ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-2113

TITLE ROBERT D. H. RICHARDSON, Petitioner v. UNITED STATES

PLACE Washington, D. C.

DATE March 20, 1984

PAGES 1 thru 59

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -x

ROBERT D. H. RICHARDSON, :

Petitioner, :

v. : No. 82-2113

UNITED STATES :

- - - - - - - - - - - - - - - - - - - -x

Washington, D.C.

Tuesday, March 20, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:17 o'clock a.m.

APPEARANCES:

ALLAN M. PALMER, ESQ., Washington, D. C.; on behalf of petitioner.

MICHAEL W. McCONNELL, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C., pro hac vice; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll just wait until the gallery clears, Counsel.

Mr. Palmer, I think you may proceed when you're ready.

ORAL ARGUMENT OF ALLAN M. PALMER, ESQ.,

ON BEHALF OF THE PETITIONER

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

We're going to first direct our attention to the appealability issue and for -- in discussing that I am going to assume for the moment, but only the moment, that we have raised a valid double jeopardy claim.

Now the government disputes the appealability of this claim under Abney on the theory that the so-called second prong of the Cohen test is not met. The government suggests that because we address the merits of the claim it's not collateral.

Now realistically it would appear to us that we have both been circling the issue and it was only recently that -- in the Flanagan case that Justice O'Conner brought us back, I believe, to the original understanding of the matter, and it is this: In the Flanagan case the Court said it is not collateral if it's not independent of the issues to be tried. Its

validity cannot be adequately reviewed until the trial is complete.

And again in MacDonald, discussing the speedy trial claim, the Court said "there needs to be a divorce between the claim and the events at trial". To us this boils down to the following: that if there be no need to look at the events of trial to determine the claim, it is indeed collateral. And in this case the trial, of course, is something we seek to avoid.

We have an extant record of the first trial, which, we say, shows clear insufficiency of the evidence, and that is why the Chief Justice in Abney said that the very nature of a double jeopardy claim such that it is collateral and independent to the principal issues to be tried, and we think in that light there is no question but all three prongs of the Cohen test have been met.

Now --

QUESTION: Now Abney came up in a somewhat different posture than this case, didn't it?

MR. PALMER: Yes, sir. Your Honor, unquestionably, but the posture in which it arose does not change the operable principles as to the Cohen factors. We still have -- we're assuming now a double jeopardy violation. If it's a double jeopardy

violation --

QUESTION: But why do you have to assume the validity of your claim in order to determine its appealability?

MR. PALMER: Well, because if it's not a double jeopardy violation, we're out of court. There's no interlocutory appeal.

QUESTION: Yes, but presumably you'll never know whether there is a double jeopardy violation until you get a determination on the merits on appeal.

MR. PALMER: Well --

QUESTION: I mean, there's a circularity about it, I suppose, from both sides.

MR. PALMER: Well, as we indicated, it's a self-determining claim. When you say the insufficiency of the evidence, when the government fails at a criminal trial to prove enough to go to the jury, we say that raises a collateral bar, that it has no right to a second bite of the apple.

Now indeed in determining that, the same claim of insufficiency, you must look at the record, the evidence adduced, to determine whether or not the violation has occurred, but that is separate.

QUESTION: But that assumes a view of the law of double jeopardy that is certainly not necessarily

represented by any of this Court's opinions. I mean, it may be that so long as it's a hung jury the jeopardy simply has not ceased to attach.

MR. PALMER: Well, that gets us to the next question, whether it is double jeopardy or not, whether there is jeopardy, and that's why I assumed for the first argument that it was, because the government now makes the claim that it isn't.

Now -- but I think if it is double jeopardy, if we have a right to avoid a retrail, if the evidence was insufficient at the first trial, then I think Abney clearly applies. All three prongs of the test are clearly met.

Now I think the question that Your Honor is addressing is you have trouble with visualizing or conceptualizing this as a true double jeopardy claim, and that takes us to the next question. Prior in the Court of Appeals --

QUESTION: When you say a "true double jeopardy claim", Mr. Palmer, do you mean one that will -- ultimately ought to be validated or one that you just cite the right cases for?

MR. PALMER: A true double jeopardy claim in the sense that it raises a double jeopardy issue. Its determination, whether we're right or wrong, will vary

with whether or not you consider the evidence insufficient. But when you say the evidence at the first trial, the government did not produce enough evidence to support a conviction.

We're saying that it has no right at the second bite of the apple. It has had a full and fair opportunity to convict, but it failed.

QUESTION: But now that's a view of double jeopardy law, but it certainly is not nailed down by any cases of this Court. You may be right or wrong on that.

MR. PALMER: Well, I think Burks supplies us with an underpinning to make that argument. Every Court of Appeals that has considered it has said that, in a mistrial context, that it's double jeopardy. They go up on the question well, is it appealable now or later, but they all agree that it is double jeopardy and the government cannot prosecute again.

QUESTION: Well, the Courts of Appeals may agree on that, but I don't think that this Court has certainly resolved the thing one way or the other.

QUESTION: Do you mean, Mr. Palmer, that in every case where a jury cannot agree the defendant is dismissed?

MR. PALMER: Of course not, Your Honor.

QUESTION: That's almost what I gathered from what you just said. That would be, I think, the British approach, would it not?

MR. PALMER: I have tried many cases. We have had hung juries. But rare is the case in which you will find a hung jury predicated upon or bottomed upon insufficient evidence. We're saying under the Glasser test, Virginia v. Jackson, that where the hung jury is based -- is bottomed on a government's prosecution that fails to muster enough evidence to get to the jury and the trial court errs in submitting it, we think in that context the government should have no right to reprosecute because it has failed in its burden of proof.

QUESTION: Well, then, doesn't that add up to just what I described as your position that in every case where a jury does not agree unanimously --

MR. PALMER: No, because in many cases they may have trouble with a witness. Nine jurors may say well, I don't believe him, but the evidence will be sufficient. In practically every case tried rare is the case in which a counsel in good faith could say well, the evidence here was insufficient.

QUESTION: What other grounds do you suggest that produce a hung jury?

MR. PALMER: In which someone could not be retried?

QUESTION: Just in the abstract, when a jury does not agree either on some counts or on all counts?

MR. PALMER: When you can't get twelve jurors to say guilty or not guilty.

QUESTION: Then you say that's the end of the road for the prosecution?

