# Supreme Court of the United States

OCTOBER TERM, ~~1969~~ 1970



**In the Matter of:**

UNITED STATES,

Appellant

vs.

MILTON C. JORN,

Appellee

**Docket No.** ~~84~~ 19





**Place** Washington, D. C.

**Date** January 12, 1970

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NHAM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

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| UNITED STATES, Appellant | ) | |
| vs | ) | No. 84 |
| MILTON C. JORN, Appellee | ) | |

The above-entitled matter came on for argument at 11:15 o'clock a.m. on Monday, January 12, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 84, the United States against Jorn.

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

ORAL ARGUMENT BY LOUIS F. CLAIBORNE, ESQ.

OFFICE OF THE SOLICITOR GENERAL,

ON BEHALF OF APPELLANT

MR. CLAIBORNE: Mr. Chief Justice, and may it please the Court: This is a criminal tax case brought here by direct appeal by the United States District Court for the District of Utah.

I might say at the outset that the United States brought the case here, not because of the intrinsic importance of the case, much less for the revenue involved, but rather, out of concern for the, what seems to us only fairly characterized as judicial arbitrariness in this matter.

Having said that, I want to be very careful and detailed in stating the facts of the case.

As I said, we're in the District of Utah before the Chief Judge, Judge Ritter. An information is filed against a man who is charged with having prepared income tax returns for others and having done so, in a way so as tomake those returns false and fraudulent.

Specifically, he invented or grossly exaggerated deductions to which the taxpayers were not entitled. The case

was called for trial on a certain day in August of 1968, at which time a jury was selected and sworn. This was in the morning. In the afternoon the United States Attorney indicated that he wished to amend the 25-count information and reduce it down to 11 counts. At that point Judge Ritter indicated that if there was some doubt about the need for bringing what he called a "two-bit" case, perhaps the Government wanted more time, to have some more time; perhaps more time would result in a dismissal of the remaining counts.

I point out that this, itself, would have resulted in a mistrial, the jury having already been sworn, if the Government had been allowed more time in which to consider whether it wished to dismiss this information.

The Government indicated that it was ready. The defense had no suggestions to make, understandably, and so the case proceeded. The first witness was an Internal Revenue official who was called, simply to identify the returns which were the subject of the charge. It was immediately stipulated that these were authentic returns and the witness, therefore, was immediately removed from the stand.

Thereupon, the first real witness was called by the prosecution, who was one of the taxpayers; that is, one of those for whom a return had been prepared by the defendant, Mr. Jorn. As soon as the taxpayer took the stand, defense counsel, and this appears at Page 40 of the very short record in this case,

Mr. Morrill, Defense Counsel, addresses the Court as follows: "In view of the transcript in the preliminary hearing in this matter, it is my feeling that each of these taxpayers should be warned as to his constitutional rights before testifying, because I feel that there is a possibility of the violation of the law."

The judge responded: "Well, we wouldn't want anybody to talk himself into a Federal penitentiary here, so what the Court has to say to you is this:" And I will not read the following two pages in which the judge quite clearly, emphatically, in the strongest possible terms, advises the prospective witnesses of their right not to testify for fear of incriminating themselves; of their right to have a lawyer; of their right to have a lawyer appointed for them, even though they are not criminal defendants, before they testify; and then he addresses the witness and says -- this is now on Page 41: "Well, what do you want to do?"

The witness responds: "You Honor, my wife and I have had it pointed out to us that our returns had information in them that we know is wrong and we have admitted this and I would admit it further in this court."

The judge responds: "Have you talked to a lawyer?" And he says, "No, sir." The Court says, "I'm not going to let you admit it any further in this court; that is all there is about that. The admissions you have already made were very likely

made without telling you what your constitutional rights are.

The witness says, "No, sir."

The Court says, "What is that?"

The witness says, "We were advised at the time we were first contacted by the Internal Revenue Service."

The judge responds, "If you were, you are the only taxpayer in the United States that has been so-advised, because they do not do that when they first contact you." And the judge then explains his version of how the Revenue Service goes about incriminating prospective defendants.

