The Burger Court Opinion Writing Database

Sanabria v. United States

437 U.S. 54 (1978)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

December 28, 1977

Dear Thurgood:

Re: 76-1040 Sanabria v. United States

I join.

Regards,

WEB

Mr. Justice Marshall

cc: The Conference

J

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

CHAMBERS OF
THE CHIEF JUSTICE

January 25, 1978

Re: 76-1040 - Sanabria v. United States

Dear Thurgood:

Lewis Powell's memo of January 19, 1978 persuades me that the safer course is to await the upcoming double jeopardy case and those pending here now. I hope we are going to clarify this area, and seeing all these opinions together gives a better of chance of clarifying the subject.

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

March 2, 1978

Dear Thurgood:

Re: 76-1040 Sanabria v. U.S.

I am still of the view that this case should await the other cases in the same general area.

Conceivably the results in the other cases might lead me to reconsider my position, but I want to be sure we clarify some of the confusion that has developed.

Regards,

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 28, 1977

RE: No. 76-1040 Sanabria v. United States

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 19, 1978

Re: No. 76-1040, Sanabria v. United States

Dear Thurgood,

The additions you suggest are fine with me.

Sincerely,

Bill

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 21, 1977

Re: No. 76-1040, Sanabria v. United States

Dear Thurgood,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 19, 1978

No. 76-1040, Sanabria v. United States

Dear Thurgood,

Your proposed changes are all acceptable to me.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 27, 1977

Re: 76-1040 - Sanabria v. United States

Dear Thurgood:

I shall await the writings in dissent in this case.

Sincerely yours,

Byron

Mr. Justice Marshall

Copies to Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 25, 1978

Re: 76-1040 Sanabria v. U.S.

Dear Thurgood,

I am not at rest in this case, but I promise not to hold you up if the case is to come down the week of February 20.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 13, 1978

Re: 76-1040 - Sanabria v. U.S.

Dear Thurgood,

I join parts I, IIA and III of your circulating opinion.

Sincerely,

Byron

Mr. Justice Marshall
Copies to the Conference

Dec. 20, 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1040

Thomas Sanabria, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January —, 1978]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue presented is whether the United States may appeal in a criminal case from a midtrial ruling resulting in the exclusion of certain evidence and from a subsequently entered judgment of acquittal. Resolution of this issue depends on the application of the Double Jeopardy Clause of the Fifth Amendment to the somewhat unusual facts of this case.

I

Petitioner was indicted, along with several others, for violating 18 U. S. C. § 1955, which makes it a federal offense to conduct, finance, manage, supervise, direct, or own all or part of an "illegal gambling business." *Id.*, § 1955 (a). Such a business is defined as one that is conducted by five or more persons in violation of the law of the place where the business is located and that operates for at least 30 days or earns at least $2,000 in any one day. *Id.*, § 1955 (b).[1] The single-count

[1] 18 U. S. C. § 1955 provides in relevant part:

"Prohibition of illegal gambling businesses.

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 18, 1978

Re: No. 76-1040, Sanabria v. United States

Dear Chief, Bill, Potter, and John,

In response to Bill Rehnquist's dissent, I would like to incorporate the enclosed as additions to the footnotes.

Please let me have your views.

Sincerely,

T.M.

The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 23, 1978

Re: No. 76-1040, Sanabria v. United States

Dear Lewis,

I am glad you agree that under Martin Linen and Lee the district court's order here was an acquittal barring further prosecution. These cases having been decided only last Term, and in each instance by substantial majorities, I would have hoped they would survive at least a few years.

For several reasons I am disinclined to agree with your suggestion that the Conference hold up Sanabria for Scott. Although both involve the Double Jeopardy consequences of a midtrial ruling on defense motions, they are substantially dissimilar in one key respect. In Sanabria, the ruling was in form and substance an acquittal and, for that reason, did not contemplate further prosecution. Scott, by contrast,

> "does not involve an acquittal [and] its proper disposition is [therefore] unaffected by this Court's recent decision in United States v. Martin Linen Supply Co...." Government's Petition for Certiorari in United States v. Scott, No. 76-1382, at 6 n. 2.

Although the dismissal for pre-indictment delay in Scott obviously did not contemplate further prosecution, the order was by no means an acquittal in form or in traditional understanding: it was not a "resolution ... of some or all of the factual elements of the offense charged." Martin Linen, 430 U.S. at 571.

