinced that he has a good and impartial, fair jury but the prosecutor wants to have twelve more peremptory channels so he dismisses the prosecution to try to get a better jury from the prosecutor's standpoint?

MR. KELLER: Well, now you are talking prosecutory manipulation, Justice Stevens, and that was met head-on by Justice Haswell, of the Montana Supreme Court. If what you are talking about is prosecutorial manipulation, that makes no difference whether the jury has been empanelled and sworn or the first witness is sworn. If I as a prosecutor can manipulate to get to this point, I can ask for my dismissal before you swear the jury. So the point that they are raising doesn't really get to the difference in point of time. This time to do the prosecuatorial manipulation is just as valid in the federal system as it is in the state system. We first have to assume that the prosecutor is manipulating, that the trial judge hasn't caught it, and he can do it just as effectively in the federal system as they are suggesting it can be done in the state system.

QUESTION: Immediately before the jury is sworn --

MR. KELLER: That's right.

QUESTION: -- and you know who the jurors will be?

MR. KELLER: Exactly, and you just exhaust it all and

you know right then, this doesn't look like a hangman's jury, maybe we better get rid of it and try twelve more, and that point in time is just as valid before you swear that jury as it is when the first witness is sworn.

I really think the valued right concept, and it was expressed as policy's underpinning in one of your opinions, Justice White, this point go both to speedy trial and double jeopardy, and the right as such is the right to get the case tried. But it doesn't put the valued right to get the case tried right now quite in the point of a constitutional right. Certainly, he has a constitutional right under speedy trial, and there are overtones from that in this situation, but that puts us back to the question of what kind of passage of time are we talking about, as between just before the jury is sworn and just before the first witness is sworn.

I would like to reserve the remainder of my time.

QUESTION: May I ask you before you sit down, you in your brief seem to have abandoned the argument on manifest necessity.

MR. KELLER: Yes, sir.

QUESTION: Let's assume you are wrong on your thought that it isn't properly here, it isn't properly subject to appellate jurisdiction here. Assume you are wrong on that. Do you mean -- would you mean to abandon it or not?

MR. KELLER: Yes, sir. I am compelled to answer yes on

the standard of manifest necessity.

QUESTION: Under what case?

MR. KELLER: Under what case?

QUESTION: Yes.

MR. KELLER: Well --

QUESTION: Where do you abandon it?

MR. KELLER: Because our whole thrust of the Montana statute when we came in in taking over this prosecution, I think that the manifest necessity was raised for the first time by federal district Judge Bratton when this case was heard, and I don't -- in my mind, I don't believe that the state even raised it at the outset.

QUESTION: So you don't think it has ever been presented to the Montana Supreme Court?

MR. KELLER: It has not, no.

QUESTION: So there has been -- well, is there any necessity for that in --

MR. KELLER: Any necessity for raising it to the Montana Supreme Court?

QUESTION: In a federal habeas corpus proceeding, is there any necessity for you to have, in order to argue manifest necessity, to have it gone through the state system?

MR. KELLER: No, I don't think so.

QUESTION: There is no requirement for exhaustion on the state, is there?

MR. KELLER: That's right. No, there is no requirement on the state.

QUESTION: Well, why do you say that the manifest necessity isn't properly here?

MR. KELLER: I had two reasons, frankly, and one is the one that I gave. I think from the outset that the state has taken the position prior to my time that their concern about the statute and this point in time --

QUESTION: Well, if you just don't want to raise it, that may be so, but if you lose -- what if you lose on the statute?

MR. KELLER: Then I have lost.

QUESTION: Then you don't want us to consider, you just don't want that issue of manifest necessity adjudicated here, is that it?

MR. KELLER: That's correct, yes. So that is the second point. I think that we are grossly weak on manifest necessity and --

QUESTION: Well, of course, that is ultimately a decision for this Court, not for you.

MR. KELLER: Well, I didn't intend to pursue it, Judge.

QUESTION: So you don't think it is worth anything under Lee. Did you read Lee, the Lee case?

MR. KELLER: Yes, sir.

QUESTION: You don't think it is worth anything under

Lee?

MR. KELLER: We were asked by the Solicitor General to move for a continuance before we had to first file anything so that Lee could come down in time before we got to -- before we even presented our brief, and at that time made the decision that we were going to proceed on the issue that we felt was there from the outset and not manifest necessity, so our brief was in before the opinion came down in Lee.