MR. PALMER: Oh, no, not at all, Your Honor. I am saying that really enables us to present our claim of double jeopardy, which is grounded in the notion that in this particular --

QUESTION: Mr. Palmer, I thought I heard you say --

MR. PALMER: Yes, sir.

QUESTION: You're limiting your argument to situations in which the trial judge has made an error in submitting the case to the jury because there was insufficient proof by the prosecution.

MR. PALMER: Yes.

QUESTION: To get the prosecution to the jury; is that what you're saying?

MR. PALMER: Yes, it should never get to the jury.

QUESTION: And it's in that situation where he

makes the error and there's a hung jury that you say you make your argument for double jeopardy?

MR. PALMER: Solely in that limited context. And the last case reversed --

QUESTION: But, Mr. Palmer, have you ever seen a criminal case where the defense attorney didn't make a motion at the conclusion of the state's case to dismiss for insufficient evidence?

MR. PALMER: Yes.

QUESTION: Well, I haven't, and I have sat on many, and what you're really talking about here is setting up the possibility, at least, of making Federal habeas claims in every state prosecution that might end in a hung jury based on the insufficiency of the evidence claimed.

It isn't that you're going to win all of those, but it certainly would afford opportunities for extended delay and difficulty as a result of it if you're correct. Isn't that right?

MR. PALMER: Well, it may be in the habeas corpus context that if the government has failed in its proof it has no right to retry somebody.

QUESTION: Well, even if you're right, the point is I guess we have to be a little bit concerned with the administration of the system and with seeing to

it that maybe state prosecutions can go on and finish their course before we start the Federal habeas review. So what I'm concerned about is whether it's reasonable to say that double jeopardy just never matures as long as the jury hasn't come in with a verdict in the first trial.

Maybe it just never matures to the point that you can make your appeal.

MR. PALMER: Well, insofar as the states are concerned, we're just talking here about a Federal statute and the appealability thereunder. The states probably could provide a rule that they could not be appealed on that ground until after the second trial or conviction and, therefore, habeas would be inappropriate. That could be an alternative.

QUESTION: Well, but I suppose what we decide here will certainly be governing what happens on Federal habeas from state prosecutions.

QUESTION: Under your most recent answer, Mr. Palmer, can the state statutes limit the right of Federal habeas corpus petitioners?

MR. PALMER: Oh, I don't believe it can, Your Honor.

QUESTION: Well, then in every case, in every case in a state court, even though here we have a

Federal case, in every case where there is a hung jury in a state case automatically that would be a habeas corpus case, and the habeas Federal District Court would be performing the function of the state appellate process to determine the issues you raised.

MR. PALMER: Well, I don't know the context of the rise. I assume Your Honor is saying if there's a hung jury and it's insufficient evidence could they then rush into Federal District Court.

I would assume that the states could make a rule if they wanted to provide by statute you could raise the claim, but only upon appeal from the conviction, and I think that would -- in that sense --

QUESTION: Well, anyway under the habeas statute doesn't the habeas petitioner have to exhaust all of his --

MR. PALMER: State remedies.

QUESTION: -- state remedies before he's allowed into habeas?

MR. PALMER: I understand that to be the rule. Of course, I'm not here in the context of a habeas case, am not entirely familiar with the full panoply of habeas corpus. We're here in the context of appealability in the Federal -- in this system.

Insofar as the Federal system is concerned --

QUESTION: Well, how do you get the right to appeal on a hung jury?

MR. PALMER: Well, we filed a motion in bar of prosecution based on double jeopardy, and then when that was denied we appealed that denial.

QUESTION: What was the basis of the double jeopardy?

MR. PALMER: Well, we alleged and indeed show at length in our brief, that the evidence in support of the prosecution was insufficient as a matter of law, under Glasser.

QUESTION: It was a normal appeal? Wouldn't that be done in a normal appeal if he had been convicted?

MR. PALMER: If he had been convicted --

QUESTION: Wouldn't that be the appeal you would have made?

MR. PALMER: Of course, if he had been convicted.

QUESTION: Well, how can you make that -- what judgment did you appeal from?

MR. PALMER: The failure to --

QUESTION: What judgment, judgment? You know what a judgment is?

MR. PALMER: Yes, sir. The judgment was

failure to honor our double jeopardy claim. That is what we appealed from.

QUESTION: Well, what was your double jeopardy claim at the stage of where the jury came in on? What was the status at that stage that would grant you the right to appeal?

MR. PALMER: When they were hung and a mistrial declared.

QUESTION: What else was done in deciding this trial?

MR. PALMER: That was it. The judge set a new trial date.

QUESTION: And you can appeal that?

MR. PALMER: You cannot directly appeal that, as such.

QUESTION: Okay. Well, how can you appeal it indirectly?

MR. PALMER: Well, because --

QUESTION: So you're now admitting you did appeal.

MR. PALMER: Well, we appealed it because everything -- you may view evidence -- let me put it this way. In a criminal trial, evidence of other criminal acts cannot come in to show the defendant's a bad actor, but you can put in the very same evidence --

QUESTION: Can you put that in without a judgment? Can you raise that on appeal without a judgment of conviction?

MR. PALMER: As such, you cannot raise it, as such.

QUESTION: Right.

MR. PALMER: It has to be geared to a double jeopardy claim.

QUESTION: My point is you cannot raise it.

MR. PALMER: Correct.

QUESTION: Well, how did you happen to raise it now?

MR. PALMER: Well, I'll show you. If the defendant were convicted and the evidence were insufficient, as in this case, we allege, the conviction must be overturned and a direction for an acquittal because the evidence was insufficient.

Now it is our theory that just because he was not convicted and the jury came a step closer to the direct result, because the evidence is insufficient they were erroneous in convicting him. Merely because they came a step closer to the correct result and moved toward an acquittal should not preclude him -- why should he be in a worse position because the jury came closer to the correct result than because it erred

entirely?

Our point is that regardless of what the jury does this evidence is insufficient and the government, under the Burks test, has no right to retry this man, to reprosecute him.

QUESTION: Am I correct the evidence did not convict him?

MR. PALMER: That is correct, and we don't think the government should have the right on its failure of proof to attempt to convict him again. That was the very point of the Burks case.

QUESTION: You said "convict him again". I thought you said he was not convicted any time, not even a half a time.

MR. PALMER: Should not have the right to --

QUESTION: Isn't that right? Am I right?

