The Burger Court Opinion Writing Database

United States v. Scott

437 U.S. 82 (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

Memorandum

_____, 19_____

Lewis

This persuades me that I was right in joining you & one other to remand on Lee

Even though Lee is not acceptable to our young friend!

WOB

76-1382,
U. S. v. Scott

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

CHAMBERS OF
THE CHIEF JUSTICE

May 3, 1978

Re: 76-1382 United States v. Scott

Dear Bill:

Only the heavy "traffic" has kept me from getting at this case.

I now join.

Regards,

WEB

Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 3, 1978

RE: No. 76-1382 United States v. Scott

Dear Bill:

I thought I had already circulated that I would undertake the dissent in the above. Apparently I had not so this is to inform you that I shall.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

No. 76-1382--United States v. Scott.

From: Mr. Justice Brennan

Circulated: 5/17/78

Recirculated: _____

MR. JUSTICE BRENNAN, dissenting.

On the basis of his evaluation of the trial evidence, the District Judge concluded that unjustifiable pre-indictment delay had so prejudiced respondent's defense as to preclude--consistently with the Due Process Clause--his conviction of the offense alleged in count one of the indictment. He therefore dismissed this count with prejudice. Under the principles of Double Jeopardy law that controlled until today, further prosecution of respondent under count one would unquestionably be prohibited, and appeal by the United States from the judgment of dismissal thus would not lie. See 18 U.S.C. § 3731. The dismissal would, under prior law, have been treated as an "acquittal"--i.e. "a legal determination on the basis of facts adduced at trial relating to the general issue." United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977)(citations omitted). Indeed, further proceedings would have been barred even if the dismissal could not have been so characterized. United States v. Jenkins, 420 U.S. 358 (1975), established that, even if a mid-trial termination does not amount to an "acquittal", an appeal by the United States from the dismissal would not lie if a reversal would, as is of course true in the present case, require "further

See Pages 1, 10

Mr. Justice
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.

From: Mr.

Circulated:

Recirculated: 5-23-78

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1382

United States, Petitioner, v. John Arthur Scott. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1978]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

On the basis of his evaluation of the trial evidence, the District Judge concluded that unjustifiable preindictment delay had so prejudiced respondent's defense as to preclude—consistently with the Due Process Clause—his conviction of the offense alleged in count one of the indictment. He therefore dismissed this count with prejudice. Under the principles of double jeopardy law that controlled until today, further prosecution of respondent count one would unquestionably be prohibited, and appeal by the United States from the judgment of dismissal thus would not lie. See 18 U. S. C. § 3731. The dismissal would, under prior law, have been treated as an "acquittal"—*i. e.*, "a legal determination on the basis of facts adduced at trial relating to the general issue." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 575 (1977) (citations omitted). Indeed, further proceedings would have been barred even if the dismissal could not have been so characterized. *United States* v. *Jenkins*, 420 U. S. 358 (1975), established that, even if a midtrial termination does not amount to an "acquittal," an appeal by the United States from the dismissal would not lie if a reversal would, as is of course true in the present case, require "further proceedings of some sort devoted to the resolution of the factual issues going to the elements of the offense charged." *Id.*, at 370. This principle was reaffirmed only last Term in *United States* v. *Lee*, 432 U. S. 23, 30 (1977): "Where a mid-trial

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 25, 1978

RE: No. 76-1382 United States v. Scott

Dear John:

I'll be happy to adopt both the suggestions contained in your note of May 24 and will incorporate them in the next circulation.

