The Burger Court Opinion Writing Database

United States v. Jorn

400 U.S. 470 (January 25, 1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 7, 1970

Re: No. 19 - U. S. v. Jorn

Dear John:

Notwithstanding that your proposed opinion is not in accord with the Conference vote I am prepared to join it. You recall I reserved my final vote because I was strongly for a reversal if any rational basis could be found. You have found a solid basis for reversal. It could be enhanced only by a strong verbal chastisement of the distinguished trial judge.

Regards,

WEB

Mr. Justice Harlan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 10, 1970

Re: No. 19 - U. S. v. Jorn

MEMORANDUM TO THE CONFERENCE:

My note to Justice Harlan of December 7 was one of those memos dashed off at 9:55 (and probably with some interruptions). Hence, it was garbled as to the "reversed" concept. We "reverse" Ritter only in the sense of finding abuse of discretion, but for me I still reluctantly conclude that the defendant cannot be made to bear the burden of even a gross abuse by the trial judge. I will await final action until I see other views before making a final decision. If I stay with an affirmance I will have a few pointed words to add concerning the conduct of the district judge.

Regards,

WEB

TM

SUPREME COURT OF THE UNITED STATES

No. 19.—October Term, 1970

United States, Appellant, *v.* Milton C. Jorn.	On Appeal From the United States District Court for the District of Utah.

[January —, 1971]

Mr. Chief Justice Burger, concurring.

I join in the opinion and judgment of the Court not without some reluctance, however, since the case represents a plain frustration of the right to have this case tried, attributable solely to the conduct of the trial judge. If the accused had brought about the erroneous mistrial ruling we would have a different case, but this record shows nothing to take petitioner's claims outside the classic mold of being twice placed in jeopardy for the same offense.

December 3, 1970

Dear John:

In No. 19 - U. S. v. Jorn, please note that I join your opinion.

W. O. D.

Mr. Justice Harlan

WD
Adm

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Harlan, J.

Circulated: 12-2-70

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 19.—October Term, 1970

United States, Appellant, v. Milton C. Jorn. | On Appeal From the United States District Court for the District of Utah.

[December —, 1970]

Mr. Justice Harlan delivered the opinion of the Court.

The Government directly appeals the order of the United States District Court for the District of Utah dismissing, on the ground of former jeopardy, an information charging the defendant-appellee with willfully assisting in the preparation of fraudulent income tax returns, in violation of 26 U. S. C. § 7206 (2).

Appellee was originally charged in February 1968 with 25 counts of violating § 7206 (2). He was brought to trial before Chief Judge Ritter on August 27, 1968. After the jury was chosen and sworn, 14 of the counts were dismissed on the Government's motion. The trial then commenced, the Government calling as its first witness an Internal Revenue Service agent in order to put in evidence the remaining 11 allegedly fraudulent income tax returns the defendant was charged with helping to prepare. At the trial judge's suggestion, these exhibits were stipulated to and introduced in evidence without objection. The Government's five remaining witnesses were taxpayers whom the defendant allegedly had aided in preparation of these returns.

After the first of these witnesses was called, but prior to the commencement of direct examination, defense counsel suggested that these witnesses be warned of their constitutional rights. The trial court agreed, and pro-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

January 4, 1971

Re: No. 19 - United States v. Jorn

Dear Bill:

First let me note, in response to your letter of December 22, my appreciation of your efforts to reach a common ground in this case.

My difficulty with your position stems from my confusion as to what you mean by the term "acquittal" with regard to the record in this case. By "acquittal," you may mean that the constitutional analysis in parts II and III of my opinion demonstrates that Judge Ritter's mistrial motion must be accorded the same effect as an acquittal, and Judge Ritter's own subsequent action dismissing the information against Jorn on plea of former jeopardy only makes sense if based on a constitutional analysis of the effects that must be accorded his earlier mistake. On this use of "acquittal," I gather the jurisdictional defect you perceive is that of the "put in jeopardy" language of the motion-in-bar provision of 18 U.S.C. §3731. I continue to adhere to my view of this language, as expressed in part I of my Jorn opinion and Part III. C. of my Sisson opinion.