MR. PALMER: A hundred percent correct, Your Honor. But the government does not --

QUESTION: But he does have a right to appeal?

MR. PALMER: The government does not have the right to retry and reprosecute a man if it failed to muster evidence at the first trial sufficient to convict.

QUESTION: Isn't it true, Mr. Palmer, as I think Justice Rehnquist may have made the point earlier,

that all of the double jeopardy cases, from this Court, at least -- and you correct me if I'm wrong -- have not allowed a double jeopardy claim as a bar to a second trial unless there has been a judgment terminating the first trial.

And you're really relying on a hypothetical judgment that's never been entered, namely you're contending that the judge should have granted your motion for -- to dismiss on the ground of insufficient evidence. But he denied that motion, so there really is -- you're in effect relying on a judgment you don't have yet.

MR. PALMER: Well, we're relying on the right to obtain that judgment.

QUESTION: Correct, and there is no case, is there, in which a double jeopardy, a successful double jeopardy, plea has been sustained on the basis of a right to obtain a judgment that you didn't get?

MR. PALMER: In Sneed, which we referred to in our supplemental brief for certiorari, there was an appeal of a conviction.

QUESTION: I'm not familiar with Sneed. Tell me, is that a case --

MR. PALMER: It's in our supplemental brief, Your Honor. It's a Fifth Circuit case.

QUESTION: Oh.

MR. PALMER: There are other cases like it -- Bodey, et cetera. There's an appeal from a conviction, claim trial error, insufficient evidence. The Court of Appeals reversed trial error. The government -- the defendant went back and said the Court of Appeals didn't consider the insufficient evidence. I have a right to bar of double jeopardy.

Now, the defendant in that case claimed just a bar of double jeopardy because of the prior proceedings he said it was insufficient evidence. Now at this stage of the proceeding there was no conviction and there was no acquittal. There was no judgment indicating an acquittal or that the evidence was insufficient.

Now he went to the Court of Appeals and they noticed their prior Becton and Rey cases, and they said well, there we said no. Although now we say yes, it appears that the Third Circuit probably properly criticized our prior holdings.

And the Court said, significantly, we could not and do not now reconsider our refusal to address the insufficiency issue. This is a separate appeal grounded in double jeopardy because the evidence at the first trial was insufficient. We have no judgment of conviction. We have no acquittal. We have nothing, and

the Court of Appeals --

QUESTION: Well, then maybe their analysis is unsound there.

MR. PALMER: Well, it may be, but it's one of the cases I'm relying on. In any event, the Court of Appeals said we have jurisdiction and overturned the conviction, finding in fact insufficient evidence.

QUESTION: This was after the second trial?

MR. PALMER: Before the second trial.

QUESTION: I am puzzled.

MR. PALMER: It was strictly an interlocutory double jeopardy appeal, the very thing we have in this case, Your Honor. The context is no different.

QUESTION: Mr. Palmer?

MR. PALMER: Yes, Your Honor.

QUESTION: I suppose it is not unknown at the conclusion of a trial in which there has been a hung jury so that there is no verdict, trial judges have been known to make an analysis and decide that the case -- the judge should not have submitted the case to the jury, that there was not enough evidence, and he can then correct the error that you seek to correct here; is that not so?

MR. PALMER: Yes.

QUESTION: And now suppose the judge, who has

heard all the evidence, thinks it's an overwhelming case, but for reasons which no one has ever been able to explain about how juries function, including their right of compassionate verdict, they have decided to reach no verdict.

Now why is not the trial judge, who knows more about the evidence than any appellate court could possibly know and the credibility of witnesses, why is that not the route for the relief that you're seeking?

MR. PALMER: The trial court?

QUESTION: Yes.

MR. PALMER: Well --

QUESTION: A motion to dismiss at that time, after the hung jury. Nothing to prevent you --

MR. PALMER: But we did make such a motion.

QUESTION: Beg your pardon?

MR. PALMER: We did.

QUESTION: Oh, I know, but there's nothing to prevent him from granting that relief. Suppose he knows, whether he should know it or not, that the jury was eleven-to-one for a conviction, and sometimes those things become known around a courthouse.

MR. PALMER: Right.

QUESTION: Nevertheless you would say that there's an absolute right to a review of the kind you

are seeking now?

MR. PALMER: In this limited context. Let me make this clear, Your Honor. One of the elements of this claim is there has to be a certain amount of good faith on the part of the attorney raising this issue. We have to -- in other words, we would not have made this claim if we didn't believe in good faith that to file this interlocutory appeal the evidence was not insufficient.

We believed it was insufficient. We briefed it extensively and the government response is well, it's sufficient, citing no cases, not analyzing the evidence, and doing nothing to really join issue with us on the matter.

QUESTION: But the District Judge was in a position to make that appraisal, was he not, whether he had adequate help from the prosecution or not?

MR. PALMER: Well, in this case it was Judge Johnson. She was in the position to appraise the evidence, but did so incorrectly. Judges do it from time to time. They will incorrectly appraise the evidence.

But let us not forget in viewing the record we view it under the Glasser standard, viewing the evidence in the light most favorable to the government, giving

the benefit of every inference available, without regard to the credibility of witnesses, and on that Glasser standard, which I'm very familiar with, we say the evidence here failed to reach the threshold of submissibility to the jury.

And just like in Burks. Your Honor said well, if the judge in Burks has submitted, had acted properly, he would have acquitted the defendant. Similarly, if the judge in Richardson had acted properly, she would have acquitted the defendant and why should we be in a worse stead, why should we be prejudiced? Why should we be -- come out the loser, so to speak, because the judge erred?

QUESTION: Mr. Palmer, suppose -- let me ask you this. What if we decided that there really is no substantial double jeopardy claim in a situation like this, that jeopardy is never ended, that the defendant can be retried, and that the issue of sufficiency of the evidence at the first trial is never over, even after he's convicted at a second trial, which is different from what the Court of Appeals held below, I take it.

MR. PALMER: The Court of Appeals said --

QUESTION: Well, now let's just suppose that --

MR. PALMER: All right.

QUESTION: -- five Justices thought that.

What should we do with this case?

MR. PALMER: Well, then I'm in a great deal of difficulty.

QUESTION: You are in great difficulty, but what should we do with it? What should we do with it if the double jeopardy issue on its merits isn't appealable? How can we ever reach it?

MR. PALMER: You will never reach it; that is correct. We're out.