The Government's brief in Scott, moreover, does not go nearly as far as would Bill Rehnquist; its argument there is that

> "The Double Jeopardy Clause does not forbid a second trial when the first has been terminated at the defendant's request on grounds not amounting to an acquittal. The Double Jeopardy Clause erects an absolute bar to a second prosecution only if the first ends in acquittal." Gov't Brief at 9.

It is therefore difficult to see how, given the current state of the law, resolution of Scott one way or the other will affect the reasoning or result in Sanabria.

Further, while I intimate no view on the ultimate merits of Scott, I do not think that the Court's opinion in Sanabria dictates a result in Scott. The Sanabria opinion does not enunciate any novel principle of Double Jeopardy law, but rather applies what I had thought were now settled principles to an unusual and complex factual setting. I think the opinion is quite narrow (as Harry observed in his dissent), with analysis of why there was a true acquittal of the single offense carefully pegged to the particular statute and these particular facts.

As to Bill Rehnquist's proposal to abandon not only Martin Linen and Lee, but also the reasoning and holdings of Wilson and Jenkins (under any of which this case must be reversed), it certainly seems somewhat injudicious to do so where briefing and argument here flowed on both sides from the assumption that Martin Linen and Lee defined the relevant principles of decision. Although we are not bound by stare decisis, it represents a wise policy and cautions at the least that departures from recent decisions be taken incrementally, from one case to the next, and not at a fell swoop. Moreover, even if the Court were inclined to undertake such a venture, this is not the case in which to do so. The judgment of acquittal for insufficient evidence was improper only because the earlier ruling excluding evidence was erroneous. But Section 3731 seems expressly to preclude review of such midtrial evidentiary rulings, and thus even under Bill's analysis the judgment of acquittal would have to remain intact.

Because the issues in Sanabria and Scott are distinct and the reasoning of Sanabria quite narrow, the interests of intra-Term consistency do not require that Sanabria be held up until Scott is ready to issue. If the Conference contemplates going as far as Bill proposes, however, and for that reason decides to hold up Sanabria, I think it might be necessary to hold up Arizona v. Washington as well. All the above aside, I am quite concerned at the thought of adding this burden to the always frantic end of the Term.

To delay Sanabria for several months could lead to another newspaper report about "Justice Marshall holding up the work of the Court."

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Changes noted at pp. 4, 5, 6, 22

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: _____

Recirculated: 3/30/78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1040

Thomas Sanabria, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January —, 1978]

MR. JUSTICE MARSHALL delivered the opinion of the Court.*

The issue presented is whether the United States may appeal in a criminal case from a midtrial ruling resulting in the exclusion of certain evidence and from a subsequently entered judgment of acquittal. Resolution of this issue depends on the application of the Double Jeopardy Clause of the Fifth Amendment to the somewhat unusual facts of this case.

I

Petitioner was indicted, along with several others, for violating 18 U. S. C. § 1955, which makes it a federal offense to conduct, finance, manage, supervise, direct, or own all or part of an "illegal gambling business." *Id.*, § 1955 (a). Such a business is defined as one that is conducted by five or more persons in violation of the law of the place where the business is located and that operates for at least 30 days or earns at least $2,000 in any one day. *Id.*, § 1955 (b).[1] The single-count

*MR. JUSTICE WHITE joins Parts I, II-A, and III of this opinion.

[1] 18 U. S. C. § 1955 provides in relevant part:

"Prohibition of illegal gambling businesses.

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(I) 'illegal gambling business' means a gambling business which—

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 22, 1978

Re: No. 76-1040 -- Sanabria v. United States

Dear Bill:

In response to your changes, I am sending to the printer the following change in my draft opinion in Sanabria:

> Delete from Footnote 6 (pp. 4-5) all of the first paragraph, and the second paragraph up to the sentence beginning "But petitioner has consistently maintained." In addition, delete from this sentence the first word, "But."

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

P. 4

23 FEB 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1040

Thomas Sanabria, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January —, 1978]

MR. JUSTICE MARSHALL delivered the opinion of the Court.*

The issue presented is whether the United States may appeal in a criminal case from a midtrial ruling resulting in the exclusion of certain evidence and from a subsequently entered judgment of acquittal. Resolution of this issue depends on the application of the Double Jeopardy Clause of the Fifth Amendment to the somewhat unusual facts of this case.

I

Petitioner was indicted, along with several others, for violating 18 U. S. C. § 1955, which makes it a federal offense to conduct, finance, manage, supervise, direct, or own all or part of an "illegal gambling business." *Id.*, § 1955 (a). Such a business is defined as one that is conducted by five or more persons in violation of the law of the place where the business is located and that operates for at least 30 days or earns at least $2,000 in any one day. *Id.*, § 1955 (b).[1] The single-count

*MR. JUSTICE WHITE joins Parts I, II-A, and III of this opinion.