However, since you agree that at the very least we have jurisdiction to decide jurisdiction, it seems to me that as part of the very process of deciding our jurisdiction you could join parts II and III of Jorn. A notation along the following lines might, on the above assumptions, resolve the problem:

> MR. JUSTICE BRENNAN concurs in parts II and III of the Court's opinion, but for the reasons expressed therein concludes that the Court lacks jurisdiction under 18 U.S.C. §3731. Therefore, he would dismiss the appeal for want of jurisdiction.

However, you may be using the term "acquittal" in the sense it was used in part II. C. of the opinion in Sisson; i. e., Judge Ritter's action here, though expressly contemplating re-prosecution of the defendant, somehow went sufficiently to the facts in evidence to constitute an adjudication on the merits. In response, I offer the following points surrounding Judge Ritter's actions at the first trial: (1) the record affirmatively shows that Judge Ritter acted in order to give the witnesses time to consult attorneys, see R. 43-46. (2) More importantly, the record is devoid of the slightest showing of any reliance by Judge Ritter on facts relating to the general issue of the case, thereby surely distinguishing this case from part II. C. of Sisson, and, I should think, under the very reasoning of Sisson warranting the conclusion that Ritter's action was not an "acquittal" in this sense. (3) Ritter himself clearly considered his original action a mistrial declaration. See Record, 46, and Brother Stewart's dissent at note 1.

Further, Ritter's subsequent action in dismissing the information was based solely on the view that constitutional analysis required the plea of former jeopardy be sustained. Here I refer you to (1) P. 60 of the record, where Ritter's "Order Dismissing Information" is simply put on the ground of defendant's former jeopardy plea, with no further explanation, and (2) pp. 55-59 of the record, which contain all the material on the post-mistrial motion proceedings below and which demonstrate that the parties below put the question to Ritter exclusively in terms of our Perez-Wade-Hunter line of cases governing mistrial discretion.

In sum, as far as I can tell, the record is utterly devoid of the slightest indication that Ritter ever acted on the basis of facts in evidence on the general issue or ever subsequently interpreted his actions in those terms.

Finally, I submit for your consideration the following as an alternative to what I have suggested above:

MR. JUSTICE BRENNAN believes that the Court lacks jurisdiction over this appeal under 18 U.S.C. § 3731.

because the action amounted to an acquittal + therefore there was no discretion left to the trial judge to [illegible] appellee again in jeopardy

However, in view of a decision by a majority of the Court to reach the merits, he joins in parts II and III of the opinion and the judgment of the Court.

Sincerely,

J. M. H.

Mr. Justice Brennan

CC: Mr. Justice Black

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Harlan, J.

Circulated: JAN 7 1971

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 19.—October Term, 1970

United States, Appellant, v. Milton C. Jorn.	On Appeal From the United States District Court for the District of Utah.

[January —, 1971]

Mr. Justice Harlan delivered the opinion of the Court.

The Government directly appeals the order of the United States District Court for the District of Utah dismissing, on the ground of former jeopardy, an information charging the defendant-appellee with willfully assisting in the preparation of fraudulent income tax returns, in violation of 26 U. S. C. § 7206 (2).

Appellee was originally charged in February 1968 with 25 counts of violating § 7206 (2). He was brought to trial before Chief Judge Ritter on August 27, 1968. After the jury was chosen and sworn, 14 of the counts were dismissed on the Government's motion. The trial then commenced, the Government calling as its first witness an Internal Revenue Service agent in order to put in evidence the remaining 11 allegedly fraudulent income tax returns the defendant was charged with helping to prepare. At the trial judge's suggestion, these exhibits were stipulated to and introduced in evidence without objection. The Government's five remaining witnesses were taxpayers whom the defendant allegedly had aided in preparation of these returns.

After the first of these witnesses was called, but prior to the commencement of direct examination, defense counsel suggested that these witnesses be warned of their constitutional rights. The trial court agreed, and pro-

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 19.—October Term, 1970

United States, Appellant, *v.* Milton C. Jorn.	On Appeal From the United States District Court for the District of Utah.

[January —, 1971]

Mr. Justice Harlan delivered the judgment of the Court in an opinion joined by The Chief Justice, Mr. Justice Douglas, and Mr. Justice Marshall.

The Government directly appeals the order of the United States District Court for the District of Utah dismissing, on the ground of former jeopardy, an information charging the defendant-appellee with willfully assisting in the preparation of fraudulent income tax returns, in violation of 26 U. S. C. § 7206 (2).