The judge addresses --

Q May I ask, Mr. Claiborne, were other potential witnesses present in the courtroom at this time?

A No, Mr. Chief Justice; there had been a separation of witnesses. The other prospective taxpayers had been excluded. They later were returned to the courtroom and addressed by the judge with respect to their rights, also, and by that time the judge had already indicated his disposition to abort the trial.

The judge excuses the witness at this point, turns to the U. S. Attorney and says, "Where are your witnesses in this case? The U. S. Attorney replies, "Your Honor, by the time any of these witnesses were dcontacted, there was a criminal investigation, not of the witnesses, but of the defendant. It is true that the Internal Revenue Service does not require this

warning until after first meeting with the special agent. It is the practice in this office; they do give this warning. It is not required, but they do."

The judge then expresses some doubt as to whether the warning could have been sufficient. There is more colloquy between the Court and the United States Attorney. We are now on Page 43.

The Judge once again expresses his view that this case never should have been brought because of the trivial amounts involved.

Q How much was involved?

A There were, originally, Mr. Justice Black, 25 counts, showing exaggerated or invented deductions in amounts ranging from, I think, for each taxpayer, totals somewhere between $200, $300 and $400. Eventually, 14 of those counts were removed, but for all we know, Mr. Jorn had been involved in this occupation for some time and with respect to a great large number of taxpayers.

Q Was Mr. Jorn a professional tax adviser or consultant?

A It appears from colloquy at the beginning of the trial between the judge and, I think, Defense Counsel, that Mr. Jorn was not a professional accountant, but he at this point was no longer engaged in this tax service, but that he had some accounting training and judging from this particular

information, which recites several tax years with respect to each of the taxpayers, he had been engaged in it at least three years, because we have three different years for several of the taxpayers.

We just don't know how large an operation it was. It does appear that the taxpayers involved were of modest income.

On Page 43 of the record, the Court finally ends the colloquy with this statement: "Well, I will tell you what is going to happen in this case. Ladies and gentlemen it won't be necessary for you to attend the Court any further on this matter. This Court discharges the jury." The judge then requires all the taxpayers, including the witnesses who had been excluded under the rule to return to the courtroom. We are now on Page 44 of the record. And he, once again, and for the better part of three pages, advises them with respect totheir right to remain silent; their right not to testify; his decision not to allow the trial to proceed until such time as he, personally, has had further opportunity to suggest to them the unwisdom of putting themselves in danger of self-incrimination and finally, the judge says: "So, this case is vacated; the setting is vacated this afternoon and it will be calendared again; and before it is calendared again, I am going to have these witnesses in and talk to them again before I willpermit them to testify.

Q Who is Mr. Watson?

A Mr. Watson is the Assistant United States Attorney, Mr. Justice Stewart. He was handling the case for the Government.

On basis of the facts I just recited, it seems to us certain propositions are not subject tocontroversy. The first is that the Government here, the United States Attorney was in no way at fault, no way guilty of misconduct, in no way responsible for the ending -- premature ending of this trial or the declaration of a mistrial.

It is also true that no combat of defense made this course inevitable. However, as I pointed out in the statement of facts, it was at the instance of Defense Counsel that the judge proceeded tointerrogate the witnesses and ultimately to declare a mistrial. It was the suggestion of Defense Counsel that provoked the ultimate action declaring a mistrial.

Now, it may be that Defense Counselhad in mind simply that the judge would admonish the taxpayers with respect to their rights. No doubt Defense Counsel hopes that such advice from the judge might changes the minds of some of the witnesses with respect to their willingness to testify or their decision thus far not to invoke the Fifth Amendment. Or it may be that Defense Counsel anticipated what, in fact, did happen. We are in no position to guess about that.

Insofar as the mistrial is the consequence of a

Defense motion, the case is so clearly governed by prior cases of this Court, that I need not dwell on that aspect of it.

I am willing to argue, however, on the alternative basis that the defense is not to be held accountable for the judge's arbitrary action in prematurely ending the trial.