[1] 18 U. S. C. § 1955 provides in relevant part:

"Prohibition of illegal gambling businesses.

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

pp. 8, 20, 21, 23

22 MAR 1978

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1040

Thomas Sanabria, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January —, 1978]

MR. JUSTICE MARSHALL delivered the opinion of the Court.*

The issue presented is whether the United States may appeal in a criminal case from a midtrial ruling resulting in the exclusion of certain evidence and from a subsequently entered judgment of acquittal. Resolution of this issue depends on the application of the Double Jeopardy Clause of the Fifth Amendment to the somewhat unusual facts of this case.

I

Petitioner was indicted, along with several others, for violating 18 U. S. C. § 1955, which makes it a federal offense to conduct, finance, manage, supervise, direct, or own all or part of an "illegal gambling business." *Id.*, § 1955 (a). Such a business is defined as one that is conducted by five or more persons in violation of the law of the place where the business is located and that operates for at least 30 days or earns at least $2,000 in any one day. *Id.*, § 1955 (b).[1] The single-count

*MR. JUSTICE WHITE joins Parts I, II-A, and III of this opinion.

[1] 18 U. S. C. § 1955 provides in relevant part:

"Prohibition of illegal gambling businesses.

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 30, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1040 - Sanabria v. United States

WHR having withdrawn his dissent, I have sent to the printer changes in my opinion deleting the second paragraph of footnote 9 and all of footnote 35.

T.M.

√— Deletions pp. 5, 20

30 MAR 1978

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1040

Thomas Sanabria, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April —, 1978]

MR. JUSTICE MARSHALL delivered the opinion of the Court.*

The issue presented is whether the United States may appeal in a criminal case from a midtrial ruling resulting in the exclusion of certain evidence and from a subsequently entered judgment of acquittal. Resolution of this issue depends on the application of the Double Jeopardy Clause of the Fifth Amendment to the somewhat unusual facts of this case.

I

Petitioner was indicted, along with several others, for violating 18 U. S. C. § 1955, which makes it a federal offense to conduct, finance, manage, supervise, direct, or own all or part of an "illegal gambling business." *Id.*, § 1955 (a). Such a business is defined as one that is conducted by five or more persons in violation of the law of the place where the business is located and that operates for at least 30 days or earns at least $2,000 in any one day. *Id.*, § 1955 (b).[1] The single-count

*MR. JUSTICE WHITE joins Parts I, II-A, and III of this opinion.

[1] 18 U. S. C. § 1955 provides in relevant part:

"Prohibition of illegal gambling businesses.

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

HAB

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 19, 1978

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 76-1040, Sanabria v. United State

1. No. 76-1543, United States v. Grasso. Since Bill Rehnquist has summarized the facts, I will not repeat them. However, I cannot agree with his conclusion that it was only respondent's request for a dismissal that precipitated the mistrial, or that we should treat the facts of this case as falling within the Lee-Scott category of defendants who procu a termination of their trials short of verdict on grounds not relating to guilt or innocence.

Both the majority and dissenting opinions below treated t mistrial as one declared "sua sponte" by the trial judge. While respondent, at the time of the court's ruling, did not object, he indicated that the mistrial was not his idea, sinc he wanted an acquittal. Moreover, the trial court made clear that it was not granting the mistrial on the ground on which respondent had earlier sought a dismissal -- prosecutorial misconduct -- but rather because it beleved the issues at tri would become confused, with too much attention focusing on th witness' veracity. Thus I think the court below was correct view this case as one involving a sua sponte declaration of mistrial by a judge, a situation governed by rules that have not been disturbed this Term.

The issue that divided the panel below -- and that the Government seems to present in its petition -- is whether the respondent can be said to have impliedly consented to the mistrial through his silence and earlier motion to dismiss. Even the dissent below did not disagree that the reasons give by the trial court do not constitute a "manifest necessity" justifying a mistrial; a critical issue in the case was necessarily going to be the credibility of the Government witnesses testifying to likely sources of unreported income. Because the mistrial was declared sua sponte, it does not seem to me that the Court's decision in No. 76-1168, Arizona v. Washington, undercuts the majority's analysis of the lack of manifest necessity here; without any argument or consideratio of the mistrial alternative by counsel, the court simply declared one. Since the order entered was not an acquittal, I do not believe Sanabria has terribly much bearing on the case, and because it was a sua sponte declaration of a mistrial, I do

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 1/5/78

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1040

Thomas Sanabria, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January —, 1978]

MR. JUSTICE BLACKMUN, dissenting.