QUESTION: But if it were appealable, it would only be appealable once, if there were five Justices who thought that it was not a substantial double jeopardy issue because it would never do you any good to appeal on this ground, on the double jeopardy case.

MR. PALMER: That is correct. In fact, although -- we have an anomaly under Your Honor's hypothesis. The anomaly would be this: Although the Court has time and time again said that at the core of the Fifth Amendment is the notion that the government, after a full and fair effort or opportunity to present its case, and it fails, fails to meet the threshold of Glasser, then the Fifth Amendment says that government has no right to successive prosecutions.

QUESTION: Well, you may call that an anomaly, but that's the way the railroad's been run for a long

time, and the only possible ground that you've got is that Burks came along.

MR. PALMER: Well, Burks admittedly overruled other precedent. It created new learning, new concept, and it provided later insights into what had previously not been understood.

QUESTION: Well, we don't always follow this remorsely the logic of some prior case.

MR. PALMER: Well, we know that logic may not be the life of the law. We think that in this particular regard that to deny this defendant his rights would do what this Court has time and time again said cannot be done.

The bottom line is the government has no right, should not have the right, to reprosecute a defendant that it has not mustered enough evidence to convict. That, to us, is the bottom line. Now, while the procedural context --

QUESTION: When did the government reprosecute this man?

MR. PALMER: It has not reprosecuted this man. That's our claim; it has no right to reprosecute him.

QUESTION: Well, have they alleged that right?

MR. PALMER: Well, the trial date has been set.

QUESTION: What you did, you filed a motion for acquittal and a motion in bar of double jeopardy, and they were both considered together, and both denied together, and now you're trying to bootstrap one on top of the other.

MR. PALMER: Well, I think, Your Honor, that it depends on the conceptual framework in which you look at it.

QUESTION: I'm not depending on that. I'm depending on the record that you filed, which says just what I said.

MR. PALMER: Well, the mere fact --

QUESTION: You can't go back on this.

MR. PALMER: Of course not, but the mere fact that the insufficient evidence --

QUESTION: Well, can you give me one case where that was done?

MR. PALMER: Where there was an appeal in this context?

QUESTION: Where there was a motion for acquittal and a motion to bar trial of the man considered at the same time? Give me the case.

MR. PALMER: Well, the case that we refer to,

the Sneed case, Justice Stevens --

QUESTION: That man was convicted, wasn't he?

MR. PALMER: Well --

QUESTION: Wasn't he? This man wasn't convicted.

MR. PALMER: But, Your Honor, the conceptual framework of the conviction was it was overturned, but the Court never considered the insufficiency of the evidence.

QUESTION: Well, is the answer to my question you don't have any case?

MR. PALMER: No, I disagree with that entirely.

QUESTION: Well, give me the case.

MR. PALMER: The Sneed case supports --

QUESTION: Which one?

MR. PALMER: The one I just referred to supports us 100 percent.

QUESTION: Was the man convicted?

MR. PALMER: Yes.

QUESTION: Well, isn't that a little different from this one?

MR. PALMER: Not really, for the reason that --

QUESTION: Not really?

MR. PALMER: The conviction was overturned for

trial error. At that point there was no conviction, there was no acquittal. There was nothing. You just had a record of the first trial. That's pretty similar to our case, in which you just have a hung jury.

He then filed a double jeopardy motion, denied, interlocutory appeal. The Fifth Circuit said we're going to entertain that motion now interlocutory -- interlocutorially because under Burks it does raise a claim the government has no right to reprosecute, reviewed the evidence, found insufficiency, reversed.

To me that is the same posture as this case. I see no difference. Your Honor may very well. Of course, Your Honor's going to make the judgment. The question or the answer to your question is there is no conceptual difference between the Sneed case, Bodey, and about three or four circuit cases, and the case at bar.

It is precisely the same posture.

QUESTION: Except that the jury in this instance didn't reach a verdict.

MR. PALMER: Right.

QUESTION: So perhaps the first trial was never actually completed in that sense, and maybe jeopardy doesn't attach in those circumstances.

MR. PALMER: Well --

QUESTION: Or it attaches but doesn't mature.

MR. PALMER: Well, Justice O'Conner, the notion that the jury failed to reach a verdict, the trial lawyer or trial judge at first blush, you know, should be another trial if you have a mistrial. But our point is that in this limited context of insufficient evidence, which rarely occurs in Federal criminal prosecution -- I've seen three of them in all my experience -- it's rare that the government does not make out a prima facie case under the Glasser test.

We're just saying in this limited context that when it fails to muster its proof, regardless of what the jury did, if the jury convicted we know the result. Why should the result be different if the same -- everything is equal, the same evidence has been presented, nothing changes, all facts being equal except the jury instead of convicting, the same result -- he would have been acquitted thereafter -- if it acquitted, the same result, came to the middle and hung, instead of erring completely in convicting him on insufficient evidence.

It came a step closer to the correct result, which would have been an acquittal. Now the government says the right of the defendant to have his double jeopardy claim or his right not to be retried and forced

varies with the jury's determination.

And we know that we give deference to juries. We say they can act without regard to logic. They can act illogically, do what they want. That being the case, why should our right not to be retried hinge upon so tenuous a basis as the vagaries of what a jury may do? We think conceptually this defendant had the same right not to be retried had he been convicted or acquitted.

QUESTION: Mr. Palmer, it hinges on what the judge did, not what the jury did.

MR. PALMER: Excuse me?

QUESTION: It hinges on what the judge did, not what the jury did. The judge didn't enter the order granting your motion for acquittal.

MR. PALMER: Well, the judge erred in not --

QUESTION: Well, you say so, but as Justice O'Conner points out there are an awful lot of cases that will be appealed if you prevail.

MR. PALMER: Not really.

QUESTION: Well, you say there won't be.

MR. PALMER: In the Federal context there were 58 retrials after mistrials in the entire year for which statistics were reported -- 58 cases. And of those the government or the Office of the Federal Courts did not

distinguish between mistrials based on hung juries or mistrials for any reason -- a juror going to sleep or whatever. Of those 58 cases, we think a very small percentage will ever be truly bottomed on insuffcient evidence.

As Your Honor pointed out --

QUESTION: You think that in very few of those cases there was a motion to dismiss at the end of the government's case?

