In the

Supreme Court of the United States

ORIGINAL

OREGON,	:	
	:	
Petitioner,	:	
	:	
v.	:	No. 80-1991
	:	
BRUCE ALAN KENNEDY	:	

Washington, D. C.

Monday, March 29, 1982

Pages 1 thru 53

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Monday, March 29, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:50 o'clock a.m.

APPEARANCES:

DAVID B. FROHNMAYER, ESQ., Attorney General of Oregon, Salem, Oregon; on behalf of the Petitioner.

SAMUEL A. ALITO, JR., ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; amicus curiae.

DONALD C. WALKER, ESQ., Portland, Oregon; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Oregon against Kennedy.

You may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID B. FROHNMAYER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FROHNMAYER: Thank you, Mr. Chief Justice, and may it please the Court, this case is here on a writ of certiorari to the Oregon Court of Appeals. That Court reversed defendant's theft conviction despite the fact that defendant's earlier trial was terminated by defendant's own successful mistrial motion. The Oregon Court of Appeals held that reprosecution itself was barred because of jeopardy grounds due to the events preceding defendant's successful mistrial motion in the aborted trial.

At issue in this case is whether a convicted theif ought to be able to escape the occasion of that conviction through the consequence of his own deliberate trial strategy.

The relevant facts, we believe, are few and simple. Early in defendant's first trial, the prosecution asked an admittedly improper seven-word question. Before the witness answered, defense counsel objected, moved for a mistrial, and asked that the

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matter be reset for trial. The trial court granted defendant's motion over the strenuous objection of the prosecution. Prior to his retrial, defendant then asked a different judge to dismiss the case on double jeopardy grounds. The trial court declined to do so after making explicit findings that the prosecutor's conduct was not intentional, that the question was not asked in bad faith, and that it was not grossly negligent.

The Oregon Court of Appeals, however, reversed defendant's subsequent conviction, finding that there was nonetheless a Fifth Amendment jeopardy bar because the prosecutor's question constituted something, to wit, called overreaching.

The proposition we would put to this Court is simple, and that is that a defendant who elects to move for a mistrial cannot raise a jeopardy bar to his retrial except in one narrow circumstance, and that is where the prosecutor's conduct itself is intended to provoke that very mistrial, and we note at the outset the anomaly that under the settled law of this Court, had defendant merely objected to the question, been convicted, and then secured successful reversal upon appeal, he could be retried. So, the issue is whether the defendant, by himself, shortcircuiting the trial process in a full trial on the merits, can be allowed to

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achieve a different result because his well-taken mistrial motion was granted.

We contend that the defendant cannot create these anomalous results and cannot complain except in the narrow circumstance where the prosecutor intends that the trial not be completed, and where the prosecutor's conduct was intended to provoke that very mistrial.

We believe that our proposed test would assist both the public and criminal defendants, and we believe that to affirm this case would do grave injury to both. An affirmance would clog court calendars. It would multiply appeals about the precise degree of prosecutorial misconduct or error which should lead under a blameworthiness standard of some kind to a double jeopardy finding. It would also, we believe, deter trial judges from granting mistrials in cases where they are appropriate, because they would know for certain that the defendant would go scot free.

Under those circumstances, the delay, the time, the anxiety, the multiplication of appeals, and the cost to the public of hearing clearly meritorious appeals would be, we think, a prohibitively high cost for such a different rule.

We believe that the rule for which we argue is

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compelled by an understanding of the history and purposes of the double jeopardy clause, that it is implicit, at least, in the dicta and holdings of prior decisions of this Court that a Draconian sanction of barring retrial altogether when the prosecution makes an error ignores the fact that there exist equally effective sanctions against prosecutorial misconduct, and that as a matter of policy the ease and certainty of application of our rule make it a justifiable and appropriate one.

We note at the outset, of course, that one of the pieces of the history and purpose of the double jeopardy clause is to prevent against repeated harassment of a defendant by the prosecution when the prosecution suddenly realized that the case is going badly. In that sense, this Court has spoken of the defendant's valued right to decision by a first tribunal.

On the other hand, we can find no decision of this Court which has ever found that the double jeopardy bar applies where a mistrial motion on behalf of the defendant is granted at the defendant's request, and that, we believe is for a good reason, and that is because, as this Court has explicitly recognized, in Lee and in other cases, a mistrial declaration, when it is properly made, serves the constitutional prohibition

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against double jeopardy. It is a deliberate election on the part of the defendant to avoid a jury verdict which it is his right to achieve, and to challenge whatever error there may be in the record on appeal.

At the same time, that very mistrial motion ordinarily acts as sufficient and complete punishment for whatever prosecutorial error or unfair advantage there might have been, and of course, this Court has also recognized that there is and must be balanced against whatever right there is to a first tribunal, or policy there is in favor of a first tribunal, an important social interest in the completion of criminal proceedings against a defendant once and for all, a rationale which was re-emphasized as recently as the decision of this Court in United States versus Scott.

We think the policies that lie behind this and behind this Court's earlier dicta on the question make an enormous amount of sense, because ordinarily mistrial is itself a very significant sanction against the prosecutor. It is very easy, I think, to envision the displeasure of the prosecutor's supervisor and the public at the expense of a new trial, let alone the fact that a new trial probably for the prosecution will be more difficult to carry through.

However, the limited exception to the rule,

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which we believe is implicit in this Court's dicta, at least, is that if the prosecutor wishes that very sanction in this trial to be imposed, then of course it loses its character as a sanction for misconduct, and under those circumstances, a more serious sanction would be called for, becuase if it is not, then the consequence is the deliberate harassment of the defendant within the central meaning of the double jeopardy clause itself.

In this case, of course, none of the factors that would call forth that rule exist. We have already noted that under the facts, the error of the prosecutor occurred early in the trial. Two perfunctory witnesses were heard. The third had testified not to essential elements of the defendant's guilt or innocence, but was merely testifying as to the value of the rug that was in question.

QUESTION: Didn't your court say he was a key witness?

MR. FROHNMAYER: Yes. There is no question, Justice Marshal --

QUESTION: Well, can't we take his word over yours?