Now, I am summarizing a lot of things, but we had a pretty in-depth discussion with the Solicitor General and the facts in our case, and all I can say is that was also a factor in deciding not to --

QUESTION: Well, he doesn't seem to agree with you on such a weak point.

MR. KELLER: I have to concur with some of the points made by counsel for Bretz. I don't --

QUESTION: He would sustain -- he would think there was manifest necessity if the merits are reached here.

MR. KELLER: I don't think he has a e rights facts in this case, Justice White.

QUESTION: I see.

MR. KELLER: And I concur with Bretz' counsel on that point. We have --

QUESTION: We have enough issues without reaching for one.

MR. KELLER: Yes. 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 issue of mootness has been raised, so I will direct myself to that initially. The Solicitor General in his brief, in a footnote on page 5, has noted the fact that Mr. Cline's conviction was reversed by the Montana Supreme Court, and the Solicitor expresses his opinion that Mr. Cline has received all the relief that the writ of habeas corpus could provide.

I suggest to the Court that that assertion assumes that the writ of habeas corpus statutes can do nothing more than effect the release of a man from prison, and I would direct the Court's attention to this Court's opinion in Karafas v. Lavelle, 391 U.S. 294, in which this issue of mootness was answered in the --

QUESTION: Well, before you get to that, I think you left out one point. The Court not only reversed but also dismissed the charges.

MR. LEAPHART: That's correct, Your Honor.

QUESTION: That's a little different from just a reversal.

MR. LEAPHART: Well, I have no quarrel that the charges

were dismissed, but it --

QUESTION: Well, what can the state do after that under Montana state law?

MR. LEAPHART: Well, I maintain, Your Honor, that --

QUESTION: What can Montana do as to these charges against this man after the Supreme Court of Montana dismisses them?

MR. LEAPHART: Okay. Your Honor, at the first trial that we are talking about that was aborted, there were nine counts. The state voluntarily dismissed one, the judge on his own motion dismissed three more, and then the prosecution came in and dismissed the remaining counts, came back and filed a two-count information, and we went to trial on that.

It is my position that Mr. Cline still has a very vested interest in the determination as to whether or not jeopardy attached at that first trial, because --

QUESTION: Even if they can't try him again? Even if they do not try him again?

MR. LEAPHART: Well, Mr. Cline right now is defending this appeal. He has been named by the state as an appellee. Mr. Keller's representation today that they do not intend to further pursue the matter is the first that I have ever heard of that. As his counsel, I have had to assume that, since they are prosecuting the appeal, that they intend to pursue the matter.

QUESTION: But you still haven't told me how they can.

MR. LEAPHART: Well, what I am saying, Your Honor, is that there still are five counts remaining from that first prosecution that, if jeopardy had not attached, conceivably the state can come in and charge him on those five counts. You see, they only filed two counts the second time.

QUESTION: So the conviction was only reversed on two counts?

MR. LEAPHART: That's correct. We still have five counts that are kind of hanging there.

QUESTION: But as it stands right now, he is clean with the state, there are no charges pending against him?

MR. LEAPHART: That's correct.

QUESTION: And there is no lingering consequences from his conviction?

MR. LEAPHART: That's correct.

QUESTION: I thought you said charges were dismissed by the court.

MR. LEAPHART: Two, Your Honor.

QUESTION: Well, can they be retried?

MR. LEAPHART: No.

QUESTION: Well, where are these counts that they can retry?

MR. LEAPHART: Well, we have two separate trials that we are talking about. We started out with a nine-count

information which was knocked down to eight counts and then down to five counts and then the prosecution dismissed those five and came back and only filed two.

QUESTION: Well, that is all there is.

MR. LEAPHART: Well --

QUESTION: There is no bar in Montana law for their refiling those three counts?

MR. LEAPHART: The remaining counts?

QUESTION: Yes, the ones they dismissed.

MR. LEAPHART: Pardon me?

QUESTION: The ones they dismissed, the ones the prosecution dismissed, those three counts.

MR. LEAPHART: I think that it is arguable, I think that they could come in and try to refile them.

QUESTION: Well, they could try to file them without filing them at all. Under Montana law, charges that are dismissed by a court can be retried?

MR. LEAPHART: No, sir. I am saying that there are still five counts that were not dismissed by the court.

QUESTION: Dismissed by the prosecutor?

MR. LEAPHART: That's correct.

QUESTION: And has the statute of limitations run by now?