And for that purpose, it seems to us we can assimilate this case in every respect with Gori versus the United States, decided by this Court some few terms ago. There also, a judge in what this Court characterized as "exaggerated," or perhaps exaggerated solicitude for the defendant, without any motion from the defense, ordered a mistrial and the question was whether the defendant could be retried subsequently and the Court held that he could.

That decision, as well as, or prior decisions of this Court on this subject, have indicated that the double jeopardy clause really does not control this question in any direct sense. The double jeopardy clause, historically and as this Court has construed it, deals more immediately with the problem of a case which gone to verdict, whether a verdict of acquittal or a verdict of conviction.

A mistrial which is, of course, neither, bars re-prosecution only in circumstances where either, and I think this is this Court's decision in Downum, where to allow a re-trial, would be to get around the double jeopardy clause in this sense: if the defendant stood a good chance of winning an

acquittal, which would have barred his retrial, he must not be cheated of that right to obtain an acquittal by action -- unjustified action laid at the door of the prosecution, because the government thinks its case is going badly. And, in that sense --

Q The question, then, basically is one of fundamental fairness or fundamental unfairness?

A It could be put in terms of fundamental fairness or fundamental unfairness. We put it in terms of whether the action of the court was taken on behalf of the government; whether its effect was to harrass the defense. We recognize that it may be a part of the right to trial by jury, though, aside from the double jeopardy clause, to have a case brought to a conclusion before the jury is first empaneled.

Q That certainly doesn't apply in the event of a jury that disagrees. Nobody has ever claimed that after a mistrial caused by a hung jury that there cannot be another prosecution.

A And precisely that example, an example which indicates not a motion of the defendant; not a waiver by the defendant, indicates that there is no absolute bar.

Mr. Justice Washington very earlier on, said the double jeopardy clause obviously doesn't control this situation of a mistrial, because the double jeopardy clause has no exceptions in it and we have no right to read exceptions into it.

Therefore, this is a case not governed by the double jeopardy clause, since everyone concedes that in the case of a hung jury, for instance, there must be a right to the public in the prosecution to retry even though no argument of waiver by the defense could possibly be advanced.

Q Is there more reason, would you say, to have a stringent rule on double jeopardy where the defendant has gone forward and put in his evidence, than in the case where his evidence has never been reached? Policy reasons I'm talking about now.

A It could, Mr. Chief Justice. It does seem to us that the early termination of his trial after it had only, technically, begun, has a bearing on the extent to which the defendant was harrassed by or would be harrassed by the prosecution. He has not undergone, he has not gone through the gauntlet in any real sense at the point when this trial was aborted. And since this is a matter not governed by absolute rules, those considerations, it seems to us, ought to be relevant.

I must say that this bears or this invokes the decision of this Court in Tateo versus the United States. It seems to us also relevant that in the case of the trial which does go to a conclusion, but which is reversed on appeal, reversed on appeal often for grounds which amount to, characterizing the first trial as a mistrial, an erroneous trial; a trial

in many instances where the judge should have halted it before it went to verdict. That situation and this one ought not be so radically distinguished, and yet in every case where a trial which is reversed on appeal, allows a retrial even where the first trial was reversed for lack of sufficient evidence as this Court has specifically so held.

And why the results should be so different just because the judge interposed himself early rather than an appellate court, is not easy to appreciate. It cannot be that it is the defendant who is moving for a new trial in the case of an appeal, because that would be an instance in which a defendant would require, in order to assert one constitutional right, the constitutional right to reversal on constitutional error, to waive his supposed other constitutional right, the right not to be retried, that is right granted him by the double jeopardy clause.

It follows from this that it is not the defendant's motion that makes a new trial permissible in the case of a trial which has gone to verdict. It must be here a balancing of interests which the double jeopardy clause does not deal with. And the defendant's motion and any notion of waiver is quite irrelevant to the rule permitting this.

For these several reasons, we suggest that the judgment below ought to be reversed and the prosecution be free to proceed with a new trial.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Claiborne. Mr. Morrill.

ORAL ARGUMENT BY DENIS R. MORRILL, ESQ.