MR. PALMER: Usually there's a motion for judgment of acquittal, and, as Your Honor pointed out in concurring in Jackson v. Virginia, there are very few insufficient -- true insufficient evidence cases. But the point is that it's up to the lawyer as an obligation to file a valid claim based on the insufficiency and what it entails.

You read the briefs. It's easy to determine, as we see it.

QUESTION: Thank you.

MR. PALMER: Thank you.

QUESTION: Mr. McConnell.

ORAL ARGUMENT OF MICHAEL W. McCONNELL, ESQ.,

ON BEHALF OF THE RESPONDENT

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

There has been no final judgment in this case because the jury was unable to reach a verdict. The issue is whether retrial must be postponed to allow Petitioner to appeal the District Court's order denying his motion to acquit for insufficiency of the evidence. The Court of Appeals dismissed for want of appellate jurisdiction.

I plan to make three major arguments, first that the order is not appealable because it does not fall within the collateral order exception to the final judgment rule as this Court has described in its cases; second, Petitioner's claim does not in any event sound in double jeopardy and thus the -- there is no possiblity of a bar to retrial under these circumstances; and, third, that an examination of the details of Petitioner's claim reveals that his actual complaint was with the trial judge's ruling on a matter of receipt of evidence and not even insufficiency as we ordinarily understand it and thus it falls even more strongly that his claim does not sound in double jeopardy.

QUESTION: Mr. Palmer, if the insufficiency of the evidence at the first trial can be raised at the second trial, as the majority below found, how is that affected by the merits of the second trial?

MR. McCONNELL: Well, Justice O'Conner --

QUESTION: I just don't understand your position on why it isn't collateral.

MR. McCONNELL: First of all, it's not a collateral issue because the question of the sufficiency goes directly to the heart of the -- of the question to be determined at trial, namely guilt or innocence. Now my friend has suggested relying upon --

QUESTION: But I just don't see how an order denying a claim of insufficiency of the evidence at the first trial can be anything but collateral to everything that goes on at an entirely new trial.

MR. McCONNELL: Justice O'Conner, it is not a collateral because a decision is a decision on the merits, as this Court determined in Burks. If the Court determines that the evidence was insufficient, that is the equivalent, operative equivalent, as the decision said, of a judgment of acquittal. It is in fact a judgment on the merits. And that is the principal question as to whether it is collateral.

Now it's true that in Flanagan and in MacDonald this Court extended the concept of being non-collateral to issues which were not as directly related to guilt or innocence as this and as it is in this case, and for those -- in those circumstances it is

true that looking to whether the issue is one that needs to be decided upon the full record of the case is a useful test in deciding whether it is so enmeshed in the factual merits of the case that it is not appealable, even though in fact, as in the case of disqualification of counsel, it has nothing logically to do with guilt or innocence.

But in a case like this, where the question is sufficiency of the evidence, which is the very heart of the merits of the case, there can be no question that the decision was collateral.

QUESTION: But sufficiency of the evidence at a trial that's already taken place, isn't there something to what Justice O'Conner says, that anything that happened at the first trial is almost by definition collateral to the second trial?

MR. McCONNELL: Justice Rehnquist, what was sought to be appealed from here had nothing to do with the second trial. It was the denial of a judgment of acquittal in the first trial, and that matter was certainly one that went to the question of guilt or innocence in that trial.

Now if what you're concerned about is the possibility that there may be an appeal from an ultimate conviction upon the second, if Petitioner were in fact

retried and then were convicted, that there might then be an appeal upon that second conviction based upon the insufficiency in the first --

QUESTION: Well, that was what the Court of Appeals majority found, Judge Wilke's opinion --

MR. McCONNELL: That's right.

QUESTION: And you thought that was fine all the way until footnote 25 of your brief up here, and seem to have changed your position

MR. McCONNELL: Indeed, Justice O'Conner, we still think that that may -- we still believe that that may --

QUESTION: But your second position I thought that you were going to voice today was that there is no double jeopardy issue at all in this case.

MR. McCONNELL: That's correct. Let me explain why those positions are perfectly consistent. The reason why there is no --

QUESTION: Well, they needn't be, need they?

MR. McCONNELL: I'm sorry.

QUESTION: Go ahead.

MR. McCONNELL: The reason why there is no double jeopardy bar is that it does not violate the Defendant's double jeopardy rights to retry him after a mistrial where he has not received a judgment of

acquittal or a functional equivalent up in an appellate court.

QUESTION: That's true whatever you might think about the state of the evidence at the first trial.

MR. McCONNELL: That's correct, whatever you may think of that.

QUESTION: Well, how could that issue ever be open, if I believe you, after he is tried and convicted at a second trial?

MR. McCONNELL: Justice White, there are cases in the civil context where the double jeopardy clause does not apply at all where there are mistrials because of hung juries and where upon an appeal from the judgment in the second trial the Courts of Appeals have entertained the issue of whether a directed verdict should have been granted in the first trial.

They may be correct. We think that there is some question as to whether they're correct, but they may very well be correct. But whether they are correct or not obviously has nothing to do with double jeopardy.

QUESTION: But it's not a double jeopardy issue.

MR. McCONNELL: And similarly in the criminal

context.

QUESTION: I don't -- consequently, I don't understand how you can say that you -- that you agree with the Court of Appeals majority in this respect.

MR. McCONNELL: What we have said is that we do not believe that that point, which, incidentally, was relevant to the Court of Appeals' decision, only on the basis of the third aspect of the collateral judgment doctrine, which we are not arguing here today.

But the point is that they may be correct or they may not be correct, but it has nothing to do with double jeopardy. It has to do with whether --

QUESTION: Mr. McConnell, let me challenge you on that. Supposing it's reviewable at the end of the second trial and at that time a court holds that a judgment of acquittal should have been granted, and then they enter a judgment of acquittal.

Would not that judgment bar the second conviction? Wouldn't that at least raise a double jeopardy question?

MR. McCONNELL: That judgment by the appellate court would constitute a judgment of acquittal, and there would not be --

QUESTION: And as of the end of the first trial --

MR. McCONNELL: There would then -- as of when --

QUESTION: There would be a judicial determination that the defendant was entitled to have a judgment of acquittal at the end of the first trial. Now wouldn't that bar the second trial?

MR. McCONNELL: At the time it is entered, it then bars retrial.

QUESTION: No, no. He's already been retried.

MR. McCONNELL: Certainly there would be a double jeopardy bar if we sought to retry him after the appellate court had made that decision.