This case, of course, is an odd and an unusual one, factually and procedurally. Because it is, the case will afford little guidance as precedent in the Court's continuing struggle to create order and understanding out of the confusion of the lengthening list of its decisions on the Double Jeopardy Clause. I would have thought, however, that the principles enunciated late last Term in *Lee* v. *United States*, 432 U. S. 23 (1977)—which I deem a more difficult case for the Government than this one—had application to the facts here. I do not share the Court's distinction of *Lee, ante*, p. 20, and I do not agree that *Lee* is "manifestly inapposite." Here, as in *Lee*, there is misdescription by the trial court of the nature of its order, and, as in *Lee*, the defendant-petitioner's maneuvers should result in a surrender of his right to receive a verdict by the jury that had been drawn. Further, it appears to me that petitioner has succeeded in having the indictment read one way in the trial court, and another way here, as the situation required.

I would affirm the judgment of the Court of Appeals.

~~76-1057~~
76-1040

Supreme Court of the United States

Memorandum

1-19

----------, 19 28

WJB

Do you mind if I do
not join you in Sanabria?
I suspect you will prove to
be correct, but it goes a little
farther than I am now
prepared to go.

I fully understand your
points. My dissent goes further
than present case because —
it is the result of a desperate
search for a rule decidendi

(over)

for double jeopardy that does not to have all the substantive of the forms of action

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 28, 1977

No. 76-1040 Sanabria v. United States

Dear Thurgood:

Although I voted "the other way" at Conference, you have written a persuasive opinion.

I now am not inclined to write a dissent. If a dissent is to be circulated by one of our Brothers, I will await it before coming to rest.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Confernce

January 12, 1978

No. 76-1040 Sanabria v. United States

Dear Thurgood:

Please join me.

Sincerely,

Mr. Justice Marshall

lfp/ss

cc: The Confernce

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 19, 1978

No. 76-1040 Sanabria v. U.S.

Dear Thurgood:

In light of Bill Rehnquist's dissent, which offers some promise of resolving the confusion (to which I have contributed), and limiting the incentive for technical maneuvering on the part of defense counsel in this area, I would prefer that we consider this case together with No. 76-1382, United States v. Scott, where the government is advancing an approach quite similar to Bill's in Sanabria. I am told that Scott is tentatively scheduled for the February argument period.

I agree with you that under the existing decisions, notably United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), and Lee v. United States, 432 U.S. 23 (1977), the District Court's order in this case constitutes an "acquittal" barring reprosecution for the same offense. Bill's dissent, on the other hand, suggests a new approach to double jeopardy law. "[W]here a defendant seeks to withdraw his case from the trier of fact by presenting a question of law, not of fact, to the trial judge under Rule 29, I would conclude that he may always be retried where an appellate court decides that the motion was erroneously granted." Dissent, at 7.

While I might not accept the full breadth of this approach, it would permit the Court to take a realistic view of what took place in Sanabria's case. At the urging of Sanabria's counsel, the District Court excluded the evidence of numbers activity because of a concededly erroneous reading of the indictment. The court then felt compelled to grant an acquittal because there was no evidence of Sanabria's participation in horse-betting activity. In realistic terms, and as the trial judge himself made clear in passing on the Government's motion for reconsideration, the acquittal stemmed from the trial judge's construction of the indictment, and not from any assessment of the weight of the Government's case against

the defendant. Although Martin Linen and Lee support your result, I doubt that we further any important policy of the Double Jeopardy Clause in these circumstances.

In Scott, the Government seeks a determination of the applicability of the Double Jeopardy Clause to the situation where a midtrial dismissal is based on a ground which contemplates an end to all prosecution for the offense charged, but which does not rest on a determination of guilt or innocence. As I read it, the Government's position in Scott embodies an analysis that corresponds to the approach taken in Bill's dissent. It would require, however, a reexamination of our decisions in Martin Linen and Lee as well as United States v. Jenkins, 420 U.S. 358 (1975). In sum, I would prefer to reserve our final decision of Sanabria until after we have had an opportunity to decide whether to accept the government's invitation to reformulate double jeopardy principles in Scott.

I apologize for not having focused on this possibility earlier. Bill Rehnquist's dissent (that I was awaiting) brought it to my attention, and I mentioned it briefly at last Friday's Conference.