MR. FROHNMAYER: Yes, you certainly may. I did not mean to intimate that any witness was not a key

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witness. I am simply saying that the witness was not testifying directly to the guilt or innocence of the defendant, which is one of the points which earlier decisions of this Court, I believe, place special emphasis upon.

The point is that the trial judge did make findings, Justice Marshal, precisely with respect to the nature of the conduct in which the prosecutor had engaged.

QUESTION: May I ask you on that point, General Frohnmayer, the hearing on the double jeopardy issue was conducted by a different trial judge than the first one.

MR. FROHNMAYER: That is correct, sir.

QUESTION: Is that the normal -- maybe these things don't arise that often, but was that pursuant to any special rule?

MR. FROHNMAYER: It was not to my knowledge pursuant to any special rule, although it would not be atypical for Oregon's largest county for a different judge to hear the motion calendar than had heard the case.

QUESTION: What would be your view of the case if the same trial judge, the judge who was conducting the trial had conducted the hearing on the double jeopardy issue, and you had exactly the same record at

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the original trial, and the same testimony, and the judge said, well, my impression is that the case was going badly for the prosecutor, and so the prosecutor took a few chances, and was trying to -- hoping to get a better result, so although there was not a subjective intent to provoke a mistrial, it is tantamount to that, and therefore I will find that it was the equivalent of an intent to cause a mistrial, and that is unfair to the defendant? Would that be a different case?

MR. FROHNMAYER: I am not sure that it would. It would go mainly to the issue of who evaluates the record. It is our view that this rule should give appropriate deference to the trial judge's finding, whether it is a different judge who evaluates the first conduct or the one who was there. In the example that you posit, it seems perfectly appropriate that the judge who was even closer to the actual conduct of the criminal trial and therefore who might be able to judge and know of his own observation of the nuances of defendant's and prosecutor's demeanor might be an even better place to make such a decision.

QUESTION: Well, then, supposing the first trial judge said, I understand that the prosecutor testified she didn't intend to, but I really don't believe her, I think that she was pretty desperate, she

wanted a second chance, and so I will find on the very facts we have in this case that it was deliberately done to provoke a new trial. Then I take it there would be double jeopardy.

MR. FROHNMAYER: That is correct.

QUESTION: So that on this record it could have gone either way.

MR. FROHNMAYER: That is a possibility.

QUESTION: Depending on what the trial judge found.

MR. FROHNMAYER: Yes. Of course, it is, and we believe that it is within the purview of the trial judge to evaluate not merely the testimony of the witnesses, the --

QUESTION: The court of appeals didn't rule on that point. It ruled on flagrant.

MR. FROHNMAYER: The court of appeals --

QUESTION: Isn't that right?

MR. FROHNMAYER: The court of appeals accepted the findings of the trial court.

QUESTION: That's right.

MR. FROHNMAYER: Which, Justice Marshal --

QUESTION: And said, however, this case of flagrant overreaching lies outside that rule.

MR. FROHNMAYER: Well --

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QUESTION: Isn't that the ruling of the court? It is the last -- next to the last sentence.

MR. FROHNMAYER: We understand that that is in fact what the court of appeals said, and we have no quarrel with the characterization of the prosecution's conduct as being improper. What we simply state --

QUESTION: Flagrant? Do you agree with flagrant?

MR. FROHNMAYER: That is a characterization that --

QUESTION: That is -- your court used that word.

MR. FROHNMAYER: Well, that is a characterization of the court of appeals by which I assume that we are bound. However, it does differ, I must say, in at least emphasis or epithet from that which was given to it by the trial judge whose findings the court of appeals accepted.

QUESTION: Perhaps stupid would have been a better characterization.

MR. FROHNMAYER: Well, we come to this Court with no apologies for the prosecutor's conduct, and I hope that is clear to this Court. What we are simply saying is that however flagrant the conduct may be, whatever epithet had been attached to it, it was not of the character and kind which this Court's prior

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decisions and dicta, at least, quite properly indicate should be the occasion for finding that the mistrial motion was one into which the defendant was goaded without any real option or without any real choice.

QUESTION: Mr. Frohnmayer, even if we were to agree with you in your argument here today as far as the federal rule is concerned, if the case were to go back to Oregon, would Oregon apply a more stringent test, as has been suggested in one of the amicus briefs, so that under the Oregon constitution and under Oregon law, for example, in the Rathbun case, is a stricter standard applied?

MR. FROHNMAYER: Yes. I am glad that you asked the question, because it does give me a chance to point out that the amicus brief which raises the Rathbun case raises the wrong Rathbun case. It refers to the Oregon Supreme Court case in the Rathbun case, but in fact the court of appeals whose decision we are contending today is erroneous cited deliberately its own opinion, and pointed out that the Supreme Court Rathbun case was decided on other grounds. The other grounds on which the Oregon Supreme Court case was decided were in fact state constitutional grounds.

QUESTION: So you think that the court of appeals, when it cited its Rathbun decision, meant the

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decision of the court of appeals in Rathbun, and not the later decision of the Supreme Court of Oregon?

MR. FROHNMAYER: There is no question in my mind, Justice Rehnquist. In fact, it is difficult to see how more clearly other than stating it explicitly the court of appeals could have been saying that it was deciding the case on federal grounds, because it cites its own opinion, says that the other opinion is reversed on other grounds. the other grounds on which it was reversed were state constitutional grounds, so there is no question but that we are here on federal grounds.

But to address your question, Justice O'Connor, it is not clear what the Rathbun case would dictate, because at the time the Supreme Court decided Rathbun, it noted that there was no state or federal constitutional authority precisely on point on the double jeopardy question where a bailiff attempts improperly to infuence a jury, and there still is no such federal case, so we would have to know whether or not this Court, for example, would extend double jeopardy protections to a defendant where a bailiff engaged in improper conduct.

We did note that in the Rathbun case decided --

QUESTION: Well, is there a possibility that Oregon law would apply a different standard than that

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which you are arguing should be applied by us?

MR. FROHNMAYER: Yes, it is a possibility, and what we represent to this Court, however, is that the Oregon court of appeals chose deliberately to determine the case on federal grounds, apparently believing, since the state constitutional grounds were argued to it at least in the briefs of both defendant and state, that the federal ground was the appropriate and dispositive ground.