Appellee was originally charged in February 1968 with 25 counts of violating § 7206 (2). He was brought to trial before Chief Judge Ritter on August 27, 1968. After the jury was chosen and sworn, 14 of the counts were dismissed on the Government's motion. The trial then commenced, the Government calling as its first witness an Internal Revenue Service agent in order to put in evidence the remaining 11 allegedly fraudulent income tax returns the defendant was charged with helping to prepare. At the trial judge's suggestion, these exhibits were stipulated to and introduced in evidence without objection. The Government's five remaining witnesses were taxpayers whom the defendant allegedly had aided in preparation of these returns.

After the first of these witnesses was called, but prior to the commencement of direct examination, defense

stylistic changes

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

From: Harlan, J.

Circulated: _____

Recirculated: JAN 22 1971

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* JORN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

No. 19. Argued January 12, 1971—Decided , 1971

Appellee was tried in Federal District Court on an information charging him with willfully assisting in the preparation of fraudulent income tax returns. Following the impanelling of the jury, the prosecutor called to the stand a taxpayer whom appellee allegedly had aided in preparing his return. At defense counsel's suggestion, the judge warned the witness of his constitutional rights. The witness expressed his willingness to testify, stating that he had been warned of his rights when first contacted by the Internal Revenue Service (IRS). The judge refused to permit him to testify until he had consulted an attorney, indicating that he did not believe the witness had been warned by the IRS. Although the prosecutor advised the judge that the remaining witnesses had been warned of their rights by the IRS upon initial contact, the judge stated that the warnings were probably inadequate. Thereupon he discharged the jury and aborted the trial so that the witnesses could consult with attorneys. The case was set for retrial before another jury, but on appellee's pretrial motion the judge dismissed the information on the ground of former jeopardy. The Government filed a direct appeal to this Court. *Held:* The judgment is affirmed. Pp. 2–16.

Affirmed.

MR. JUSTICE HARLAN, joined by THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE MARSHALL, concluded that:

1. The sustaining of a motion in bar based on a plea of former jeopardy is appealable by the Government, as long as the motion was sustained, as here, prior to the impanelling of the jury in the subsequent proceeding at which the motion was made. Cf. *United States* v. *Sisson*, 397 U. S. 267. Pp. 2–7.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 8, 1970

RE: No. 19 - United States v. Jorn

Dear John:

Would you please add at the foot of your opinion:

> Mr. Justice Black and Mr. Justice Brennan would affirm, being of the view that in the circumstances of this case the action of the trial judge on August 27, 1968 was in fact an acquittal of appellee so that his re-prosecution would violate the Double Jeopardy Clause of the Fifth Amendment.

Sincerely,

Mr. Justice Harlan

WB

December 22, 1970

RE: No. 19 - United States v. Jorn

Dear John:

I've restudied Jorn and I have real problems. Basically they arise from the fact that I think Ritter's dismissal of the information simply formalized the actual effect of his action on August 27, 1968, which, in my view, amounted to an acquittal of appellee.

The history of the 1907 law is ambiguous on many things, but one thing is crystal clear: the Senate was firm that the Government should have no right of appeal from an acquittal to this Court or to any other court. Thus, I can't see how there is any question before us under the motion in bar provisions of 18 U.S.C. § 3731. Although we, of course, have jurisdiction to decide our jurisdiction, my review suggests that the proper disposition of the Government's appeal is dismissal for want of jurisdiction. I think your analysis in Parts II and III of your opinion in effect accept Ritter's conclusion that his mistrial actually amounted to an acquittal, and, upon that understanding, I might be able to join those parts. My dilemma is the appealability issue. I obscured it in my proposed note to be added to the foot of your opinion which, you will remember, joins a judgment of affirmance. Have you any suggestions that would cure my dilemma?

Sincerely,

Mr. Justice Harlan

cc: Mr. Justice Black

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 6, 1971

RE: No. 19 - United States v. Jorn

Dear John:

I've tried very hard and so too has Hugo yesterday and today, but we finally agreed that the best we can do is join your judgment. The basic difficulty for me has been that I read the legislative history of the 1907 Act as denying the Government any appeal to this Court not only where the trial judge expressly says he directs an acquittal but also in any case where his actions present a substantial question whether they amount to an acquittal. The appraisal Hugo and I make of Judge Ritter's actions is that they did amount to an acquittal and left him with no discretion to put the appellee again in jeopardy.