MR. LEAPHART: No. No, sir.

QUESTION: Under the Ninth Circuit's ruling, in effect,

you get a complete immunity on all nine counts, whereas you say you are uncertain with respect to the results --

MR. LEAPHART: That's correct.

QUESTION: -- if it just depends on the decision of the Supreme Court of Montana?

MR. LEAPHART: We still have a lingering uncertainty as to those remaining counts.

QUESTION: And you say that is enough to justify habeas?

MR. LEAPHART: I think so. And I would further submit to the Court that should this Court declare that Mr. Cline's position is moot, that the effect of that decision is to say that a double jeopardy, a person whose double jeopardy rights have been violated only has a remedy if he has been convicted. And I think the double jeopardy protection is broader than that. It protects the man from having to stand trial twice, not just be convicted.

QUESTION: Well, where is he standing trial twice here?

MR. LEAPHART: Well --

QUESTION: I suppose you don't know yet. Isn't that your point? You don' t know, that he may be charged again?

MR. LEAPHART: That's correct.

QUESTION: That is what concerns you?

MR. LEAPHART: That's correct. Well, assuming my position is correct on the merits of this case, jeopardy did

attach at that first trial, then we have stood trial twice. We have gone through two trials. I am projecting an uncertainty about a third trial, that they could come back in and refile on those remaining five counts, and which in fact it would be a third trial.

QUESTION: There is no threat of that at all?

MR. LEAPHART: Well, other than the fact that I am here --

QUESTION: In addition, we have this statement from the Attorney General that he will not do it.

MR. LEAPHART: You do have that. I --

QUESTION: Where is the threat, that the next Attorney General might do it or his grandson may do it?

MR. LEAPHART: Well, Your Honor, my position is that the fact that I am here defending this appeal to me indicates that they are still pursuing this matter, and this is the first that I have heard that they do not intend to reprosecute.

QUESTION: I don't think that both of you by agreement would give us jurisdiction, if it is not here.

MR. LEAPHART: Well, I think the jurisdiction is there, Your Honor. The issue has been raised. Mr. Cline was in custody at the time the District Court assumed jurisdiction.

QUESTION: But as of now he is not in custody, he is not subject to trial --

MR. LEAPHART: Well, I think --

QUESTION: May I ask a similar question much the same way, I suppose. Habeas corpus is a collateral attack on a judgment.

MR. LEAPHART: Yes, sir.

QUESTION: What judgment is outstanding as being collaterally attacked by your client?

MR. LEAPHART: I think the answer to that, Your Honor, is that we have to put this in the context of the jurisdiction attaching in the Federal District Court.

QUESTION: It attached as to a judgment which has now been set aside.

MR. LEAPHART: That's correct.

QUESTION: Now these five other counts have never been reduced to judgment, have they?

MR. LEAPHART: That is correct.

QUESTION: How can they provide the basis for a collateral attack?

MR. LEAPHART: My answer, Your Honor, is that in this Court, in the Serfass decision, said that once habeas jurisdiction --

QUESTION: I understand that case, there was a judgment outstanding that was involved in the appeal. The judgment survived the service of his sentence, but that doesn't hold that you can attack a nonexistent judgment.

MR. LEAPHART: Well --

QUESTION: A judgment entered by a court.

MR. LEAPHART: In a double jeopardy context, Your Honor, the fact still remains that my client had to stand trial twice.

QUESTION: -- for a related offense to which you would say that is really encompassed within what you have been acquitted of or something like that. There is always a possibility of somebody indicting you and you making a plea in abatement or a plea in bar, claiming double jeopardy, but the Court has never found that a basis for collateral attack that I know of.

MR. LEAPHART: Well, I would submit that I am not merely engaging in speculation when I am defending this appeal by the State of Montana, the state which has already tried my client twice and still has five outstanding counts that unless jeopardy attaches they can refile.

QUESTION: In any event, I suppose the issue will be presented by the other case for resolution --

MR. LEAPHART: I submit that my client has a very significant interest.

QUESTION: Apart from your client's interests --

MR. LEAPHART: Yes.

QUESTION: -- the basic issue will be settled in the other case.

MR. LEAPHART: Yes, Your Honor.

Now, as to the merits of the case, Mr. Keller throughout

this litigation has maintained that there are no constitutional policies underlying the federal rule, the rule announced by this Court in Downum v. United States. He has taken the position that the Montana rule offers as much protection to a defendant as does the Downum rule.