If the Conference prefers to go ahead with Sanabria (which I would quite understand), I will join only in the judgment, as this may give me greater flexibility in the future.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 30, 1978

No. 76-1040 Sanabria v. United States

Dear Thurgood:

I have wanted until the circulation of Scott to decide whether I could join your Sanabria opinion, in addition to joining the judgment.

Scott has now been circulated, and you have deleted the references to Jenkins. There remains one sentence on page 22 that still troubles me. I think the sentence is not at all essential to the flow of your opinion.

Would you consider omitting the sentence? There is some tension between this sentence and the opinion in Scott.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 24, 1978

No. 76-1040 Sanabria v. United States

Dear Thurgood:

Please join me.

Sincerely,

L. Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 20, 1977

Re: No. 76-1040 - Sanabria v. United States

Dear Thurgood:

As I mentioned at the Conference discussion of Green v. Massey, No. 76-6617, and Burks v. United States, No. 76-6528, I had tentatively planned to write a dissenting opinion which would cover both those cases and Sanabria. My Conference notes show that of the three dissenters in Sanabria, I am the junior, and both because of that fact and because I do not want to hold up the handing down of your opinion in Sanabria any longer than is necessary, it may be that if either Harry or Lewis write in that case I will simply join them and save my dissent for Green and Burks, where I was the lone dissenter. I will let you know definitely as soon as I can.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 5, 1978

Re: No. 76-1040 - Sanabria v. United States

Dear Harry:

Please join me in your dissent in this case. I anticipate circulating a separate dissent of my own within the next couple of days.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: JAN 9 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1040

Thomas Sanabria, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January —, 1978]

MR. JUSTICE REHNQUIST, dissenting.

Today's decision of the Court further confounds the already confused state of double jeopardy law. By its uncritical reliance on the proposition that "'[a] verdict of acquittal . . . [may] not be reviewed . . . without putting [the defendant] twice in jeopardy, and thereby violating the Constitution,'" *ante*, at 8–9, quoting *United States* v. *Ball*, 163 U. S. 662, 671 (1896), the Court allows the substantive rights of criminal defendants and the general public to turn on the label applied by a district court to a concededly erroneous ruling on a question of law. Only last Term, where a district court faced with virtually identical circumstances dismissed the indictment, we concluded that the Double Jeopardy Clause of the Fifth Amendment did not bar retrial, *Lee* v. *United States*, 45 U. S. L. W. 4661 (1977). As my Brother BLACKMUN indicates in his dissent, which I join, the contrary result reached here cannot be squared with this Court's pronouncement in *Serfass* v. *United States*, 420 U. S. 377, 392 (1975), that "[t]he word [acquittal] has no talismanic quality for purposes of the Double Jeopardy Clause."

The result is all the more regrettable because it advances none of the interests protected by the Double Jeopardy Clause. As the Court has previously explained:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be

~~76-1057~~
76-1040

Supreme Court of the United States
Memorandum

1-10, 1978

WHR

Do you mind if I do not join you in Santa Clara? I suspect you will prove to be correct, but it goes a little farther than I am now prepared to go.

I fully understand your position. My dissent goes further than present case law allows — it is the result of a desperate search for a ratio decidendi

(over)

for double jeopardy that doesn't
turn out to have all the
substantive of the forms of
action

J —

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 9, 1978

Re: No. 76-1040 - Sanabria v. United States

Dear Thurgood:

I have been considering possible responses to your proposed changes in your opinion for the Court in this case, because like Byron I have no desire to hold up its coming down if the Conference is so disposed at its next sitting.

My difficulty is with your proposed changes, which you submitted to the Chief, Bill, Potter, and John; the latter three have, as I understand it, expressed their agreement with them, but the Chief has not, and they have not yet been actually incorporated into your opinion. If your actual opinion adopts the construction of counsel's concession in revised footnote 5A, I plan to eliminate my reference to it, although I may refer to it elsewhere as an admission of the "specious" nature of much of his conduct during the trial. The point is tangential to my main argument, and can be dropped, but I do not wish to drop it unless the Court takes issue with it.

I do not anticipate any other changes, unless you have further revisions in mind. As soon as I understand the present posture of the case, I will submit to you and the other

members of the Conference Xerox drafts of any proposed changes in my dissent so that I will not be in the position of holding up the opinion.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 21, 1978

Re: No. 76-1040 - Sanabria v. United States

Dear Thurgood:

I am sending to the printer the following changes to my draft dissent in this case.