ON BEHALF OF APPELLEE

MR. MORRILL: Mr. Chief Justice, and may it please the Court: I believe counsel for the Government has adequately stated the facts. I would amplify on these in certain instances.

First, I believe it should be pointed out that a peculiar relationship existed in this case between the defendant and the taxpayer witnesses called to testify against him.

The defendant was accused in the information of aiding, assisting and procuring and counseling and advising in the preparation of false and fraudulent tax returns. The returns involved were the returns of the very witnesses who were testifying.

The Internal Revenue Service had determined that these returns were erroneous, were fraudulent in their view, therefore, if defendant was not guilty of the fraud then the taxpayers may well have been guilty. From the preliminary hearing in the matter, I, being defense counsel at the time, it was my feeling that some of these witnesses were trying to blame their errors on the defendant and thus escape prosecution from the Internal Revenue Service.

MR. CHIEF JUSTICE BURGER: Now, counsel, unless there is something in the record to reflect that, you had better

confine yourself to what's in the record, not your private views of the matter.

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

For this -- based upon the relationship between the taxpayers and the defendant in this case, one facet of the defense prepared was to show that these people had given the information to the defendant from which he prepared their returns.

In other words, defendant wished to convey to the jury that these witnesses were trying to, in essence, blame him for their mistakes. It was for this reason that counsel pointed out to the court that he felt that these witnesses should be warned of their rights. This was certainly not tantamount to any motion for a mistrial.

After this warning was given, as stated by Counsel for the Government, the jury was summarily dismissed, with no opportunity on either side for objection.

From the law as stated by this Court, it appears to me that once a jury is empaneled to try a criminal case, it may only be dismissed by the Court in rare and extraordinary circumstances. The test which has been verbalized is often referred to as the manifest necessity test, wherein the jury is to be discharged only if there if a manifest necessity for doing so in order to preserve substantial justice.

The cases of this Court have held that the discretion

of the trial court in granting a mistrial, while not closely scrutinzed, ce tainly is not unlimited. I believe that the instant case shows no extraordinary circumstance, now any manifest necessity for granting a mistrial.

The trial court, after warning these witnesses, concluded that he would not allow them to testify. Whether this is a legally-defensible conclusion, I believe, at this point, is irrelevant.

After so concluding the trial court took a further step, which should be distinguished, I believe, from the first. That is, he dismissed the jury. Certainly the second step did not follow from the first. The trial court had several discretionary alternatives which he could have followed. If he had felt these witnesses should have a more explicit warning than he had given, he could have recessed the court overnight, which would have given ample opportunity for the accomplishment of his purpose. He could have called counsel to the court. There are counsel available close which he could have requested. He did not do this; he dismissed the jury and I believe the alternative which he chose clearly was not dictated by any manifest necessity.

Q I gather from your argument, the logic of your argument is that the more wrong the District Judge was, the more erroneous was his action in dismissing the jury, the stronger your case is; do I understand you correctly? In other

words, if there was an absolute necessity for a mistrial, that any rational, competent judge would have no choice, but declare it a mistrial because of some event or another. I gather that you concede that there then could be a new trial, a new prosecution.

But if, on the otherhand, there was no such necessity no such absolute ecessity and the trial judge irrationally or erroneously declared a mistrial, then there cannot be a new trial; is that it? That's the logic of your argument, isn't it?

MR. MORRILL: Yes, Your Honor, that would be the logic of my argument. It has been stated by one of the members of this Court that the risk of judicial arbitrariness should not be placed upon the defendant, but rather should be placed upon the Government in this instance.

Then, too, I believe the position of the trial court in this case is rather unique, in that the same court that granted this mistrial, or discharged the jury, some five months later, on reviewing his own exercise of discretion, granted defendant's motion to dismiss, based upon the double jeopardy clause of the Fifth Amendment.

It would appear to me that this judge was in an excellent position to review his own exercise of discretion and that in granting this motion he concluded that in his prior action he had abused his discretion. Abuse of this discretion

prejudiced the defendant, and for this reason the action in dismissing the information should be affirmed.