QUESTION: No, but you --

QUESTION: But his conviction is then set aside.

QUESTION: He set aside his conviction.

MR. McCONNELL: That's correct.

QUESTION: So there would be a double jeopardy issue if that happened.

MR. McCONNELL: Not necessarily. He would certainly be --

QUESTION: They would set aside his conviction, wouldn't they?

MR. McCONNELL: That's correct.

QUESTION: So there would be a double jeopardy

issue if that happened.

MR. McCONNELL: Not necessarily. He would certainly be entitled --

QUESTION: Well, why would you set aside his conviction, then?

MR. McCONNELL: Because he would have received a judgment of acquittal.

QUESTION: After the first trial. But you have tried him a second time. You have gotten a conviction. You have just postponed the review of the first trial, and at that time you've got a judgment of conviction on the books, and he's asking to have it set aside because the first trial should have ended in a judgment of acquittal.

MR. McCONNELL: For exactly the same reason that a plaintiff or a party in a civil case would make the same argument. Double jeopardy has nothing to do with it. The question is whether the judgment of the appellate court that the evidence was insufficient in the first trial constitutes a judgment of acquittal. It does.

QUESTION: If this case is tried a second time, and then there's an appeal to the Court of Appeals, what record does the Court of Appeals review -- the record of the first trial or the record of the

second trial?

MR. McCONNELL: Well, I -- we are not taking a position on that. The Court of Appeals held that the court on review of judgment would be able to look to the insufficiency of the first trial. That may very well be correct for the same reason that they would be able to do so in the civil context.

But they would no need to cite the double jeopardy clause in so doing.

QUESTION: How would you get the record before the second trial? How would you get the record of the first trial into the record of the second trial?

MR. McCONNELL: I -- I'm not quite sure that I understand Your Honor's question.

QUESTION: I don't understand either how you get it in there.

MR. McCONNELL: It is -- the record of the first trial will be --

QUESTION: You say the judge, the Court of Appeals judge, said that in considering the second case they ruled that the first case was wrong. Well, how did that first one get before the Court of Appeals?

MR. McCONNELL: Well, in a sense that's the very question that --

QUESTION: In a sense?

MR. McCONNELL: -- that may imply that the Court of Appeals was incorrect on this point, and they may very well have been incorrect. But the answer is the same whether it's the civil context or whether it's the criminal context, because the answer has to do with whether these issues are merged in the judgment --

QUESTION: Well, I --

MR. McCONNELL: Let me give you another example that may --

QUESTION: Well, let me give you one, that double jeopardy doesn't apply to civil cases, period.

MR. McCONNELL: My point exactly. Therefore, the fact that the exact parallel exists in the civil context indicates that the answer to the question has nothing to do with double jeopardy.

QUESTION: I'm not sure I really understood your response to my earlier question. Let me try again. When there has been a trial and no verdict so that the case is tried again, whether it is because one of the jurors died while they were in deliberations and the parties wouldn't stipulate to trying it on the eleven jurors or whatever, there is a second trial.

A conviction results. You go to the Court of Appeals on review. What record does the Court of Appeals review -- the first trial or the second trial?

Before I got some ambiguity from you, but I sat on that Court for 13 years, many, many, many cases, with reviewing a second trial where there was a mistrial in the first case. Never did I see any record of the first trial.

MR. McCONNELL: Mr. Chief Justice, that may very well be the case, which was why in our footnote in our brief we indicated that we were not so convinced by the Court of Appeals to the contrary.

Our simple point in this case is that --

QUESTION: We'll resume here at 1:00.

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

AFTERNOON SESSION

(1:04 p.m.)

CHIEF JUSTICE BURGER: Mr. McConnell, you may resume your arguments.

MR. McCONNELL: Thank you, Mr. Chief Justice.

I think it would be helpful in addressing the question that the Chief Justice put to me just prior to the break to discuss for just a moment what the interests are of the government in this case.

Our interests in this case are to enable us to engage in prompt retrials at the conclusion of mistrials, especially hung juries. Now the question of whether an appellate court would be able to reverse on the basis of the insufficiency of the evidence in a first trial upon appeal from a conviction in the second trial is a question of very little practical import to the government, largely, incidentally, because that question is going to be as a matter of practical fact essentially the same as the question of whether the evidence in that second trial was sufficient, because we're talking about two trials which would be based upon minor variations but essentially the same body of evidence.

And the government is not particularly concerned about the additional prospect of the Court of

Appeals reviewing the evidence of the first trial. Now --

QUESTION: Mr. McConnell, if one were to adopt Judge Scalia's position in the Court of Appeals that jeopardy does not cease to attach merely by a hung jury, then as a matter of double jeopardy law there would be no occasion to review the evidence at the first trial following the second trial if the first trial resulted in a hung jury, as you have here.

MR. McCONNELL: That's correct.

QUESTION: And does the government agree or disagree with Judge Scalia's position?

MR. McCONNELL: We agree that that's true as a matter of double jeopardy law, which lays aside, incidentally, the question of whether the Court would be able to review that as a matter of one of the many issues which are simply merged in the judgment of the second -- of the second trial.

The fact that many courts have found that they are able to reach the issue in the civil context suggests that the question remains open. We don't ask the Court to resolve that question here because we don't -- we think it's a fairly difficult question of very limited, at least to us, practical importance.

But we're extremely concerned about the

prospect of mistrials being interrupted by appellate processes before we're able to engage in the retrial as, incidentally, the Speedy Trial Act requires. We would -- we are quite interested in being able to schedule the retrial while the evidence is still fresh, while the witnesses are still available, and while the public's interest in justice can still be vindicated reasonably promptly.

And our concern with this case is that it provides the opportunity for a notice of appeal to interrupt those processes in virtually every case that ends in a mistrial, because as a matter of practice a motion for judgment of acquittal on the basis of insufficiency of the evidence is made in virtually every criminal case.

And that will then involve the appellate court in what can be a very burdensome operation of reviewing the entire record to find out whether the evidence was sufficient, incidentally an effort which they're going to have to go through upon review of the conviction in the second trial anyway. And although the evidence may in minor ways be different, the double expenditure of effort is not one that should be overlooked.

QUESTION: Mr. McConnell, suppose we agree with Judge Scalia to this extent, that retrying this man

without passing on the evidence is not a violation of double jeopardy and that the issue is never open. Suppose we decided, give the facts and we decide that first. Do you think that question could be decided first, in your opinion?