QUESTION: But would not the proper disposition be, if we agreed with you, to send it back to that court to be sure that they do not think there is a state rule that adequately supports their determination?

MR. FROHNMAYER: No, I don't believe so at all, because the Oregon courts know when they wish to cite a state ground. In fact, I think that's really explicit in the brief of the American Civil Liberties Union citing other cases.

QUESTION: Well, even so, Mr. Attorney General, if we were to reverse, our mandate is for further proceedings not inconsistent with our opinion, so I should suppose if your court of appeals wanted then to determine a state constitutional ground, it would be free to do so under our mandate, would it not?

MR. FROHNMAYER: I suppose that it would,

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except that the court of appeals made it explicit in our judgment that it rejected the viability of any state constitutional grounds because, had it wished to address those --

QUESTION: It may have, but we have no choice after we decide the federal question, if we do, in your favor, but to remand for further proceedings not inconsistent with our opinion.

MR. FROHNMAYER: That is correct.

QUESTION: And I would suppose that would leave your court of appeals open to -- if it wants to change its mind, to apply a state ground.

MR. FROHNMAYER: Yes. However, Your Honor --

QUESTION: Your state supreme court declined to review this case, did it not?

MR. FROHNMAYER: Our state supreme court had a crack at this case and did decline discretionary review, and that is why we believe it is appropriate to take this issue directly to you.

Mr. Chief Justice, I wish --

QUESTION: As I understand, the court of appeals says the law of Oregon gives two reasons for applying double jeopardy. One, the trial court found didn't apply, and the second one was the one that the court of appeals ruled on, and you haven't -- I mean,

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aren't we to give deference to their holding that this was overreaching?

MR. FROHNMAYER: Their --

QUESTION: Didn't they specifically say it is overreaching?

MR. FROHNMAYER: Overreaching is an epithet, Your Honor, which is taken directly from Fifth Circuit Court of Appeals federal cases purporting to construe this Court's precedents in double jeopardy cases. That is a line of cases which we believe to be erroneous, and one which I will respectfully address on rebuttal, as will the Solicitor General.

QUESTION: But he says, this is a case -- well, do you deny that there was overreaching?

MR. FROHNMAYER: No, we have never contended that the nature of the prosecutor's conduct was appropriate. We are merely saying it does not fit the characterization of intentional misconduct designed to abort a trial because the prosecution wishes a more --

QUESTION: Well, is the law of Oregon that overreaching is a ground?

MR. FROHNMAYER: No, it is the law of the Federal Constitution which the Oregon court is purporting to construe.

QUESTION: Is it the law of the court of

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appeals?

MR. FROHNMAYER: It is the law of the case of State versus Kennedy, which we are asking this Court to reverse.

QUESTION: And that's the court of appeals.

MR. FROHNMAYER: That's correct.

QUESTION: And you say their finding that -- you admit that this man was overreaching.

MR. FROHNMAYER: That is correct. That is the characterization of the court of appeals, the findings of the trial judge.

QUESTION: My question is, do you agree with it, that it is overreaching, end of quote?

MR. FROHNMAYER: Yes.

Mr. Chief Justice, I wish to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Alito.

ORAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.,
ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. ALITO: Mr. Chief Justice, and may it please the Court, the United States agrees with the state of Oregon that the double jeopardy clause does not prevent retrial of the defendant after a mistrial is declared at his request or with his consent, provided only that the prosecution did not deliberately provoke

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the mistrial request or the defendant's consent.

In the federal system, most of the courts of appeals now adhere to that rule. However, some have held or stated that reprosecution may be barred where the mistrial request is caused by prosecutorial overreaching or gross negligence or bad faith or intentional misconduct.

In the brief time allotted to me this morning, I will attempt to show that none of these alternative standards is workable, and that all would produce highly undesirable practical consequences.

First, all these terms are simply too vague to provide any real guidance to courts or litigants. Overreaching, for example, is simply a conclusory terms. It means conduct that reaches or goes too far. It is not a question of fact. Since it means conduct that reaches or goes too far, virtually all prosecutorial or judicial error that causes a mistrial would appear to constitute overreaching, because by definition it is conduct that went too far. It caused the mistrial.

Gross negligence is an equally vague standard. This Court's decision in Lee in 1977 stands for the proposition that simple negligence on the part of a prosecutor or a judge is not sufficient to bar retrial,

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and no one has ever adequately explained the distinction between gross negligence and simple negligence. In the field of torts from which that term was borrowed, the concept has now been generally repudiated.

The terms bad faith and intentional misconduct have similar flaws. Apparently these terms refer to any conduct that is not inadvertent, and that the prosecutor or judge knows is wrong or improper.

QUESTION: Let me give you a hypothetical case to test your -- Supposing you had a case in which the prosecutor toward the end of his case knew he didn't have enough evidence to convict, but he had had an interview off the record with some witness that was not admissible, and he thought, well, the only possible way -- I know justice demands that we convict this man -- would be to get this evidence before the jury, so he deliberately told the jury about some inadmissible evidence, and then the other side moves for a mistrial. Would that be permissible? He didn't even think about the consequences of a mistrial. But a rather flagrant example.

MR. ALITO: In that case the remedy would be the declaration of a mistrial --

QUESTION: And a new trial?

MR. ALITO: -- or if a mistrial was not

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declared, reversal on appeal.

QUESTION: Could he do anything bad enough to justify a final determination of innocence if he didn't really think about the mistrial problem and double jeopardy?

MR. ALITO: Under other provisions of the Constitution, he might, if he took some action that irreparably prejudiced the defendant's ability to obtain a fair trial.

QUESTION: Well, just in this particular trial. He just did everything that you can think of that would make the trial unfair, but he just was very inexperienced and very zealous and very eager to get justice done in the particular case.

MR. ALITO: The remedy there is simply a mistrial reversal of a conviction.

QUESTION: And a second trial.