On the contrary, I would submit to the Court that historically the Downum rule has protected two basic interests. First of all, it protects the defendant from having a judge or a prosecutor dismiss a case when it becomes apparent to either one of them that a conviction is going to be unlikely; and, secondly, it protects, it insures the defendant that he can proceed to trial before a particularly chosen tribunal.

Now, both of these interests are best served by having jeopardy attach at an early stage in the trial proceeding. And the point at which jeopardy attaches, as has been pointed out in the Sommerville decision, merely begins the inquiry as to whether or not there are double jeopardy interests involved. The mere fact that it is attached does not necessarily mean that the defendant's double jeopardy interests are going to prevail.

For example, in the Sommerville case, the interests in sound judicial administration and the ends of public justice were the prevailing factors, and so it is just a matter of balancing those interests out.

The problem with moving the point of attachment to a later stage in the proceeding is that you then create a period

of time during which the prosecutor can ask for a mistrial or a dismissal and he can do so without making any showing of manifest necessity or extraordinary circumstances.

QUESTION: Of course, there is still the factor of the sound judicial discretion of the trial judge as to whether to grant it, so you are not without protection.

MR. LEAPHART: That's correct, Your Honor, but I don't think that there is sufficient protection because the trial judge doesn't have the guidelines that are brought into play by the attachment of jeopardy.

QUESTION: Are you saying that there is some really imperative need -- I am not sure what manifest necessity means, that there is some significant element of the administration of justice that requires the federal and the state timeframe to be the same?

MR. LEAPHART: Well, what I am saying is that I think that the attachment of jeopardy rule protects essentially two interests; number one, protecting the defendant's right to proceed before a particular tribunal; and, secondly, insuring that a judge or a prosecutor cannot dismiss when they think that a conviction is unlikely without showing manifest necessity. And I think that that is sufficiently protected under the Downum rule. And what I am saying is if you move the point in time, as Montana has done, then you start to jeopardize those two interests, because as you pointed out, during that period of time you have got

such things as the opening statement of the prosecutor, and, more importantly, you've got the possibility of an opening statement by the defense counsel.

QUESTION: Well, I am not arguing or suggesting or intimating that one or the other is better. I am simply saying is there any need that the federal rule bind all the fifty states as to this time factor?

MR. LEAPHART: Well, I think if we are going to make any sense out of double jeopardy protection in the states, there is. If we open the door, if the Court opens the door and allows the states to adopt their own rules as to when jeopardy attaches, then conceivably the State of Montana is free to adopt a rule such as the common law rule, that jeopardy doesn't attach until the jury verdict comes in, and I don't think that anybody is going to argue that that is going to protect the interests which become associated with double jeopardy protection.

I think that this Court has specifically said in the Jorn case that that point in time represents a point in time at which time constitutional policies come into play, and I think it --

QUESTION: That was a federal case, wasn't it, Jorn?

MR. LEAPHART: Yes, sir. But I should point out --

QUESTION: Was Jorn a Court opinion or was it just a plurality opinion?

MR. LEAPHART: Plurality.

I should point out that this Court in Illinois v. Sommerville and in Breed v. Jones has applied the Downum rule to the State of Illinois and the State of California.

QUESTION: It is clear, is it not, that in the federal system, in a non-jury trial, jeopardy attaches -- does not attach until after the first witness is sworn?

MR. LEAPHART: That's correct.

QUESTION: That is clear?

MR. LEAPHART: I think so, yes, sir. I think a distinction between the jury and the non-jury trial is that, in terms of practice, in a non-jury trial most often if there is a mistrial or a dismissal and it is refiled, it comes back in front of the same judge, which is the same tribunal, so you haven't jeopardized the defense.

QUESTION: That is really not necessarily so in many instances.

MR. LEAPHART: I know it is not necessarily so, but in Montana, as a matter of practice, I think it is; whereas, in a jury trial, once you have a dismissal or a mistrial, the second time around you've got an entirely new tribunal.

QUESTION: In Montana, does the judge impose the sentence?

MR. LEAPHART: Yes, sir.

QUESTION: Well, don't some of your double jeopardy

considerations then apply even to a bench trial? I am thinking now of the opening statement, stress and anxiety, the possible impression upon the trier of a fact.

MR. LEAPHART: Your question, Your Honor, are they affecting the tribunal or the trier of fact?

QUESTION: Wouldn't all of those considerations tend to come to rule that jeopardy attaches before the first witness is sworn?