This Court has also held in Downum versus the United States that a mistrial declared in the aid of prosecution would prevent retrial. Upon separating the action of the trial judge into two parts, the first his opinion or conclusion that these witnesses could not testify and second, the dismissing oftthe jury, it appears to me that the defendant was prejudiced.

After concluding that the witnesses could not testify, had the court continued the trial there is no question but what a verdict of acquittal would have been forthcoming, since these were all of the Government's witnesses.

In both the Gori case and the Tateo case, relied upon by the Government, retrial was allowed after a mistrial in the one case; after conviction in the other. Both times to protect the rights of the accused. This Court, I believe, dwelled rather heavily on that argument: the rights of the accused were being protected.

In the instant case the dismissal of the jury clearly was not for the protection of Mr. Jorn. Any possible beneficiaries of this action were the witnesses and, of course, the Government.

Q Why the Government?

A Because, after the judge took the first step of not allowing any of their witnesses to testify, they had no

case.

Q Well, how could he stop them, ultimately? The judge couldn't stop a witness from testifying; could he?

A Well, he --

Q He could defer it until the witness got counsel on his rights, but no judge sitting anywhere could prevent the witness from testifying; could he?

A No, he couldn't, ultimately, is correct, Your Honor. But, in this case, perhaps it's a peculiarity of that particular court, he did order that these witnesses would not be allowed to testify.

Q Then, I suppose what you are saying is that he actually could, but it wouldn't be legal.

A This is true; this is true. It is the defendant's position that once the jury was empaneled, evidence was taken from one witness; another witness was sworn, jeopardy attached and pursuant to the United States Constitution, the Fifth Amendment, and the cases of this Court, the defendant cannot now be retried.

Either this appeal should be dismissed because, under Section 3731 if jeopardy had attached, no appeal would lie, or the action of the court below should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Morrill. Mr. Claiborne, do you have anything further?

MR. CLAIBORNE: One comment, Mr. Chief Justice.

REBUTTAL ARGUMENT BY LOUIS F. CLAIBORNE, ESQ.
OFFICE OF THE SOLICITOR GENERAL, ON BEHALF
OF THE APPELLANT

MR. CLAIBORNE: I agree with counsel that the question in this case is correctly stated in the quotation made attributed to a member of this Court that the issue is where the risk of judicial arbitrariness must fall in these circumstances. That statement is taken from the dissenting opinion in Gori versus the United States. We invoke majority opinion in that same case, which has been repudiated, not by the Downum decision, or by the subsequent decision in Tateo versus the United States.

It seems to us that the balance of considerations here requires that in this case where a judge as this judge, we must conclude, has, arbitrarily and without the need for doing so, declares a mistrial, but not at the instance of the Government, not to the advantage of the Government, that the provisions of the double jeopardy clause do not prevent retrial of the defendant.

Q When a trial judge approaches, or gives some indication of contemplation of mistrial in the circumstances where they are not warranted, is there any remedy which the Government has that you know of? Can they effectively reach him by mandamus; is his order reviewable in any way by any court?

MR. CLAIBORNE: This Court will, I think, shortly perhaps, have that problem; not quite in the circumstances of the mistrial. In the case of the judge who indicated that he would, unless restrained, grant a directed verdict of acquittal but had not done so, and attempted to leave the Government free to file an appeal.

I suppose that by parity of reasoning here if the judge were to indicate that unless restrained by an appellate court he intended to grant a mistrial, in the meantime, simply granted a continuance, allowing the Government an opportunity to seek mandamus from the High Court, nothing would prevent a high court from entertaining and granting such a writ.

Q We had a case here some few years ago, involving what seemed to be an entirely erroneous and irrational direction of the judgment of acquittal, up in the District of Massachusetts. Von Prue, I think, was the name of the case and that was -- the Government sought to remedy that by writ of mandamus and that -- which was granted by the First Circuit Court of Appeals and that action of the Court of Appeals was reversed here. Am I correct in my recollection of that?

A I may have been quite wrong, Mr. Justice Stewart, but that was done after the judge acted, rather than on the basis of --

Q It was; it was.