MR. ALITO: That's right. The defendant has a valued right to have his trial completed by a particular tribunal, but it is important to emphasize that he has no right to a single errorless trial or even a single trial that is free of highly prejudicial reversible error. That proposition was effectively settled more than 80 years ago, when this Court held in Ball that a retrial was permitted following reversal of conviction

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on appeal, and there are sound reasons for that rule. It would simply be impossible as a practical matter to guarantee criminal defendants a single errorless proceeding. Criminal trials are simply too complicated. Too many things can go wrong. Things happen spontaneously and unexpectedly. Prosecutors and judges are required to say and do many things without the opportunity for leisurely reflection, and requiring a single -- requiring the --

QUESTION: Yes, but granted all that, maybe you don't joint the Attorney General's concession, but on these very facts, if this young lady had deliberately intended to get a mistrial by asking that question, you would agree that then there would be double jeopardy?

MR. ALITO: Certainly. If she deliberately intended to provoke a mistrial, then double jeopardy would have barred reprosecution, but the trial level court found that she did not have such an intent, and that has not been disputed by -- that was not reversed by the Oregon court of appeals.

QUESTION: How does one prove the subjective intent of the prosecutor? Could you ever do it if the prosecutor denied that intent?

MR. ALITO: Yes, I doubt that there will be very many cases in which a prosecutor will admit that he

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set out to cause a mistrial, but I think that there will be circumstantial evidence from which an experienced trial judge could determine without great difficulty whether the prosecutor deliberately provoked a mistrial.

QUESTION: But not in the hypotheticals I gave you. That wouldn't be adequate.

MR. ALITO: Well, as I understood your hypothetical, Justice Stevens, there the prosecutor did not have the intent to provoke a mistrial.

QUESTION: Well, he got on the stand before the judge and said, well, I just didn't think about this consequence, and I haven't had much experience.

MR. ALITO: Well, if the Judge believed him, and based on the circumstantial evidence, how was the case going for the prosecutor, what was his manner when he made the fatal error, what is his background, what was his reaction to the defense mistrial request, based on all of those and other factors, if the trial judge believed that he lacked the intent to provoke the mistrial, then double jeopardy would not bar reprosecution.

As I was attempting to show, these alternative standards that have been adopted by some of the lower federal courts and by some state courts are simply too vague to provide any real guidance to courts or

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litigants. They will produce inconsistent and inequitable results. They will result in confusion on the part of trial judges who must decide whether to grant defense mistrial requests. Because those judges will be fearful that granting a request will bar future prosecution, they will probably be more reluctant to grant defense mistrial requests, and that, of course, will work to the disadvantage of defendants.

It will also lead them to be more inclined than they are at present to permit the completion of tainted proceedings, knowing that a reversal on appeal would not bar reprosecution, and that would result in more appellate reversals, needless appellate litigation, and many wasted days of trial while tainted proceedings are permitted to run their course.

QUESTION: What you are saying is that with a subjective rule that almost requires psychoanalyzing the prosecutor, the safe thing for a trial judge to do is simply say, let it go, and then let them go the regular appeal route, correct the error on appeal, and then they will be retried?

MR. ALITO: I think that's -- that's absolutely correct. I have no idea what overreaching means. It is simply a conclusory term. It is not a finding of fact which in the federal system would be governed by the

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clearly erroneous rule. It is simply a conclusion that the judge draws, and I would venture to say that in any arguable case, there are many -- there is room for many opinions as to whether the conduct at issue constituted overreaching.

In sum, we don't think that any of these alternative standards is workable. They would all produce highly undesirable practical consequences, and we therefore respectfully urge that the judgement of the Oregon court of appeals be reversed.

QUESTION: And you stand, I take it, on the fact that the trial court found and the reviewing court did not disturb the finding that there was no invideous or improper intent.

MR. ALITO: Yes. We think that is the finding of fact that wasn't disturbed and decides this case under the rule that we advocate and that this Court has adopted repeatedly at least in dicta in recent decisions.

QUESTION: Are we bound by that finding, do you think?

MR. ALITO: I think -- I don't believe this Court would disturb such a finding made by a trial level state court.

QUESTION: Can we also take the finding of the court of appeals?

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MR. ALITO: Justice Marshal, I would not regard the court of appeals' statement that the prosecutor's conduct constituted flagrant overreaching as a finding of fact. That was simply a conclusion that the court -- a conclusion --

QUESTION: Well, are we bound by that conclusion?

MR. ALITO: No, I don't believe you are.

QUESTION: And the reason we are bound by one and the other is what?

MR. ALITO: There are two reasons. One is a finding of fact, and the other is simply a conclusion of law. One was made by a trial level court, and the other was made by an appellate court.

QUESTION: And the trial level is above the appellate level.

MR. ALITO: No, but the trial level court took testimony on this issue, and was able to observe the --

QUESTION: Did it take testimony?

MR. ALITO: Yes, it did.

QUESTION: It doesn't say so in the opinion.

MR. ALITO: The trial level court took testimony from, I believe, from the prosecutor.

QUESTION: And of course the prosecutor didn't say I violated the laws.

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MR. ALITO: No, she didn't, and the trial level judge believed her, and made a finding of fact to that effect.

QUESTION: I understood that the appellate court did accept the finding of fact by the trial court that there was no intent to bring about a mistrial.

MR. ALITO: That's correct, Justice Powell. It said under Oregon --

QUESTION: I didn't think you had mentioned that. So you have a two-court rule, don't you, on that finding of fact?

MR. ALITO: That's correct.

Thank you.

CHIEF JUSTICE BURGER: Mr. Walker.

ORAL ARGUMENT OF DONALD C. WALKER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. WALKER: Mr. Chief Justice, and may it please the Court, I would like just to say a few things on the facts of this case which I think have been stepped over a little lightly. On the prosecuting witness, the defense counsel of the trial had shown certain bias on the prosecuting witness, and then on redirect the deputy district attorney tried to rehabilitate the state witness. The attorney -- Mr. Attorney General stated that the deputy DA was goaded

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into it.

Now, there was a recess the day of the trial, so the deputy district attorney had all evening, and the testimony is that she met the witness in the hall and discussed it, found out -- it came out in the facts of the case that the prosecuting witness did not know the defendant, had never done business with him, and they like to go over the fact that it was a seven-word question. It was a commenting statement more than a question, and then it goes more to an objection as to the proprieties of a question on hearsay or the fact that the question could have been asked another way.