Sincerely,

Mr. Justice Stevens

Wm Brennan
05/77

STYLISTIC CHANGES throughout

See pp 1, 3-6, 8-15

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 6/7/78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1382

United States, Petitioner, v. John Arthur Scott. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1978]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

On the basis of his evaluation of the trial evidence, the District Judge concluded that unjustifiable preindictment delay had so prejudiced respondent's defense as to preclude—consistently with the Due Process Clause—his conviction of the offense alleged in count one of the indictment. He therefore dismissed this count with prejudice. Under the principles of double jeopardy law that controlled until today, further prosecution of respondent under count one would unquestionably be prohibited, and appeal by the United States from the judgment of dismissal thus would not lie. See 18 U. S. C. § 3731. The dismissal would, under prior law, have been treated as an "acquittal"—*i. e.*, "a legal determination on the basis of facts adduced at trial relating to the general issue of the case." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 575 (1977) (citations omitted). Indeed, further proceedings would have been barred even if the dismissal could not have been so characterized. *United States* v. *Jenkins*, 420 U. S. 358 (1975), established that, even if a mid-trial termination does not amount to an "acquittal," an appeal by the United States from the dismissal would not lie if a reversal would, as is of course true in the present case, require "further proceedings of some sort, devoted to the resolution of the factual issues going to the elements of the offense charged." *Id.*, at 370. This principle was reaffirmed only

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 12, 1978

Re: No. 76-1382, U.S. v. Scott

Dear Bill,

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

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

From: Mr. Justice White

Circulated: 10-3-77

Recirculated: _____

No. 76-1382 - United States v. Scott

Mr. Justice White, dissenting.

If at all possible, it would be advisable for this Court to establish a broad set of principles that would guide the lower courts' resolution of double jeopardy questions and that would prevent our having indefinitely to take a case-by-case approach to the subject. Unfortunately, the trilogy of three terms ago, United States v. Wilson, 420 U.S. 332 (1975); United States v. Jenkins, 420 U.S. 358 (1975); and Serfass v. United States, 420 U.S. 377 (1975), and our subsequent decisions, e.g., United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), and Lee v. United States, U.S. (1977), have not had such an impact. The upshot is that we granted review and wrote full opinions in five double jeopardy cases last term and already have five more such cases on our argument docket for this term.

The present dispute poses still another important question that merits full consideration by this Court. The United States seeks review of the decision of the United States Court of Appeals for the Sixth Circuit which held that the Double Jeopardy Clause bars respondent's retrial on a count that was dismissed during trial on the ground of preindictment delay. The United States recognizes that last term in Lee v. United States, U.S. (1977), we stated: "Where a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, Jenkins establishes that further prosecution is barred by the Double Jeopardy Clause." The Government urges us, however, to grant certiorari in this case in order to clarify the scope of this principle and to determine whether it should be limited to those cases in which the midtrial dismissal is based upon some determination of the defendant's guilt or innocence.

The question will recurringly arise as to the applicability of the Double Jeopardy Clause to the situation where a midtrial dismissal is based on a ground which contemplates an

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

p. 1

From: Mr. Justice White

Circulated: _____

1st DRAFT

Recirculated: 10-6-77

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* JOHN ARTHUR SCOTT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 76-1382. Decided October —, 1977

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, dissenting.

If at all possible, it would be advisable for this Court to establish a broad set of principles that would guide the lower courts' resolution of double jeopardy questions and that would prevent our having indefinitely to take a case-by-case approach to the subject. Unfortunately, the trilogy of three Terms ago, *United States* v. *Wilson*, 420 U. S. 332 (1975); *United States* v. *Jenkins*, 420 U. S. 358 (1975); and *Serfass* v. *United States*, 420 U. S. 377 (1975), and our subsequent decisions, *e. g.*, *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977), and *Lee* v. *United States*, — U. S. — (1977), have not had such an impact. The upshot is that we granted review and wrote full opinions in five double jeopardy cases last Term and already have five more such cases on our argument docket for this Term.

The present dispute poses still another important question that merits full consideration by this Court. The United States seeks review of the decision of the United States Court of Appeals for the Sixth Circuit which held that the Double Jeopardy Clause bars respondent's retrial on a count that was dismissed during trial on the ground of preindictment delay. The United States recognizes that last Term in *Lee* v. *United States*, — U. S. — (1977), we stated: "Where a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, *Jenkins* establishes that further prosecution is barred by the Double Jeopardy Clause." The Government urges us, however, to grant certiorari in this case in order to clarify the

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 22, 1978

Re: 76-1382: United States v. Scott

Dear Bill,

Please join me in your dissenting opinion in this case.