MR. McCONNELL: I think it could, because the question of appealability --

QUESTION: All right. So what if we decided that. Then what would we do with the issue about appealability?

MR. McCONNELL: Well, I think that that is part -- the only way this Court would be able to reach that issue is as an aspect of appealability. The only reason why --

QUESTION: One could say that -- it just becomes a frivolous issue then, doesn't it?

MR. McCONNELL: Well, the point is that there is no final judgment in this case. There can only be an appeal if petitioner's claim fits within the collateral order exception as explicated in Abney. If his claim does not even sound in double jeopardy, that is, regardless of whether the evidence was in fact insufficient to retry him would not violate double jeopardy, then he has no basis for an appeal under Abney.

QUESTION: Well, that's on the merits, isn't it?

MR. McCONNELL: I don't believe so, Your Honor. I mean, regardless of --

QUESTION: Give me the jurisdictional argument.

MR. McCONNELL: Under Abney a petitioner does not have the right to an immediate appeal in the absence of a final judgment unless he has raised a claim which sounds in double jeopardy.

QUESTION: And so the claim just doesn't sound in it, so it isn't a final judgment. He isn't being deprived of anything.

MR. McCONNELL: That's correct.

QUESTION: Well, what if he says in his notice of appeal the first caption is, this claim sounds in double jeopardy?

MR. McCONNELL: Well, Justice Rehnquist, we do not believe that invocation of the words "double jeopardy" is what this Court meant in Abney. We believe that it meant a colorable claim of double jeopardy by which we interpret to be a claim that if correct on the facts would in fact give rise to a bar against retrial. And even if --

QUESTION: You don't extend your jurisdiction

to frivolous claims, I guess.

MR. McCONNELL: Well, that's right. But frivolous, that's -- frivolousness can be on the facts or on the law. We're not asserting that the claim here is frivolous on the facts. We're merely asserting that even if he is correct on the facts that doesn't constitute a bar to retrial.

QUESTION: That's right.

MR. McCONNELL: But in emphasizing the practical importance of this case in comparison to the hypothetical that we have been spending time on this morning, I'd also like to point out that the ramifications for the state criminal justice process are even larger. Justice O'Conner alluded to this in her discussions with my colleague.

But in fact they are even more -- the consequences are even greater than Justice O'Conner implied, because not only would the Federal habeas proceedings be triggered by mistrials in the state system, but they would be triggered by convictions for trial error as well, because if Petitioner is correct, then whenever the trial -- the state courts have reversed for trial error, even, incidentally, where they have reached and affirm the sufficiency of the evidence, it will be open to a petitioner, to a defendant to take

this claim to the Federal habeas court claiming that if in fact those courts had erred that to retry him would violate the double jeopardy clause.

This is in fact exactly what happened in the case of Delk v. Atkinson, where the State Supreme Court reversed the conviction, expressly finding that the evidence was sufficient to justify going to the jury. The Federal habeas court blocked retrial, disagreeing with the State Court on the issue of sufficiency.

The Court of Appeals then agreed that the District Court had jurisdiction to act in that fashion, but found that the State Court had been right back in the first place on the issue of sufficiency, thus allowing a retrial if, after all those proceedings, the evidence was still available to permit a retrial in any event.

It's this kind of squander of appellate resources and of the ability to retry that we're so concerned about in this case. We believe that it's exactly what the collateral order, the limitations on the collateral order exception to the final judgment rule were intended to preclude.

QUESTION: It looks to me like you'd be most satisfied with a ruling that there's no colorable double jeopardy claim.

MR. McCONNELL: We would be very satisfied with such a ruling.

QUESTION: But even if you had that ruling why would not -- and say you properly characterize your opponent's motion as one for judgment of acquittal for insufficient evidence, why isn't the denial of such a motion appealable as a collateral order? What element of the three-pronged test is missing?

MR. McCONNELL: We believe that in order -- under Abney in order for there to be a basis for an appeal that there had to have been a colorable double jeopardy claim.

QUESTION: I understand that. But I'm saying I'm not going to rely on Abney. I'm going to rely on Cohen, the basic collateral order doctrine. Why doesn't -- why isn't a properly charaterized non-double jeopardy claim, just an insufficiency at the end of the first proceeding, why isn't that appealable, because you never can really get effective review of it later?

MR. McCONNELL: Well, I think that there are two reasons. The clearest is that it's not a collateral order.

QUESTION: And I'm asking why isn't it.

MR. McCONNELL: Because it's an issue that goes directly to the question of guilt or innocence. In

Abney that second prong, the collateral prong, was described as -- in several different ways. I'll just read a couple of them to you. The elements of that claim are completely independent of his guilt or innocence.

QUESTION: Yes, but this claim that I'm raising is completely indepenient of what may happen at the second trial.

MR. McCONNELL: It's not completely innocent -- excuse me, completely separate from the question of guilt or innocence.

QUESTION: Not completely separate from guilt or innocence. But it's completely independent of the merits of the second trial.

MR. McCONNELL: As a practical matter, of course, that's not so true in that when --

QUESTION: It would if you got another witness.

MR. McCONNELL: The collateral order doctrine has a -- has its origins in practical considerations about how the appellate courts ought to operate, and what you're talking about is for the second court to engage in an examination of a record which is going to be in all material respects, with some minor variations, identical.

QUESTION: Well, if it is. But at least hypothetically it could be entirely different. You might have two witnesses that you couldn't get for the first trial and you had them for the second trial.

MR. McCONNELL: In that sense, that's correct. But I would submit that that is not then what the issue -- what the second prong has referred to when it uses the word "collateral". The question there is whether the issue is one which is collateral to the merits, that is to say to the guilt or innocence of the accused.

Let me give you the example of the very classic example of the denial of a motion for summary judgment in the civil context. Now whether that motion was properly denied is totally independent in the sense you used the term of the proper resolution of the case. Nonetheless, it's an issue which goes to the merits and is understood and always has been as merged in the merits of the case.

The fact that it can be viewed independently does not make it collateral. It is the merits of the case, and I would submit that this is a very similar situation.

QUESTION: Mr. McConnell, I don't know whether any of the hypotheticals or your responses covered

another situation I'd like to put to you. The first trial includes evidence which on review of the first trial the appellate court decides certain evidence was inadmissible and that he is ordered retrial without that evidence.