She knew that she had no basic testimony to extract from the prosecuting witness, and went ahead anyway. So, I think that it is more than a technical breach. The district attorney should be able to go maybe a lifetime without making such, I think, an overreaching and flagrant statement.

Now, one thing, too, that should be pointed out, that when this happened, the trial judge did not even seek argument. He said, granted. So, I mean, I think we have to take in the circumstances, the surrounding circumstances more than just the written word that was taken down in the transcript. There was no question, and then where the trial judge says, well,

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you went over the line, it was overreaching.

One other thing that I think is important to know here is the history of the decision by the court of appeals, Judge Gillette. Judge Gillette had this case before him, and before that was the Rathbun case, which is cited in his opinion. The Rathbun case was the misconduct on the part of the bailiff. When that case came up, Judge Gillette is the one that heard that case in the court of appeals and held that it was more like jury bias rather than overreaching or that sort of thing, and so he overruled the trial court.

That went up to the Oregon Supreme Court, and the Oregon Supreme Court overruled Judge Gillette. So, when Judge Gillette in the Oregon Court of Appeals then has the Kennedy case, he has the latest decision in Oregon stating that a bailiff's misconduct, and that is the rationale of the case, where -- is abhorrent, is the case that was used in that decision.

So, if the rationale and the bailiff's subjective intent was not important, so Judge Gillette had that precedent. So he followed that case. I disagree that he was following his own court of appeals decision.

QUESTION: Well, if you are correct, Mr. Walker, why does he cite the Rathbun case first to the

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court of appeals decision and then simply say reversed on other grounds, and cite the Supreme Court decision?

MR. WALKER: Well, I think, regardless of how he says that, Justice Rehnquist, I think that the Oregon rule and the rationale, I think he might have been trying to show some face-saving interest in his own court of appeals decision, but the thing that is interesting in the Kennedy decision by Judge Gillette is that he cites as dictum U.S. Jorn and Dinitz, but then he says, the court, Oregon, or State versus Rathbun, 287 Oregon, so what is in the court? The only case that is really in point is State versus Rathbun, and the Oregon rule is that an officer of the court, a bailiff, misconduct that goes to that point where it did is flagrant and is overreaching.

QUESTION: You disagree, then, with the Attorney General as to the purpose of the use of the term "reversed on other grounds."

MR. WALKER: Definitely. I think that the bottom line is, what is the Oregon rule, and the Oregon rule is the Supreme Court rule of State versus Rathbun, and that is what he was following, I think, in that case.

Now, I would like to go into the question about this case being before this Court. First is that I think the Oregon Kennedy case is not ambiguous, and I

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think it is founded on state law, because when you say a court, that is -- I looked it up in Black's Law Dictionary. It says that, as a judge would say, I concur, I accord, and therefore, I think we are -- we look back then to State versus Rathbun. It definitely states, we are not deciding this, we are not going to speculate what the United States Supreme Court will do. We are deciding this on Oregon constitutional grounds, and that, I think, is the rationale of State versus Rathbun, which was, I think, adopted in State versus Kennedy.

QUESTION: But he also relies on Jorn, the decision by this Court, several times.

MR. WALKER: Yes. True. I think --

QUESTION: Well, we can't ignore that.

MR. WALKER: You can't ignore that, but I think that when the state judge is trying to uphold a constitutional guarantee, he has to be concerned with what is the state law that is involved, and then he can't ignore the federal law, but the -- so he has to reconcile both.

QUESTION: Well, I would think if the Oregon law is tougher on the prosecution in the area of double jeopardy, he would first go to Oregon law.

MR. WALKER: Well, I think that's the correct

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procedure, and I think that it would be -- perhaps we wouldn't be here if he had done that.

QUESTION: But he didn't. He cites, as Justice Marshal said, Jorn. Then he cites Dinitz.

MR. WALKER: That's true.

QUESTION: Doesn't Justice Lindy, at least, of your Supreme Court write opinions all the time encouraging reliance on your state constitution rather than on the federal constitution, doesn't it?

MR. WALKER: That's right, and he had a --

QUESTION: But he counsels doing it very explicitly, doesn't he?

MR. WALKER: That's right, and I think probably that that message will get through to the court of appeals, and I think that that might make the job for everyone --

QUESTION: Well, but has your Supreme Court yet told the court of appeals that's the procedure to follow?

MR. WALKER: Yes, I think --

QUESTION: Put it if possible on the state constitution?

MR. WALKER: The State versus Cupp, which I think is a recent case in 290 Oregon -- it's in one of the briefs -- why states, first you look to the Oregon law, and if you look to the Oregon law and decide it on

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the Oregon constitution, that's the first analysis, and that's one, and if you follow your state constitution --

QUESTION: But can we say that was done by your court of appeals in the Kennedy case?

MR. WALKER: Well, I think, Justice Brennan, I think that my second point is at most that the court of appeals decision is ambiguous, and if it is ambiguous, then it should be reversed and remanded for clarification, but I think, though, that sometimes, you know, when things move --

QUESTION: Well, tell me, if we were to disagree with you and think this is on a federal ground, and were to affirm it, or reverse it, rather, going back to my colloquy with the Attorney General, wouldn't your court of appeals still be free to follow Justice Lindy's counsel?

MR. WALKER: By all means. And --

QUESTION: Then they are making, in that case, they are making the decision on their own responsibility. They are accountable to the state of Oregon and the voters, if you have an elective system there.

MR. WALKER: That's right. And I think that restraint should be exercised, and I think the fact that state courts should be more innovative, and I think they

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should exercise that responsibility.

QUESTION: By innovative, do you mean ignore the opinions of this Court?

MR. WALKER: No, I don't mean -- no. I think that they should -- I think that due process, part of due process is following your own state constitution, and since the defendant Kennedy has basic rights under the Oregon constitution, and neither of the counsel here have suggested the fact that maybe his state due process rights haven't been taken care of by their argument.

I would say this, and my third point on the question -- my first point being, I think that when it says the court -- State versus Rathbun, I think that's the case that's -- that Jorn and Dinitz don't really take care of Kennedy. The dictum is referrable all right, but State versus Rathbun is right on point. If a bailiff is a court officer, certainly a deputy district attorney is a court officer, and that case, I would say, was practically on all fours.