Pages 3-4: Remove language in Part I just before the quotation beginning "As petitioner's counsel candidly described his own conduct . . ." through the end of page 3 and the two top lines of page 4. Substitute instead the following:

> "It was petitioner who raised an objection to this perfectly adequate indictment. It was petitioner who instigated the exclusion of the numbers evidence, which the Court, ante, at 13, n. 21, concedes to have been erroneous, even on petitioner's reading of the indictment. Finally, it was petitioner who freely sought to withdraw his case from the trier of fact by his motion to acquit under Rule 29."

Page 14: Remove the last sentence, beginning "Because I believe that the granting of a Rule 29 motion . . ." and substitute therefor the following:

> "I would not consider here whether this record supports the granting of the Rule 29 motion,

nor would I determine whether the concomitant decision to exclude the evidence may be appealed under 18 U.S.C. § 3731. The Court of Appeals is better situated to evaluate this record in the first instance. Accordingly, I would vacate the judgment, and remand the cause for further proceedings consistent with this opinion."

Sincerely,

Mr. Justice Marshall

Copies to the Conference

Pp 3, 14

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnq

2nd DRAFT

Circulated: _____

Recirculated: FEB 22 1978

SUPREME COURT OF THE UNITED STATES

No. 76-1040

Thomas Sanabria, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January —, 1978]

MR. JUSTICE REHNQUIST, dissenting.

Today's decision of the Court further confounds the already confused state of double jeopardy law. By its uncritical reliance on the proposition that "'[a] verdict of acquittal . . . [may] not be reviewed . . . without putting [the defendant] twice in jeopardy, and thereby violating the Constitution,'" *ante*, at 8–9, quoting *United States* v. *Ball*, 163 U. S. 662, 671 (1896), the Court allows the substantive rights of criminal defendants and the general public to turn on the label applied by a district court to a concededly erroneous ruling on a question of law. Only last Term, where a district court faced with virtually identical circumstances dismissed the indictment, we concluded that the Double Jeopardy Clause of the Fifth Amendment did not bar retrial. *Lee* v. *United States*, 432 U. S. 23 (1977), as my Brother BLACKMUN indicates in his dissent, which I join. The contrary result reached here cannot be squared with this Court's pronouncement in *Serfass* v. *United States*, 420 U. S. 377, 392 (1975), that "[t]he word [acquittal] has no talismanic quality for purposes of the Double Jeopardy Clause."

The result is all the more regrettable because it advances none of the interests protected by the Double Jeopardy Clause. As the Court has previously explained:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 15, 1978

Re: No. 76-1382 - United States v. Scott; and
No. 76-1040 - Sanabria v. United States

Dear Thurgood:

As you know, the Chief has assigned to me the preparation of the proposed opinion for the Court in Scott, and I propose to write it along the lines of the Conference discussion which, in turn, I thought followed Lewis' letter to the Chief Justice of March 2nd. In effect, my opinion will embrace Martin Linen, but overrule Jenkins. I agree with the comments of both Lewis and Byron in various letters to you about Sanabria that we should not hold up an opinion in which you have a Court without some identifiable reason for doing so; but the fact of the matter is that if Part III of your opinion, which relies on Jenkins, continues to command the adherence of a Court, I obviously will not be able to get a majority for my proposed

opinion in Scott. By the same token, if I swear fealty to Martin Linen in my draft in Scott, I will have to pull in my horns some in my dissent in Sanabria; indeed, if you were to take out Part III (which I cheerfully concede I have no standing to ask you to do, since you have a Court for it), I could well end up concurring in the judgment of reversal with a separate opinion since I think if one accepts Martin Linen the position you take in Part II-B of your opinion would be one with which I would have difficulty disagreeing.

I feel less hesitant about writing an opinion overruling United States v. Jenkins than I would if that case had been written by someone else. After all, there was a character in Greek mythology which ate its own young, and I would be doing no more than that here. I think in that opinion undue weight was attached to the concededly "valuable right" of a criminal defendant to have his guilt or innocence determined by the first jury, without adequate consideration being given to the deliberate decision of a defendant to persuade the trial judge to rule in his favor prior to termination on a legal issue other than guilt or innocence.

There would be no point in rehashing all of this in a letter except that two members of the Court who, as I understand it, have joined fully your opinion for the Court in Sanabria, have also voted to reverse in United States v. Scott along the lines described in Lewis' letter of March 2nd in that case. In effect, I am counting on the votes of the Chief and Potter to overrule Jenkins, while you already have them, as I understand it, joining you in Sanabria.