Sincerely yours,

Mr. Justice Brennan
Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 22, 1978

Re: 76-1382 - United States v. Scott

Dear Bill,

Although I have joined your dissent, I have the following comments.

On page 9, note 5, you indicate that Burks rejects the government's argument about evidentiary insufficiency; but doesn't Burks reserve this very question? See page 4, note 4 of the Burks circulation. I have asked the Chief Justice to change this footnote, but he has not yet agreed to do so.

On page 6-7 (with similar language in other places) you say that "the policies of the Double Jeopardy Clause mandate that the Government be afforded but one complete opportunity to convict an accused and that when the first proceeding terminates in a final judgment favorable to the defendant any retrial be barred." This statement seems broader than the holding of Lee and seems inconsistent with the mistrial rule. This wouldn't take much to fix.

Sincerely yours,

Mr. Justice Brennan

Wm Brennan

0077

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 17, 1978

Re: No. 76-1382 - United States v. Scott

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 4, 1977

Re: No. 76-1382 - United States v. Scott

Dear Byron:

Inasmuch as the Conference was not interested in holding this case for No. 76-1040, Sanabria v. United States, will you please join me in your dissent.

Sincerely,

HAB.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 8, 1978

Re: No. 76-1382 - United States v. Scott

Dear Bill:

Please join me.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 2, 1978

No. 76-1382 U.S. v. Scott

Dear Chief:

Having "passed" at our Conference on February 24, I now respond to your request to let you have my vote before you make the next assignments - provided, of course, I could come to rest.

At Conference, I expressed a tentative willingness "to consider joining four" in an effort to clarify the confusion in double jeopardy doctrine that now causes so much litigation. In my letter to Thurgood of January 19, commenting on Sanabria, I expressed the view that these two cases - Sanabria and Scott - give us an opportunity to accept the government's invitation to reformulate double jeopardy principles.

In light of the vote at the Conference, I judge that you, Potter, Harry and Bill Rehnquist would reverse in this case in an opinion that would attempt to clarify double jeopardy law. It is not entirely clear to me exactly how this would "write", but I would like to see the effort made.

My understanding of Bill Rehnquist's position is that he would not insist on going as far as his dissent in Sanabria suggested. Rather, he would accept Martin Linen as establishing that an acquittal, whether by judge or jury, forecloses retrial even if erroneous. Bill also would agree that where a judge rules that there is insufficient evidence to go to the jury, this would constitute an acquittal. Bill recognizes, as I do, that it would be difficult to reverse in this case without overruling or substantially modifying Jenkins, but that Lee can be distinguished.

The foregoing is merely a "thumb nail" (and obviously incomplete) summary of a general approach to the

April 12, 1978

No. 76-1382 U.S. v. Scott

Dear Bill:

This will give you my reactions to your opinion in this case, which I have now had an opportunity to read carefully.

I think you have written a fine opinion - faithful to the "thumbnail" outline in my letter to the Chief of March 2. My position, as you know, was a willingness "to consider joining four" in an effort to clarify the confusion. Subject to some minor clarification (suggested below), I now will join "four" - if the Chief, Potter and Harry agree with you.

My suggestions are as follows:

1. On page 8 (your 3rd draft), I have suggested a rider.

2. On page 12, I would like to omit the sentence stating in effect that my opinion in Lee "further undermined the rationale of Jenkins". I thought the ruling in Lee was the "functional" equivalent of a mistrial because the trial judge did not contemplate a barrier to further prosecution. Also, as I relied on Jenkins in my Lee opinion, I prefer not to take the position now that unwittingly I was undermining that case. For this reason, I also would appreciate your changing the last sentence in the first full paragraph on page 12.