But the third point that even though this Court thought it was not ambiguous and it was decided on federal law, it still should be reversed and remanded for Oregon to accept the responsibility of deciding their own law first, as Justice Lindy has stated, and then make that decision, but in that process, then, the

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state of Oregon would -- certainly the scope of it would be to see that if Kennedy's due process rights, both under the Fourteenth Amendment and under the Oregon constitution, were protected, and it is not enough just to look at the Fourteenth Amendment, but also the Oregon constitution.

QUESTION: Now, addressing -- if you will agree with me on the premise that this does rest on an interpretation of federal constitutional law -- just assume that with me. Then what do you say?

MR. WALKER: I say that even if it is based on that, that it is in line with Jorn and versus Dinitz, and in substance, it is the basis for a double jeopardy bar, and I think that --

QUESTION: Well, how do you phrase the test whether or not the mistrial was a second prosecution?

MR. WALKER: Well, I think the fact that in the second prosecution that there was the harassment, there was threatened multiple trials, and bad faith, and I think those are the terms, I think, used both in Jorn and Dinizt, and they -- both of those cases, the footnotes refer to U.S. versus Tateo, that the converse of the rule -- I think we all realize that we are on the exception to the general rule. Where the defendant moves for a mistrial, usually that is not a bar. The

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exception being is what is discussed in Jorn and Dinitz, and both footnotes of those cases refer to Tateo.

QUESTION: Well, I take it that your position is based on the proposition that the question which had been referred to and described somewhere here in one of the briefs as stupid, that that question was a deliberate effort, a calculated effort to provoke a mistrial. Is that your position?

MR. WALKER: I -- Yes. I think -- I think that it is implicit in that statement, that commenting question, and I think that that is the end result, and I think to say, and to put the prosecutor on the stand and say, well, was that your intent, I don't think that is practical.

QUESTION: Well, what if the judge, the trial judge, now, had simply said that to the jury, that remark was not a question, it was a remark, it was wholly unprofessional and out of line, has no place, and you will disregard it, and then reprimand the prosecutor in open court, and then go on with the trial? Then, if a conviction had occurred, then what?

MR. WALKER: Of course, then, I think it would be the basis for reversal, and I agree that it wouldn't be a bar, but there is one --

QUESTION: Then what you are saying is that the

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best thing to do is let the trials go on --

MR. WALKER: No.

QUESTION: -- never declare a mistrial.

MR. WALKER: I don't agree with that, and I think that counsel have been shown a lack of faith in trial judges, and they say that the term "overreaching" is vague. The word "manifest necessity" can be vague also. What does that mean? But I think it is a guideline, it is a tool, and I think it was in Jorn where the Court has said, we've declined the invitation to place these in nice little categories of what the conduct will be.

QUESTION: Was that in the plurality opinion in Jorn? There wasn't a Court opinion, was there?

MR. WALKER: It seems to me --

QUESTION: There was no Court opinion.

QUESTION: There was no Court opinion.

MR. WALKER: -- there was -- I think the language that we are not going to use the bright line rule, and that -- in other words, they -- it would be pretty difficult for this Court to make certain refinements that would take care of every situation, and I think that a trial judge who sees the method of -- the behavior of the prosecuting attorney, maybe the raising or lowering of voice, and the temperament of the whole

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situation, is in that position, and I wouldn't say that trial judges are that flimsy in their decision-making power. There comes a time, you take in the Perez decision, where you say that a hung jury, that is the basis for a mistrial, and no bar to reprosecution. Everybody would agree with that, because that is an easy example of the manifest necessity rule.

But what if you had a ten-day criminal trial, and then the judge, trial judge declared a mistrial after the jury had been out an hour and a half, for no really apparent reason. I think the defendant would certainly jump to the conclusion and jump to his feet after that say that would -- he had a right for the double jeopardy bar.

So, any rule that the Court may make has to stand eventually on its own two feet, in common sense of a trial judge, and this trial judge, you see, there's -- like has been mentioned here before, the trial judge immediately granted the mistrial. Then another trial judge, when it was going to be up for the trial the second time, then hears the statement of the prosecutor, and I would say in answer to the questions of the finding of fact, you can find the trial judge can make certain findings of the fact, but it's the constitutional impact or the consequences of those facts

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that the appellate court can say, well, those facts warrant this. We're not changing the facts, but we're saying that the constitutional consequences of those facts lead us to this legal conclusion.

QUESTION: Isn't the trial judge who has been watching this whole proceeding the best person to make an evaluation of whether there was or was not an improper intent without relying on what the prosecutor claims is his intent?

MR. WALKER: I couldn't agree more, and -- but the point of it is that the finding of facts that they are relying on is a second trial judge who was different than the first one who granted the mistrial just spontaneously, and so I think that the findings by the second trial judge is one thing, but when the appellate judge, Judge Gillette, says, we are saying that in spite of those findings, the consequential impact of those findings are that it is still flagrant overreaching, and remember, he had State versus Rathbun right before him, and State versus Rathbun says that the conduct of the bailiff was abhorrent, so what -- now, if you say the state of Oregon rule is that the bailiff's conduct is abhorrent by talking to the jurors, I think there's a greater duty on the prosecuting attorney, and so then he comes along and doesn't use the word "abhorrent" but I

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think it is synonymous, "flagrant", and so I think that those situations are very similar.

QUESTION: How does one distinguish between flagrant conduct and abhorrent conduct, and as the Court of Appeals for the Fifth Circuit in the Dinitz characterized the prosecutor's conduct as "improper" conduct?

MR. WALKER: I think that -- there again, I think that decision-making power has to be with the trial judge. You know, when these cases come up and no trial judge probably prepares himself basically ahead of time, maybe it's a criminal case on questions of search and seizures and all that. He is probably not thinking about double jeopardy and a mistrial. So then somebody, some counsel might cite him this case, and he reads it over. He hasn't read it maybe over in depth like we do in preparing for an argument, and so he has to be guided by certain common sense guidelines. The term "bad faith," "overreaching," "manifest necessity," "deliberate intent," and all that. It would be -- and I think the most vague one and the most difficult is the word "deliberate intent." I think "bad faith" and "overreaching" are much easier to arrive at.