I should be ready to circulate my opinion in United States v. Scott sometime next week, but you have had Sanabria ready to go for some time, and that is the reason for writing this letter. Except for the fact that the Conference vote in United States v. Scott took place only a couple of weeks ago, after some of the joins which you received had come in in Sanabria, I would regard my effort to write an opinion in Scott along the lines I described as an exercise in futility. The matter is of no immediate moment to Bill Brennan, Byron, you, or John, since all of you voted to affirm in Scott. The matter is likewise of no immediate moment to Harry or

Lewis, who voted to reverse in Scott but who have not joined your Sanabria opinion. But it is a matter of concern, I should think, to the Chief and to Potter, and to me because I will want to substantially modify my Sanabria dissent in the event that I get a Court for my proposed opinion in Scott.

I am hopeful that we may focus on this for a moment at Conference on Friday, in order that you and I may both know where we stand.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

P.S. The mythological character which, according to Bulfinch's Mythology, is "a monster who devoured his children" is Saturn.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 23, 1978

Re: No. 76-1040 United States v. Sanabria

Dear Thurgood:

My proposed opinion for the Court in United States v. Scott has now gone to the printer, and it should be ready for circulation by tomorrow or Monday. I do not think that your fourth draft in Sanabria, circulated this week, is inconsistent with my proposed draft in Scott. Realizing that you are doubtless a better judge of this than I, I am sending you today a Xerox copy of the draft in Scott (not, of course, expecting you to jump on the bandwagon, but simply to enable you to evaluate it as to whether, if both should become opinions of the Court, there would be any inconsistency).

While I continue to disagree, substantially for the reasons stated in Harry's dissent in Sanabria, with the application of the double jeopardy principles to the facts in Sanabria, and will continue to adhere to Harry's dissent notwithstanding your most recent draft and even if Scott gets a Court, it should be of concern to all of us that if Scott does become a Court opinion it is consistent with Sanabria.

I do not wish to delay further the coming down of Sanabria in view of your revision of Part III eliminating all mention of Jenkins. I am, however, reluctant to abandon my broader dissent in Sanabria until I am reasonably certain that my draft in Scott will receive the adherence of those who voted that way in Conference. If we can postpone the coming down of Sanabria until the Conference reaches a consensus on Scott, it seems to me that the opinions in both cases will be the stronger for it.

I realize, of course, that you presently have a "Court" for Sanabria, and that all the votes are in, whereas my Scott is

in very much of an embryonic stage. I would not blame you at all for pressing to have Sanabria come down; such action would, however, put me in the difficult position of having to decide, without knowing the fate of my proposed Scott draft opinion, whether to withdraw my dissent in Sanabria, and thereby assume that Scott would get a Court, or leave my dissent in Sanabria the way it is, which would leave considerable egg on my face if Scott does get a Court. (In my dissent in Sanabria, I berate the Court for its decision in Martin Linen; in my draft in Scott, I embrace Martin Linen).

Sincerely,

Mr. Justice Marshall

Copies to the Conference

WM

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 29, 1978

Re: No. 76-1040 - Sanabria v. United States

Dear Thurgood:

I earlier wrote you that if my proposed opinion in United States v. Scott, No. 76-1382, which is being circulated herewith, did not get a Court, I wanted to be free to adhere to my present dissent in Sanabria, whereas if it did get a Court I would simply remain in Sanabria with Harry in dissent as to the interpretation of Lewis' Lee v. United States, 432 U.S. 23 (1977).

I think your most recent revision of this opinion, the fourth draft circulated March 22nd, is not inconsistent with my draft in Scott. You voted the other way in Scott, and I will continue to adhere to Harry's dissent in this case, but I think that other members of the Court could join both opinions if they so desired.

This has led me to conclude that from an institutional point of view I cannot, simply because of the conflict between my dissent in Sanabria and my proposed Court opinion in Scott, oppose the handing down of Sanabria if all of the other members of the Court are satisfied to have it come down. I think my proposed opinion in Scott will have to stand on its own two feet, so to speak, and that I have no right to hold up your opinion just to wait and see how the votes go on my opinion in a case argued several months afterwards. I think there may be some

"tension" in outlook between your present Part III of Sanabria and my draft in Scott, but I think my draft in Scott is entirely consistent with the statement in the second sentence of Part III of Sanabria that "[t]he short answer to this question is that there is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous,' Fong Foo v. United States. . . ." (page 20).