A -- information it was going to act.

Q It was, but he, the judge had indicated his intention of doing this and the Government apparently felt powerless to prevent it, in fact, the representative of the Government seemed tosay the more the District Judge became determined he was going to grant a judgment of acquittal, simply, as I remember, to show his displeasure with the conduct of the Assistant United States Attorney. And then the

And then the First Circuit Court of Appeals by way of mandamus directed, I guess, that judgment to be set aside, and that was reversed here.

A I think the question whether there is jurisdiction to issue mandamus when the judge has indicated his intention, but has not yet issued the order, is a difficult one which has not been decided by this Court. The Second Circuit and the Court of Appeals did entertain and did grant mandamus against Judge Duling in a recent instance, when the Government applied to that court at what amounted to Judge Duling's suggestion, his having written an opinion indicating his intention to enter an order of acquittal unless the Appellate Court moved otherwise. And if I remember correctly the Second Circuit did issue a mandamus and did restrain the judge from --

Q And did we grant certiorari in that case?

A No, sir.

Q I thought we denied it.

Q So, did I.

A I think this Court did deny it recurred, because there was a question, there was an appeal on the merits, subsequently.

Q Mr. Claiborne, do you think this man was put in jeopardy?

A I think he was put in jeopardy. The question of whether that jeopardy was arranged by the occurrence of a mistrial is one way of looking at it; that seems to be one justification for a motion of a new trial, say after a hung jury. But the initial jeopardy washes out in the absence of a verdict.

Q But under 3731 that standard allows an appeal and the Government took the appeal here, the direct appeal, only when he is not put in jeopardy. Now, your confession that he was at some stage, doesn't that bear on whether or not you are properly here on direct appeal?

A I think not, Mr. Justice Brennan. I think that question is resolved by the Tateo case in which this Court had entertained a direct appeal. The Tateo case, Tateo versus the United States is not a mistrial, but a case inwhich a man clearly had been --

Q Did we say he had been, in that case?

A The Court didn't even find a problem with respect to --

Q Well, I know, but Respondent has raised the

question here of whether you are properly here on direct appeal, and it does seem to me that that may be a difficult question if the Government concedes, as I understand your answer to Mr. Justice Black, that at one stage he was put in jeopardy.

A But, Mr. Justice Brennan, we construe 3731 as meaning in jeopardy on the trial from which the offer is sought to be, from which --

Q Well, if he is put in jeopardy he was certainly put in jeopardy on the trial.

A At the second trial he was not in jeopardy. The motion to dismiss was granted before the jury was empaneled and it was at that point that the Government filed the appeal before jeopardy had set in on the second trial. If a man had been convicted 30 years before and pled double jeopardy, the --

Q Well, he did plead double jeopardy in the second trial here -- on the motion; didn't he?

A Yes.

Q And the prosecution was dismissed on the ground that he had been put in jeopardy the first time; is that it?

A That is correct, Your Honor.

Q And your reading of 3731 is that it's the order of dismissal at the second trial; is that it?

A Yes. If I may say that every member of this

Court --

Q Have you any authority for that?

A Well, the Molinski case where the Court was divided on the question of what was the plea involved, with Your Honor writing one opinion and Mr. Justice Stewart writing another; the stricter view taken by Mr. Justice Stewart, gave as example of the kind of plea involved which was directly appealable to this Court; a plea which set up the claim of double jeopardy. That is the classical plea involved. If that were not appealable then no case, under the plea and bar section of 3731 was --

Q Well, I suppose, Mr. Claiborne, if you are right on your jeopardy point, then that decision on the merits also clears up the jurisdictional point.

A I think that's true, Mr. Justice White. I think that's conceded by my opponent. However, I think it really doesn't -- this isn't the case where jurisdiction turns on the merits of jurisdiction, as this Court noted when it did not postpone, a question of jurisdiction exists in either event. Even if you should rule against the Government, there would have been jurisdiction to entertain the appeal because the appeal -- it doesn't matter whether it was three months earlier in the year that the first trial occurred, 30 years, a year or three weeks earlier, this is a wholly separate procedure.