QUESTION: Well, "deliberate intent" certainly isn't imprecise. It may be hard to arrive at.

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MR. WALKER: Well, yes, I know, but if it is hard to arrive at, Justice Rehnquist, and this is subjective, I can't imagine -- and I think we could go through many, many cases, and -- to find that the prosecuting attorney would say, yes, that was my deliberate intention.

QUESTION: Well, Mr. Walker, I thought this footnote in the court of appeals opinion, Footnote 1, indicated the court of appeals was very -- had real reservations about subjective intent. "We are not sure that the subjective intent of the prosecutor should necessarily play a pivotal role in the decision as to whether or not prior jeopdary forbids retrial." What does that mean?

MR. WALKER: Well, I think that what that means to me, Justice Brennan, is that you have to take the objective remarks and what is the objective conduct of the --

QUESTION: So deliberate intent, to the extent that is subjective, the Court of Appeals at least thought was not too good a rule.

MR. WALKER: Well, that's right, but in following State versus Rathbun, State versus Rathbun just before this case on the conduct of the bailiff, the Supreme Court of Oregon says, we can't speculate on the

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mind-reading of the bailiff, and so I think Judge Gillette had that in mind when he wrote that.

QUESTION: Mr. Walker, even if subjective intent is the standard to which we address ourselves, the trial judge can make the determination on factors other than the prosecutor's admission of intent. Isn't that true? The trial judge can look at the whole circumstances, and regardless of what the prosecutor says was intended, make that determination.

MR. WALKER: Yes. But I think that the defendant Kennedy is, perhaps, on this procedure that was followed in Oregon, is only getting half a loaf, because the real person that can make that judgment better than anybody else is the trial judge who declared the mistrial, and he said granted, right away, so several weeks after then another judge who hasn't had the atmosphere of the first case firsthand, and then just listens to the prosecutor, that was the only witness, and then says, well, I don't find any deliberate intent, I don't think that takes us away from bad faith or overreaching or even the deliberate intent, getting back to the subjectiveness of it.

In the first place, the trial judge might say, I don't find by her testimony that she had the deliberate intent.

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QUESTION: Well, the fact-finding of deliberate intent in this setting is not different, is it, from the fact-finding that the triers or trier must make on the intent in a criminal act, is it?

MR. WALKER: I think it's different in the fact that we have two different trial judges.

QUESTION: Well, did you ever object --

QUESTION: Never mind two different trial judges. Let's stay on the one question. Is it any different from the problem of finding intent which judges and jurors do not find from express admissions, they find it from a series of objective facts, do they not?

MR. WALKER: That's right.

QUESTION: And then decide that all of these facts taken together either do or do not show an intent. Now, I notice here that there is, in one of the opinions, I think the second one of the court of appeals, there's a footnote admonishing judges to see to it that their bailiffs are instructed not to talk to jurors, and so forth. If you were to prevail here, perhaps that would invoke or provoke an admonition to trial judges, in view of this fog bank of meaning on the difficulty of making the subjective determination, we commend to trial judges the idea of never granting a

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mistrial, let it go to its determination, and let it be corrected if error on appeal, and then you won't have a double jeopardy question. That might be the result, might it not?

MR. WALKER: I --

QUESTION: It wouldn't be a unanimous opinion.

QUESTION: It might be a result of such a holding.

MR. WALKER: I think that puts trial judges down a little bit. I don't think that trial judges are going to be that weak in making decisions. I think they have an equal responsibility under the United States and the Oregon Constitutions to say when a person's prize guarantee has been violated, and to respond to the question of the trier of the fact might decide something, we know all types of situations where they might decide a fact, and it might require gross negligence. Well, the court will say, in spite of your finding that is a fact, as a legal consequence, that is not gross negligence.

So, what I am saying is that the constitutional consequences of a finding of fact are still up to the appellate court on the legal consequences. And when the Solicitor General -- I think it puts a heavy burden in this case on Kennedy to use this case, which should be

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decided on Oregon law, as a basis for reconciling conflicts maybe in the various circuits, and I'm not so sure there is that much conflict. I mean, there's -- because every case has its own facts, and any proposed test, we are still going to get down to somebody can say, well, that's too vague, and no matter what you do, whether you say bad faith, overreaching, deliberate intent, whatever.

And I think that it is safer to leave the decision-making to where you have a common sense guideline, and I think Jorn and Dinitz do that.

QUESTION: If a trial judge in a hearing outside the presence of the jury after some dubious conduct on the part of the prosecutor then made a finding that this was deliberate and calculated conduct, misconduct on the part of the prosecutor, that would be the equivalent then under the rule you propose and perhaps the rule of the Oregon Supreme Court to dismissing the indictment with prejudice, would it not, because there could not be another trial?

MR. WALKER: I think that would be -- I would agree with that. But I don't think that -- I don't think it might be a 100 percent situation where that the appellate court couldn't review it if it was just a misconstruing of the law as to those -- what he said was

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deliberate intent.

QUESTION: But what if the judge making the finding that this was deliberate and calculated, inexcusable, unprofessional conduct, whatever terms you want to use, then said on that basis, in light of the decisions, I dismiss the indictment with prejudice. That would be the end of the case, wouldn't it?

MR. WALKER: I think most likely.

QUESTION: Don't you think a trial judge ought to do that if he knew that the consequence was to create a double jeopardy situation? That is, bite the bullet, and take the ultimate decision?

MR. WALKER: Well, I think -- I'm not sure I understand the question fully, but if --

QUESTION: Well, if he is saying it is calculated, deliberate misconduct on the part of the prosecutor, under the theory you advance and the theory of the court of appeals in this case, that is equivalent to saying he cannot be tried again, and so then why not do it directly and openly, and say, the indictment is dismissed with prejudice on this ground?

MR. WALKER: Well, the point there, I think, in some of these cases that involve a faulty indictment, I don't that is probably embraced in your question.

QUESTION: No, no, just conduct.

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MR. WALKER: Well, maybe I can answer it this way. In Dinitz, if it had been the prosecutor who had made those contemptuous remarks in the opening statement, and then was admonished by the trial judge, and he went on, and the trial judge finds that on those set of circumstances there was deliberate intent, I think definitely it would be under the rule that would be a bar to retrial.