I therefore withdraw my dissent in Sanabria, although I will ask Harry to show me as continuing to join in his dissent.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 21, 1977

Re: 76-1040 - Sanabria v. United States

Dear Thurgood:

Enclosed is a short statement joining substantially your entire opinion. If you could see your way clear to modifying footnote 22 to say in substance that we assume for purposes of decision that the Court of Appeals was correct, or something similar, I will join the entire opinion and not file any separate statement.

Respectfully,

John

Mr. Justice Marshall

Copies to the Conference

76-1040 - Sanabria v. United States

MR. JUSTICE STEVENS, concurring.

Although I remain unpersuaded that the statutory authorization for an appeal by the United States "from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts", 18 U.S.C. § 3731, was intended to authorize the Government to appeal from a judgment of acquittal, see United States v. Martin Linen Supply Co., 430 U.S. 564, 576-581 (STEVENS, J., dissenting), I must respect the Court's contrary interpretation of the statute. On that basis I join the Court's opinion except for its dictum in footnote 22. Since the Court ultimately holds that the Court of Appeals lacked jurisdiction, it is not necessary to decide whether an order which neither dismisses nor purports to dismiss "only a portion of a count" should be treated as an order dismissing an indictment as to "any one or more counts."

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1040

Thomas Sanabria, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[February —, 1978]

MR. JUSTICE STEVENS, concurring.

Although I join the text of the Court's opinion, I cannot agree with the dictum in footnote 22. It is true "that there is no statutory barrier to an appeal from an order dismissing only a portion of a count," but it is equally true that there is no statutory *authority* for such an appeal. It necessarily follows—at least if we are faithful to the concept that federal courts have only such jurisdiction as is conferred by Congress—that the Court of Appeals had no jurisdiction over this appeal.

ante, at 14 n. 22

The Criminal Appeals Act, 18 U. S. C. § 3731, authorizes the United States to appeal an order of a district court "dismissing an indictment or information *as to any one or more counts*, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." (Emphasis added.) By its plain terms, this statute does not encompass the present case.

Putting to one side the question whether an acquittal may properly be regarded as an order "dismissing an indictment" within the meaning of the statute, see *United States* v. *Martin Linen Co.*, 430 U. S. 564, 576 (STEVENS, J., concurring), the statutory grant of appellate jurisdiction is still unequivocally limited to review of a dismissal "as to any one or more counts." The statute does not refer to "subunits of an indictment" or "portions of a count," *ante*, at 14 n. 22, but only to "counts," a well-known and unambiguous term of art.

Prior to the amendment of § 3731 in 1970, this Court's rule of statutory interpretation was that "the Criminal Appeals

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 19, 1978

RE: 76-1040 Sanabria v. United States

Dear Thurgood:

Your proposed changes are fine with me.

Respectfully,

John

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 15, 1978

Re: 76-1382 - United States v. Scott
76-1040 - Sanabria v. United States

Dear Thurgood of Bill:

What I find most ironic about the Court's plan to devour its young is that the feast is justified by the need to eliminate "confusion." I am not aware of any confusion now but I am rather confident that some will soon be created.

Respectfully,

Mr. Justice Marshall

Mr. Justice Rehnquist

Copies to the Conference

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: 3/31/78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1040

Thomas Sanabria, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April —, 1978]

MR. JUSTICE STEVENS, concurring.

Although I join the text of the Court's opinion, I cannot agree with the dictum in footnote 23. It is true "that there is no statutory barrier to an appeal from an order dismissing only a portion of a count," *ante*, at 14 n. 23, but it is equally true that there is no statutory *authority* for such an appeal. It necessarily follows—at least if we are faithful to the concept that federal courts have only such jurisdiction as is conferred by Congress—that the Court of Appeals had no jurisdiction of this appeal.

The Criminal Appeals Act, 18 U. S. C. § 3731, authorizes the United States to appeal an order of a district court "dismissing an indictment or information *as to any one or more counts*, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." (Emphasis added.) By its plain terms, this statute does not encompass the present case.

Putting to one side the question whether an acquittal may properly be regarded as an order "dismissing an indictment" within the meaning of the statute, see *United States* v. *Martin Linen Co.*, 430 U. S. 564, 576 (STEVENS, J., concurring), the statutory grant of appellate jurisdiction is still unequivocally limited to review of a dismissal "as to any one or more counts." The statute does not refer to "subunits of an indictment" or "portions of a count," *ante*, at 14 n. 23, but only to "counts," a well-known and unambiguous term of art.

Prior to the amendment of § 3731 in 1971, this Court's rule