MR. LEAPHART: Yes. In fact, I think a very good argument can be made for having jeopardy attach at an earlier time.

QUESTION: I am just not following you on trying to draw the distinction between the two is all.

MR. LEAPHART: The counsel for the appellant --

MR. CHIEF JUSTICE BURGER: Go ahead and respond. We will extend your time by two minutes, in view of our excessive large questioning.

MR. LEAPHART: The counsel for the appellant has put forth really only one rationale for the Montana rule, and that is that the jury prior to the swearing of the first witness has nothing to consider. There are essentially at least three fallacies with that argument, I submit, because, number one, the jury does have something to consider prior to the swearing of the first witness. It has the -- the jury has the opening statement of the prosecutor, possibly the opening statement of

the defense counsel. And I was listening to the argument in Court here yesterday on the propriety of remarks made during voir dire and opening statements, and so that is another element, questions that come out during voir dire which affect the jury.

QUESTION: Well, damaging statements made during the jury selection process, unless you have a trial judge who is going to protect the case, are beyond the reach of double jeopardy, aren't they?

MR. LEAPHART: Your Honor, I am thinking of more than just damaging statements. I am thinking of things of -- oftentimes a defense counsel will ask jurors what their thoughts are if a defendant chooses not to take the stand and try to feel them out on that point, and he is tipping his hand to the prosecution as to the approach he is going to take in the case.

QUESTION: How about pretrial publicity that occurs a month before the case is set for trial? That can have some influence on the jury, and surely you wouldn't argue that jeopardy attaches a month before the case is set for trial.

MR. LEAPHART: No, I would have a difficult time arguing the jeopardy should attach any time prior to the point where we actually know what the composition of the jury panel is, before we have actually chosen the tribunal.

QUESTION: In this case, the opening statement had not been made, had it?

MR. LEAPHART: No, sir.

QUESTION: The motion by counsel for defense was made immediately after the swearing of the jury, as I understand it.

MR. LEAPHART: That's correct. 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:

In the argument presented before this Court, there was an issue raised that I would like to respond specifically to. In Benton v. Maryland, the Court said that the same constitutional standards apply against both the state and the federal government.

As I see this case, this is an effort to spin off the non-constitutional baggage of the Benton decision. That is the way I see it. In other words, we are trying to create a non-constitutional parsing of what Benton v. Maryland has said.

Now, that may be fine but I think that is what the issue is as I see it. We are trying to say that it is a non-constitutional issue as to how this Constitution should be applied in the State of Montana. I see that as the issue.

Now, I don't think that is a valid theory. I don't think the State of Montana, either legislatively or judicially, should be examining decisions of the Supreme Court of the

United States to determine what is non-constitutional baggage in terms of time. The Supreme Court applies the rule, it decides when the constitutional rule should be applied, and the states and the legislatures should follow it, in my judgment.

Now, the question is also raised as to whether there is any significant difference as to the time when jeopardy attaches. I think it is a very important question. Let me suggest one point to you before I approach that question, and that is the burden of proof.

It used to be -- and perhaps I am adopting from the equal protection cases -- the rule of compelling state interests or at least some rational rule. What we are doing here is not justifying the -- the state is not up here justifying and saying there is some compelling need not to have this rule that has been announced in Downum and Sommerville and all of the rest, there is some compelling reason in the State of Montana why we should not have this rule.

So when we talk about the difference, I don't want to be on the defensive by simply saying to you that maybe I can satisfy you as to the significant difference, and maybe I can't.

QUESTION: I thought all statutes were presumed constitutional, counsel?

MR. MOSES: That is,all statutes are presumed constitutional, but that is one of the problems we get. If I may just make a brief comment on that point, in the State of Montana

we had conclusive presumption contrary to Louie v. U.S. and the teachings of the Supreme Court. So that if we take the rule in Montana that we have a presumption to that effect, which is conclusive, then we have presumptions which are again non-constitutional issues.

You see, my point is that where the states in my view, sir, we have that presumption, but if you were to apply it in the State of Montana, you would find it conclusive and the --

QUESTION: Well, certainly no one suggests that it is a conclusive presumption, 180 years of decisions of this Court show otherwise.

MR. MOSES: Yes.

QUESTION: But you are talking about who the burden of proof should be on as to unconstitutionality.