In sum, we join in asking you to add at the foot of your opinion the following:

> "Mr. Justice Black and Mr. Justice Brennan believe that the Court lacks jurisdiction over this appeal under 18 U.S.C. § 3731 because the action of the trial judge amounted to an acquittal of appellee and therefore there was no discretion left to the trial judge to put appellee again in jeopardy. However, in view of a decision by a majority of the Court to reach the merits, they join the judgment of the Court."

Sincerely,

Bill

Mr. Justice Harlan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 4, 1970

MEMORANDUM TO THE CONFERENCE

No. 19 - United States v. Jorn

I have in mind preparing a dissenting opinion in this case in due course.

P.S.

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: DEC 29 1970

Recirculated: _____

No. 19.—October Term, 1970

United States, Appellant, v. Milton C. Jorn.	On Appeal From the United States District Court for the District of Utah.

[January —, 1971]

Mr. Justice Stewart, dissenting.

The Court today holds that whenever a trial judge in a criminal case has "abused his discretion" in declaring a mistrial on his own motion, the constitutional guaranty against double jeopardy categorically operates to forestall a trial of the case on the merits. I cannot agree.

The District Judge's decision to declare a mistrial in this case was based on his belief that the prosecution witnesses, who were to testify that they had submitted false income tax returns prepared by the defendant, had not been adequately warned that they might themselves incur criminal liability by their testimony. The judge apparently intended simply to postpone the case so that the witnesses could be fully apprised of their constitutional rights,[1] and a second trial was scheduled before a new jury. However, before the new trial date defendant filed a motion to dismiss the information on the ground of former jeopardy, and the judge granted the motion. The Government appealed directly to this Court.[2]

[1] The trial judge stated:

"So this case is vacated, 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 will permit them to testify."

[2] I agree that the Court has jurisdiction of this appeal, for the reasons set out in Part I of Mr. Justice Harlan's opinion.

1, 2, 3, 5, 6

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Stewart, J.

Circulated:

Recirculated: JAN 20 1971

SUPREME COURT OF THE UNITED STATES

No. 19.—October Term, 1970

United States, Appellant, v. Milton C. Jorn. | On Appeal From the United States District Court for the District of Utah.

[January —, 1971]

Mr. Justice Stewart with whom Mr. Justice White and Mr. Justice Blackmun join, dissenting.

The plurality opinion today says that whenever a trial judge in a criminal case has "abused his discretion" in declaring a mistrial on his own motion, the constitutional guaranty against double jeopardy categorically operates to forestall a trial of the case on the merits. I cannot agree.

The District Judge's decision to declare a mistrial in this case was based on his belief that the prosecution witnesses, who were to testify that they had submitted false income tax returns prepared by the defendant, had not been adequately warned that they might themselves incur criminal liability by their testimony. The judge apparently intended simply to postpone the case so that the witnesses could be fully apprised of their constitutional rights,[1] and a second trial was scheduled before a new jury. However, before the new trial date defendant filed a motion to dismiss the information on the ground of former jeopardy, and the judge granted the motion. The Government appealed directly to this Court.[2]

[1] The trial judge stated:

"So this case is vacated, 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 will permit them to testify."

[2] I agree that the Court has jurisdiction of this appeal, for the reasons set out in Part I of the plurality opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 4, 1971

Re: No. 19 - United States v. Jorn

Dear Potter:

Please join me in your dissenting opinion in this case.

B.R.W.

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 11, 1971

Re: No. 19 - United States v. Jorn

Dear John:

Please join me.

Sincerely,

T.M.

Mr. Justice Harlan

cc: The Conference

January 18, 1971

Re: No. 19 - U. S. v. Jorn

Dear Potter:

Please join me in your dissent in this case.

Sincerely,

H. A. B.

Mr. Justice Stewart

cc: The Conference

file copy

January 18, 1971

Re: No. 19 - U. S. v. Jorn

Dear Potter:

Please join me in your dissent in this case.

Sincerely,

H. A. B.

Mr. Justice Stewart

cc: The Conference

Dear John:

I regret being so long delayed in this. It was a close decision for me and, in addition, I wanted to see what the Chief was going to say in his separate opinion.