3. I have attached a couple of suggested footnotes to be added at or near the end of your opinion if they meet with your aproval. The longer of two notes merits an explanation. I have thought that Jenkins could be distinguished on its special facts from a case like

Scott. As I think you have recognized (indeed, in the opinion itself), what the lower courts had done in Jenkins was far from clear. The dismissal by the DC could have been prompted by a conclusion that on the facts the government could not win. If a DC made such a finding on the record, I would think it tantamount to an acquittal.

Although I have thought Jenkins could be distinguished, I agree that it is desirable to overrule it because of its rationale and, also, because otherwise we would not be fully accomplishing the objective of clarifying this aspect of double jeopardy law.

I am not sending a copy of this letter or of the riders to the colleagues mentioned above as none has yet joined you. I will be glad to discuss any aspect of this with you, as always.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

May 1, 1978

No. 76-1382 United States v. Scott

Dear Bill:

As I have indicated verbally, your letter of April 20 substantially accommodates my suggestions.

I have been awaiting the Chief's circulation of Greene, thinking that it - together with Scott and Burks - should be harmonious and come down together. In view of the Chief's "trial balloon" at Conference to the effect that we simply remand Greene for reconsideration in light of Burks, I am not at all sure where we stand.

I have taken another look at Burks in light of the comment in your letter of April 20, and I agree that there would indeed be tension between it and the last sentence in my proposed rider for page 17. I suggest deletion of that last sentence, and in its place add the following:

> "Under Burks v. United States, No. 76-6528, there would be an 'acquital' for double jeopardy purposes when a trial court dismisses a prosecution because it finds that the evidence adduced at trial reveals a complete defense even though the government otherwise would be entitled to go to the jury."

My suggestion is that you recirculate Scott with the changes we have been discussing. I will join you promptly.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 5, 1978

No. 76-1382 United States v. Scott

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 4, 1977

Re: No. 76-1382 - United States v. Scott

Dear Byron:

On the basis of your dissenting opinion circulated October 3rd, I have decided to change my vote in this case from "deny" to "grant". I agree with the view expressed in your dissent that we need a more far-reaching review of the meaning of the Double Jeopardy Clause than would be afforded by the cases already granted.

Sincerely,

Mr. Justice White

Copies to the Conference

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

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: APR 25 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1382

United States, Petitioner, *v.* John Arthur Scott.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

On March 5, 1975, respondent, a member of the police force in Muskegon, Mich., was charged in a three-count indictment with distribution of various narcotics. Both before his trial in the United States District Court for the Western District of Michigan, and twice during the trial, respondent moved to dismiss the two counts of the indictment which concerned transactions that took place during the preceding September, on the ground that his defense had been prejudiced by preindictment delay. At the close of all the evidence, the court granted respondent's motion. Although the court did not explain its reasons for dismissing the second count, it explicitly concluded that respondent had "presented sufficient proof of prejudice with respect to the first count." Pet. for Cert. 8a. The court submitted the third count to the jury which returned a verdict of not guilty.

The Government sought to appeal the dismissals of the first two counts to the United States Court of Appeals for the Sixth Circuit. That court, relying on our opinion in *United States* v. *Jenkins*, 420 U. S. 358 (1975), concluded that any further prosecution of respondent was barred by the Double Jeopardy Clause of the Fifth Amendment, and therefore dismissed the appeal. 544 F. 2d 903 (CA6 1976). The Government has sought review in this Court only with regard to the dismissal of the first count. We granted certiorari to give further con-

CHANGES
PP. 6, 7 8, 13

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: _____

APR [illegible] 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1382

United States, Petitioner, v. John Arthur Scott. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April —, 1978]

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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: APR 1 1978

Recirculated: ____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1382

United States, Petitioner, v. John Arthur Scott. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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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: _____

Recirculated: APR 5 1978

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1382

United States, Petitioner, v. John Arthur Scott. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 20, 1978

PERSONAL

Re: No. 76-1382 - United States v. Scott

Dear Lewis:

I would like to have talked to you about this rather than written, but because of the rushed state of things I am sending a personal letter to you in addition to my regular reply to your letter of April 12th about my opinion in this case. As you will see from the regular letter, I think I can satisfactorily accommodate all of your changes, with the possible exception of the last sentence of the long rider on page 17; if that sentence proves to be a problem it will be because of the Chief Justice, and not because of me.