MR. MOSES: Yes, I understand the point. I wanted to make that extra point in that it is my judgment that the State of Montana does not follow at all the Supreme Court decision. You are right, there is that presumption, but my understanding is that if you are going to depart from the Constitution, you must show some compelling reason for doing so.

QUESTION: Well, you would have to -- I would think if you are going to depart from the Constitution, no showing would justify it.

MR. MOSES: Well, that is one of the issues that is

very narrowly drawn in this case, Your Honor, because if the Supreme Court in Downum, Sommerville and all of those, if that is an application of the Supreme Court, then the State of Montana cannot change it, that is clear. The issue in this case seems to be as to whether we can take off a portion of what the Court has said and say that that is non-constitutional baggage. Now that is as I see it.

If it is a non-constitutional issue as to the time when jeopardy attaches, then, of course, there isn't any significance and, of course, the thing can apply.

When you talk about the question of whether there is any significant difference, the question is whether you have a valued right to have his trial completed by a particular tribunal That is U.S. v. Jorn and U.S. v.Lee, of course. I think there is some merit as to permitting the prosecution, the peremptory challenge to the entire panel. I think there is a lack of reciprocity, perhaps like in Fornaris.

What I am saying to the Court I think is simply that that issue was addressed to the Court in the issue by Mr. Tuttle, Chief Justice Tuttle, in this particular manner, in which he said on page 15, is that the valued right to have this trial completed by a particular tribunal independent of the threat of bad faith conduct by the judge or prosecutor -- now, I take that to mean that you are entitled to the double jeopardy argument, regardless of whether the discretion of the court in

dismissing was in good faith or in bad faith.

And I think when we come to a valued right, the question is simply is the person in jeopardy when the jury is empanelled and sworn. I think that he is. I think the opportunity to have a peremptory challenge to the entire panel -- in our state we are now giving some preliminary instructions as to what the law is in this particular case, we have opening statements in which there are outlines of what they intended to prove --

QUESTION: Mr. Moses, on that point of peremptory challenge to the entire panel, which concerned me before, under Montana law does the prosecutor have a right to have the prosecution dismiss after the jury is sworn but before the first witness is sworn, or is it subject to permission by the trial court?

MR. MOSES: In my judgment, it is subject to permission by the trial court. I do not think he has an absolute right, no, sir.

QUESTION: Then his argument -- I would be interested in your response to this -- his argument is that if you have a prosecutor who seeks to manipulate by dismissing the panel, he can do it equally before the swearing -- equally before the jury is sworn or immediately thereafter?

MR. MOSES: I think there is a point well made by Mr. Keller. I think that is true, but I think it points out the

problems that we are having. We are just taking another single step down the line, but the manipulation, according to Justice Tuttle, the right here preserved is independent of the threat of bad faith conduct by judge or prosecutor, whatever they do, jeopardy is attached.

QUESTION: I suppose a countervailing consideration -- I was just trying to think it through -- is that before you really start questioning witnesses and the like, you do need a point in the proceedings for a kind of clean-up of all outstanding motions and odds and ends which might involve a dismissal or retrial or change in the date on an indictment or something like that. And isn't there some sense to saying that in orderly procedure to have that come right before you put the witness on or before you make your opening statements, rather than right in the midst of the jury selection process and before you swear the jury? Just the terms of an orderly way to get the trial going, isn't there something to favor his argument here?

MR. MOSES: I don't think so, but I am not sure I understand the point completely. The pretrial motions and anything that is done ordinarily is done before the selection of the jury. We had two judges to rule on these motions that we urge and urge and urge.

QUESTION: But isn't it true that in this case they waited until after the jury was sworn before they presented some motion which the judge regarded as timeless?

MR. MOSES: Those motions were evidentiary in nature only. What I do is that I present all of my pretrial motions, I argue them again and again, and at the time of the trial I have the motions in limine. Now, I could have waited. There is no question, I could have waited until the first witness. That wasn't the issue at that particular time. It was not the issue. It was not ingenius. My issue was at that time that the entire nine counts did not state a claim for relief, and they dismissed all of them but two of them, and I still maintain, despite the Circuit Court of Appeals, that the first count was never any good, and that was the issue, and I thought that ought to be resolved because if you had to go on with the case with the other five counts, then it is difficult under Ash v. Swinson and Turner v. Arkansas to go back and try the other issues that had been kicked out by the court. And I put that in my brief and addressed it to the attention of the Attorney General and to the court, here is the dilemma, let's move to the Supreme Court and get it all decided.