Q You mean we do have jurisdiction to entertain an

appeal, even though he has been put in jeopardy.

A At some previous time in some --

Q Well, your whole point is "has not been put in jeopardy" relates in point of time to the second trial at which the prosecution was dismissed; is that it?

A And so we think this Court has --

Q How can you ever get -- I do not understand that, because how can you ever be put in jeopardy on the second trial and interpose a plea of -- or convict and that's the basis upon which you ask the dismissal of the prosecution.

A Well, it does happen that sometime after the trial has proceeded, a --

Q I know it does, but in the ordinary situation like this, where you are relying on the prior trial as the basis of your motion of, to either acquit or convict, why doesn't the statute refer to "put in jeopardy in the first instance," not the second?

A Well, I can only repeat that this Court has actually entertained such an appeal in such a case as Tateo, where the man had been on trial from --

Q Yes, but you don't know whether -- were we faced with this problem.

A I would say that no objection was raised; I would say further that this Court, and I think all judges have recognized the classical case of an appealable ruling

sustaining a motion involved is a ruling to the effect that the man at some previous time had been in jeopardy and if that were not appealable then they would not be, and certainly any appealable, rulings on motions involved.

Q We never could look at the problem, in any case, then, could we?

Q Well, we might not; it might have to bo to he the Court of Appeals first; that's the problem.

A Well, that is the way --

Q The question is whether we have jurisdiction on direct appeal; that's what the statute raises.

A If it's not appealable to this Court it's not appealable anywhere.

Q Now, may I follow up my first question. Let's assume --

A I'm sorry I interrupted you, Mr. Justice Black.

Q Suppose that the judge, instead of doing what he did, let the Government put on the witnesses, one by one, and when the witnesses got through, he had excluded their testimony and said, "It's no good;" then would that have been jeopardy so as toprevent another trial? And if so, why isn't the effect of what he did the same here?

A I assume, Mr. Justice Black, that your example assumes that the verdict of guilty was then entered by the jury?

Q That what?

A That a veridct of acquittal was then entered by the jury, after the judge had excluded the evidence of the witnesses.

Q Yes. WEll, suppose he hadn't done it; suppose there had been no verdict? Wouldn't that be a form of jeopardy?

A Well, if there had been no verdict, I think we would have the same problem we have here. If there had been a verdict of acquittal then I agree that there could have been no new trial.

Q In former acquittal, but would it not have been in former jeopardy if the judge had heamd all the evidence and then simply not submitted it to the jury and the jury returned no verdict.

A I think not.

Q You don't think --

A Jeopardy would have attached, but would not -- there is a sort of mystique, the jeopardy attaches from the swearing of the first juror, but that effect may not carry over if the expected conclusion of the trial, that is, a verdict does not take place, and that must be the rationale for a hung jury which does allow a retrial.

Q It might not be able to be the form of jeopardy, but it would sound to me like he was in pretty much of jeopardy as the judge, witness by witness he said, "I am not going to

let you put them on."

A I'm not clear, Mr. Justice Black, in your example, what it is that prevented a verdict from being returned. That is the critical thing.

Q I don't know what prevented the verdict, except the judge taking the bit in his own mouth and proceeding to run the trial and just tell the jury there is nothing for them to handle. Suppose he had made that kind of an error here?

A Well, there are many such errors of which the Government has no recourse, and as I say, if that had resulted in a verdict of acquittal that would have been an end of the matter.

Q Suppose they had been no verdict. Does there have to be a verdict of acquittal in order for a man to plead former jeopardy?

A Strictly speaking there must be a verdict of acquittal or conviction --

Q Well, do you mean to say there always must be?

A Well, there are considerations bringing into play the double jeopardy clause which prevents retrial when the Government is responsible for a mistrial and in effect, cheats the defendant of the plea of former jeopardy he would have had upon the acquittal which the Government prevented. And to that extent the double jeopardy clause does prevent

retrial after mistrial in some instances.

MR. CHIEF JUSTICE BURGER: Thank you for your submissions. The case is submitted.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was concluded)