But getting back to, I think, the -- so in substance I still think that the Oregon court is not out of line with Jorn or Dinitz, but getting back, I think, to a very fundamental proposition on the case being -- how this case should be disposed of, first, that -- I don't think you can ignore a court in State versus Rathbun and its opinion, and certainly what does that mean? It isn't meaningless, and you can't find -- and that case is on point. But even if it is ambiguous, then we reverse and remand. But on the cases that -- and this Court has -- in Herb versus Pitcairn and other cases, I think that the Oregon court certainly, if it went back to the Oregon court, I think Judge Gillette would end up with the same decision, and then if it went to the Oregon Supreme Court, the Oregon Supreme Court is going to follow the rule of State versus Rathbun, and follow Justice Lindy's statements and policy that we

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first look to our own, and we cited the Oregon constitution in our briefs originally in the appellate -- in the court of appeals.

So, I think that Kennedy is entitled to due process, which includes an analysis of the Oregon law, first by the Oregon court in that sequence.

If there are no more questions, why, I have tried to cover the waterfront.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Attorney General?

ORAL ARGUMENT OF DAVID B. FROHNMAYER, ESQ.,
ON BEHALF OF THE PETITIONER - REBUTTAL

MR. FROHNMAYER: Thank you, Mr. Chief Justice, and may it please the Court, several points.

First of all, in my colloquy with you, Justice Marshal, the term "overreaching" arose. The origin and pedigree, of course, of that term comes from a dictum in the Jorn decision by this Court which was construed in aberrant ways by the Fifth Circuit Court of Appeals. So it's clear from the very use of that term by Judge Gillette in the court of appeals in Oregon that in fact he was referring to a line of aberrant federal cases.

That leads us to the second point, which is really a combination of questions and concerns raised by

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Justice Stevens and Justice Rehnquist, concerning intent, various kinds of epithets used to characterize the prosecutor's misconduct. What is at issue is the importance of giving a predicate to those particular epithets. That is, not misconduct in the abstract, but misconduct which is deliberately designed to accomplish something, i.e., aborting the trial. That seems to be, to us, the critical question, and the one on which this Court's decision --

QUESTION: Of course, if that is the test, and if we make it the test, every prosecutor presumably would know that, and therefore every time a prosecutor intended to abort the trial in that way, he would also intend to acquit the defendant, because that would be as a matter of law the consequence that would follow, isn't it? So it has to be an intent to acquit in effect.

MR. FROHNMAYER: Well, an attempt at least to abort the trial. Perhaps he would also intend not to be discovered doing it, Your Honor.

QUESTION: I see, so it would have to be a secret intent by definition, because if he did it overtly, he would be acquitting the man.

MR. FROHNMAYER: I suppose that is true.

QUESTION: So you have to presume the situation in which the prosecutor is prepared to testify falsely

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that this was not his real intent.

MR. FROHNMAYER: No, I don't think so, and that really raises another point, and that is that there is a strong analogy to the rule that we are advancing in this case in the pre-indictment delay cases and discriminatory prosecution cases. This type of inquiry is not unknown to this Court or to the federal courts. It is perfectly appropriate by circumstantial evidence indeed in a criminal trial by circumstantial evidence and inference to conclude what the intent was of a defendant who never took the stand in his own defense.

So, I don't think that it's quite the paradox or the dilemma or the difficulty for a trial court making those findings as might appear at first blush.

QUESTION: No, but the ultimate inquiry is, what did he really intend to accomplish, and if he really did intend to accomplish a deliberate mistrial, and if he presumably knows the law, he then was intending to accomplish an aquittal. It is a very strange combination of circumstances.

MR. FROHNMAYER: But one has to bear in mind that this is at best a very narrow exception to a general rule that the issue ought not ordinarily to be before the court at all, because by choosing to move for the mistrial, the defendant normally is electing not to

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go to the first jury at all.

QUESTION: Sure. Something sufficiently prejudicial could have happened. You don't think there should never be a mistrial, do you?

MR. FROHNMAYER: No, I do not. In fact --

QUESTION: You don't take the --

MR. FROHNMAYER: In fact, it's the very purpose of the rule that we are announcing to make it clear that where an egregious error has been committed in the trial, that the defendant and the trial court will feel free to start the trial process over again if initiated by the defendant.

QUESTION: Do you agree that the Oregon Supreme Court in the Rathbun case expressly rejected the notion of subjective intent? They there said the bailiff intended merely to help get a conviction, didn't intend at all to get a hung jury.

MR. FROHNMAYER: Well, they rejected it at least in the sense that it -- under the Oregon statutes, which were also part of the decision setting forth what it is that the bailiff's duties were, that was the case, but let's bear in mind here that in Rathbun there was a hung jury --

QUESTION: Well, they went on. I happened to get the opinion. "There is nothing to suggest the

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bailiff sought to cause a mistrial. We dare say that nothing was further from her mind than causing a hung jury. On the contrary, her apparent purpose was to assist the state in securing a conviction." And then they say, but nevertheless we just have got to apply an objective standard. That would seem to be the rule in Oregon. You don't look to subjective intent.

MR. FROHNMAYER: Well, at least in the context of the Rathbun case, but the Rathbun case had been decided at the time this case was decided by the court of appeals.

QUESTION: Mr. Attorney General, you know, seriously, the missing witness in this case is the trial judge, and I want -- my question is, suppose the hearing was held before him. You would be pretty well bound by his ruling, wouldn't you?

MR. FROHNMAYER: Yes, I think that one of the appropriate things that stems from the rule that we advance is that the trial judge is in a position to make those findings, and we will accept those findings.

QUESTION: Right, but you didn't have a trial judge. The trial judge didn't make this decision.

MR. FROHNMAYER: A different trial judge made the decision.

QUESTION: That's right.

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MR. FROHNMAYER: It was a trial judge panel.

QUESTION: By trial judge, I am talking about the original trial judge. I think we have to explain that.

MR. FROHNMAYER: Well, I suppose under unusual circumstances, of course, it would be appropriate for one to seek an affidavit from that judge if it were a matter on which they felt strongly.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:51 o'clock a.m., the case in the above-entitled matter was submitted.)

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CERTIFICATION

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BY Irene Hammond

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