QUESTION: Mr. Moses, may I interrupt a minute. Did you make this motion before the jury had been sworn? Did you make the motion to restrict the state's evidence prior to --

MR. MOSES: No, sir, I did not. I made all --

QUESTION: Well, could you have made it under Montana law prior to the swearing of the jury?

MR. MOSES: I don't know the answer to that, sir, and

the reason that I do not know --

QUESTION: Is there anything in Montana law that would have prevented your making it?

MR. MOSES: No, sir, I know of no law that prevents it. The Attorney General at the time argued that motions in limine were unknown to the State of Montana as far as evidentiary rules are concerned.

QUESTION: The information was defective because of this typographical error on its face.

MR. MOSES: No, sir. No, sir.

QUESTION: What was your motion then?

MR. MOSES: My motion was directed to each and every count -- I'm sorry, excuse me. My motions that were presented before two courts prior to any having the trial commence --

QUESTION: But the jury had been sworn?

MR. MOSES: No, sir. I presented these motions in full, supported by briefs, that there was not under any of the counts sufficient claim for a criminal violation. Those motions were defeated twice. Then I went into court after the jury had been empanelled and sworn to be consistent, all right, if that is your view that they do state a cause of action, then my motions were to require them to prove a venue as laid, to prove that there were false and forged documents -- those were the nature of my objections, and also to confine them to the proof of a particular time which I happen to think would not win. But

the other motions were what were important, preparing false evidence, those motions in limine. That was what --

QUESTION: But the motion that precipitated the controversy that is here today was to restrict the evidence to the dates in the information, as I understand it.

MR. MOSES: Well, they have extracted that. From my point of view, sir, that was not the vitality of the motions that were presented. For instance, in Montana, you have to show where the time is relevant or significant, and whether you can prove it sometime prior to five years before the filing of the complaint. I really did not think that was that relevant. I think it is necessary when they do not, when it is consistent with our pretrial motions that were argued vigorously and supported in our trial brief.

QUESTION: The effect of your motion was to bring about a dismissal of the information?

MR. MOSES: A dismissal of these other counts.

QUESTION: Yes.

MR. MOSES: Yes, sir.

QUESTION: In practical effect, your motion was to dismiss because the state had no evidence of the offense that was charged.

MR. MOSES: I disagree with that, sir. The state had evidence of those charges as to that particular time. There was the filing of the application, there was other information

submitted, there was the final settlement in workmen's compensation covering that, a spectrum of time of almost a year. They could have prevailed on the first application to show that it was fraudulent within the time span stated.

QUESTION: Is your motion in the appendix? I don't recall. I don't think it is in there.

MR. MOSES: I do not believe it is, sir. No, sir.

I think one of the -- to conclude my argument, one of the things that concerned me theoretically, if I may place it in that light, is the question of raising non-constitutional issues as a theory to be adopted by this Court.

For instance, I think Justice Stewart address attention to Williams v. Florida and Apodaca v. Oregon. It is necessary, I think, to approach that directly. Is there a difference or a distinction between those cases and this case? I happen to believe that there are.

First of all, we have an authoritative statement in the Supreme Court of the United States as to this particular issue, in other words that jeopardy attaches when the jury is empanelled and sworn. I think that is a difference and a distinction. There was somethign bag and baggage, that was a part of double jeopardy as enunciated by this Supreme Court. I think that is a difference and a distinction in Williams v. Florida and Apodaca.

Furthermore, it is my belief that there is a difference

because the application; the court is called upon the apply this constitutional standard, and the question is when should it be applied. It is implicit in the constitutional provision itself as to when it should be applied, and I think that that makes it -- involves itself more than the issues raised on just those issues.

For those reasons and others, we think that the decision of the Circuit Court of Appeals should be affirmed.

Thank you.

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

ORAL ARGUMENT OF ROBERT S. KELLER, ESQ.,

ON BEHALF OF APPELLANT -- REBUTTAL

QUESTION: Mr. Keller, before you begin, let me put this question to you, relating to some questions I put earlier. After the swearing of the jury in Montana, I take it, the prosecutor is permitted to make the first opening statement if he elects to do so, is that correct?

MR. KELLER: Yes, sir. Ordinarily there is a brief statement made by the trial judge before the jury is even voir dired to give them some concept as to why they are here, and then the questions start.

QUESTION: Well, I am addressing myself now to the possible damage or injury to the defendant that can occur from the opening statement.