Then the defendant raises in that same posture the claim that's being raised here, that is, that the evidence, the total evidence, without the evidence found inadmissible, would not have been properly submissible to the jury and, therefore, a new trial will be double jeopardy. Is that a practical problem with respect to state cases especially?

MR. McCONNELL: Oh, yes, Your Honor, it's a very practical problem and in fact it's the problem in this case, because when -- and actually something that we were not aware of until the Petitioner filed his brief and actually laid out the basis for his claim of sufficiency.

His claim in this case is that the trial court erroneously admitted certain hearsay evidence and that when the appellate court reverses that and does not consider that erroneously-admitted evidence that it's the remaining competent evidence which was insufficient.

We believe that this is -- this is plainly not

the sort of situation that should lead to a double jeopardy bar or to an interlocutory appeal. The issue was technically left open in a footnote in Greene v. Massey, but we believe that the issue is one that has in fact been resolved by such cases as Tateo and Burks itself. In Burks it stated that an issue of the receipt of evidence is a matter of trial error.

It's not one that goes to guilt or innocence and thus under Burks would not lead to preclusion of retrial, which makes a great deal of sense because, after all, when it's a matter of trial error the government's right to one full opportunity under proper legal principles to obtain a conviction has not obtained, and for the same reasons that the government can retry after any other trial error, it ought to be able to do so.

QUESTION: And for the same reason after such rulings you can't go to Federal habeas.

MR. McCONNELL: That's correct. And we believe that the -- we see no exceptions in any of the cases of this Court that would lead one to believe that such a claim would bar retrial and thus again it does not sound in double jeopardy and should not be allowed as a matter for interlocutory appeal or, in the state context, a Federal habeas.

QUESTION: But is your response directed at those category of state cases which could not have Federal habeas available in relation to Justice White's -- your colloquy with Justice White, because if the states could come in we would have in the aggregate 28 or 29,000 state court judges, 7,000 or 8,000 of them general jurisdiction judges, as against about 300 Federal judges who would be involved as we are here.

MR. McCONNELL: I think Your Honor is perfectly correct in anticipating the practical problems with an opposite holding becauee were our position not correct and were the position of this Court in Tateo and Burks not correct, it would effectively convert every reversal on a matter of evidentiary admission into a question of sufficiency of the evidence, thus opening up habeas relief prior to retrial in hundreds or thousands of state cases. It would be a phenomenal result.

QUESTION: Mr. McConnell, the procedure in this case was the defendant filed a motion for acquittal. When was that motion filed?

MR. McCONNELL: It was first filed -- it was first filed at the close of the government's case.

QUESTION: That's what I thought.

MR. McCONNELL: Let me -- there was a motion just before that that's relevant, however, which was

prior to the close of the government's case. The Defendant moved to exclude certain evidence, certain hearsay testimony. The trial court took --

QUESTION: Well, I'm not interested -- I'm interested in the motion of acquittal.

MR. McCONNELL: It was first made --

QUESTION: It was filed at the end of the government's case?

MR. McCONNELL: That was when it was first made.

QUESTION: And that was before the hung jury?

MR. McCONNELL: That's correct.

QUESTION: Timewise.

MR. McCONNELL: That's right.

QUESTION: Well, how were those two combined and heard together?

MR. McCONNELL: They were not combined and heard together until after the case, because the motion for judgment of acquittal was repeated three times. It was made first at the close of the government's case, a second time before the case was submitted to the jury, a third time after the mistrial was declared. It was at the third time that the Petitioner suggested to the District Court and the District Court agreed that the denial of that motion amounted to a denial of his motion

to bar retrial on double jeopardy grounds.

QUESTION: Well, had there been any motion or anything to retry?

MR. McCONNELL: That's --

QUESTION: Before that?

MR. McCONNELL: That's correct.

QUESTION: Was there?

MR. McCONNELL: There was not. There was -- the motion to bar retrial --

QUESTION: There is no motion to retry yet, is there?

MR. McCONNELL: There was a motion to bar retrial which was denied.

QUESTION: But there was no motion to try?

MR. McCONNELL: The government does not require a motion to try. It's in fact --

QUESTION: Well, what does the government have to do?

MR. McCONNELL: The government simply has -- there's an indictment oustanding and after a mistrial the government and the counsel for defense simply got together with the judge and agreed upon a new trial date, which happened the very day that the jury hung.

QUESTION: But don't you have to plead? Don't you have to plead guilty or not guilty?

MR. McCONNELL: Well, Your Honor, the Defendant pled not guilty in pretrial.

QUESTION: I'm talking about the second trial.

MR. McCONNELL: This is all --

QUESTION: You just fudge them both together down there?

MR. McCONNELL: No, Your Honor. I think that for the purposes of appellate jurisdiction they ought to be looked at, the two motions -- the motion for judgment of acquittal and the motion to bar retrial -- ought to be considered separately. But for purposes of the indictment and the plea of guilty and all of the pretrial motions in this case it's all one case.

QUESTION: But for the purpose of jurisdiction, I don't see how the judge that's trying the first case can decide what's going to be done in the second case.

MR. McCONNELL: Your Honor, all -- there will be a number of pretrial matters.

QUESTION: Will the same judge try the case?

MR. McCONNELL: In this case, the same judge was going to try the case. It could be reassigned to another judge, but I think it's much more common to reassign it to the same judge.

QUESTION: But it hadn't been, had it?

MR. McCONNELL: I'm sorry?

QUESTION: Had it been reassigned?

MR. McCONNELL: Yes, in fact a new trial date was scheduled.

QUESTION: I mean my whole point is how can one case move over into the other one. That's -- I have trouble with that.

MR. McCONNELL: It's the same indictment, the same charges, and there has never been a judgment in this case. A case will continue to go until there's been a judgment of either acquittal or conviction.

QUESTION: After the disposal of these motions following the mistrial, then is it not the same as any other untried indictment?

MR. McCONNELL: Well, in many respects it is the same.

QUESTION: It just goes back on the calendar.

MR. McCONNELL: There will be matters that were resolved pretrial which will continue to be relevant in the second case.

QUESTION: But it's an untried indictment.

MR. McCONNELL: That's correct.

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

(Whereupon, at 1:24 o'clock p.m., the case was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-2113 - ROBERT D. H. RICHARDSON, Petitioner v. UNITED STATES

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY _____

(REPORTER)