MR. KELLER: I see.

QUESTION: If an opening statement, let's assume one that is outrageously bad and misrepresentation by the prosecutor, of course, the prosecutor isn't going to move for a mistrial on that ground, but the defense might do so, and I suppose under Montana procedure and practice if the statement had been -- if the opening statement had been excessively bad, the court could grant that motion?

MR. KELLER: Yes, sir.

QUESTION: And then there could be no double jeopardy problem?

MR. KELLER: I don't know about that. But, yes, the court could grant that motion.

QUESTION: Well, if there was a motion at the request of the defendant, the defendant would be in a rather difficult position to raise double jeopardy.

MR. KELLER: Well, his position I am sure, knowing the talent that we have in Montana, will be that he was forced to do this and it is double jeopardy, and I think there would be some merit to that approach in the proper situation, but I am sure that isn't why you asked the question. We don't need to get that fra. Yes, if the conduct of the prosecutor were outrageous, it would be the defense motion for a mistrial or conceivably the court on its own motion granting a mistrial just for this reason. It wouldn't be too unlike yesterday's case, only to spell out the reasons.

QUESTION: Well, presumably if the court granted a mistrial on its own motion, a double jeopardy question could well have been preserved. It would be much less likely --

MR. KELLER: If the defendant moved --

QUESTION: -- if the defendant moved for it. And, of course, we would presume that the prosecution isn't going to move for it.

MR. KELLER: Not under those circumstances, no, sir.

QUESTION: Unless a senior officer happened to walk in the courtroom and wanted to avoid the problem. Go ahead.

MR. KELLER: Well, just to respond to some of the comments, we didn't extract this part out of the motion in limine. This motion at that time, which at the time leaves the state in the position of trying to convict for an offense that was repealed a month before it is alleged to have taken place isn't an extraction. That went to the heart of everything. They had to do something with those three counts.

Part of the confusion that arose here is of the nine counts, three were subject to the problem, so the judge dismissed them sua sponte. The state dismissed of its own motion the remaining six, and I think this was Mr. Leaphart's point, that he is still sweating out. Then on the retrial, one of the defective counts and one of the counts the state dismissed were all that were charged, so there are still five counts sitting out, and I see what his point is and we don't intend to

prosecute. But that isn't something we just brought up. We didn't know anything about this until -- it just came out in the Solicitor General's opinion, and this is the first time that we have even thought about it -- no, we won't.

The voir dire questions that were commented on is true in both systems, federal or state. If you are going to talk about opening statements, that is fine, that can come up under the state system, but if you are going to affect that jury by your voir dire questions, you affect them under system, so that is not a distinction between the two systems, if you want to affect your jury, because they are not empanelled and sworn yet.

The valued right concept may be a valuable one, but I would like to call the Court's attention that we don't see it from this Court until 1948, in Wade v. Hunter, and then we are talking about a court martial. In all candor with the Court, Justice Douglas relied on Cornell, a lower court case of 1931, that refers to the valued right. In further candor, I found the valued right as such clear back in United States v. Simmons, United States v. Shumaker, and that is back in 1840, but nobody said what it was. And the most that I have to feel it was, because that is the overall concept, is let's get the case tried now as distinguished from we have a right to this particular tribunal.

The question of a judge trial in Montana needs to be

tempered a little bit by the fact that Montana has an extremely liberal disqualification feature, so we can disqualify for no reason either side one judge in a criminal case, two in a civil case. You don't have that same rule in federal cases. It is tough to get a federal judge disqualified. Does this mean if we are going to adopt this as part of the constitutional baggage that we now are going to have to be faced with what you can do to disqualify a judge if you have a vested right to this judge in a judge trial, I really don't mention it to complicate it, but Montana is that way, going back to the wars of the copper kings. It is not hard getting rid of a judge in Montana in either criminal or civil cases, and I don't say that disrespectfully, with seven years on the bench. I just know that it is not hard to get rid of them.

The only other thing I have to conclude with the argument is I want to pose this question: Suppose Congress in 1907, in the Criminal Appeals Act, had, instead of saying until jeopardy attaches, had said when the first witness is sworn, would that have been unconstitutional? Would we be here today?

Suppose Congress today enacts legislation that says in the federal system jeopardy doesn't attach until the first witness is sworn, or in acts under the Model Penal Code? Is that unconstitutional?

And I think to me that that is the crux of the issue here. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. You all have been most helpful. The case is submitted.

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

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