I am currently negotiating with the Chief to join his Burks opinion if he will make a couple of minor changes in it, and he has indicated a willingness to cast some vote other than the ninth one in my opinion in this case. But the "join four" condition imposed by your letter of April 12th, where two of the four are Harry and the Chief, is an extremely exacting one. Would you settle for a "join three" -- that is, if I make the changes you suggest, Potter approves them (since he has already joined, I have little doubt that he will), and the Chief then joins, will you join even though Harry has not as yet joined?

Sincerely,

Bill

Mr. Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 20, 1978

Re: No. 76-1382 - United States v. Scott

Dear Lewis:

I think I can accommodate all of the suggestions contained in your letter of April 12th with the possible exception of the last sentence in your proposed rider at page 17. It seems to me that this sentence may not be consistent with the Chief's opinion in Burks. I have no desire to be more Roman than the Romans, however, and since I was the sole dissenter at Conference in Burks, and may end up joining it, I am perfectly willing to have the sentence stay in if it does not offend him. (As you will recall, he, too, is a necessary vote for my five man majority in this case.) I would place the rider on page 13, at the end of footnote 9.

I would insert your Rider A at page 8 of the current draft in Scott in the place where you suggest. I would place your Rider A, page 16, at the end of the present footnote 11 on page 16, as you suggest. On page 12 of the current draft, I would make the following changes so as to avoid the implications with respect to Lee which you dislike:

> (a) The third full sentence on the page, following the page cite to Lee, would now read: "Thus Lee demonstrated that, at least in some cases, the dismissal of an indictment

may be treated in the same manner as is the declaration of a mistrial."

(b) The last sentence preceding Part IV will be deleted, and in its place the following sentence substituted: "However, our growing experience with government appeals convinces us that we must re-examine the rationale of Jenkins in light of Lee, Martin Linen, and other recent expositions of the Double Jeopardy Clause."

Sincerely,

Mr. Justice Powell

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

Mr. [illegible] Circuit

Tp 8, 12-14, 16

5th DRAFT

MAY 1978

SUPREME COURT OF THE UNITED STATES

No. 76–1382

United States, Petitioner, v. John Arthur Scott.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

On March 5, 1975, respondent, a member of the police force in Muskegon, Mich., was charged in a three-count indictment with distribution of various narcotics. Both before his trial in the United States District Court for the Western District of Michigan, and twice during the trial, respondent moved to dismiss the two counts of the indictment which concerned transactions that took place during the preceding September, on the ground that his defense had been prejudiced by preindictment delay. At the close of all the evidence, the court granted respondent's motion. Although the court did not explain its reasons for dismissing the second count, it explicitly concluded that respondent had "presented sufficient proof of prejudice with respect to the first count." Pet. for Cert. 8a. The court submitted the third count to the jury which returned a verdict of not guilty.

The Government sought to appeal the dismissals of the first two counts to the United States Court of Appeals for the Sixth Circuit. That court, relying on our opinion in *United States* v. *Jenkins*, 420 U. S. 358 (1975), concluded that any further prosecution of respondent was barred by the Double Jeopardy Clause of the Fifth Amendment, and therefore dismissed the appeal. 544 F. 2d 903 (CA6 1976). The Government has sought review in this Court only with regard to the dismissal of the first count. We granted certiorari to give further con-

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

P 39, 13-16
& footnotes renumbered

MAY 3 1978

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1382

United States, Petitioner, v. John Arthur Scott. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

On March 5, 1975, respondent, a member of the police force in Muskegon, Mich., was charged in a three-count indictment with distribution of various narcotics. Both before his trial in the United States District Court for the Western District of Michigan, and twice during the trial, respondent moved to dismiss the two counts of the indictment which concerned transactions that took place during the preceding September, on the ground that his defense had been prejudiced by preindictment delay. At the close of all the evidence, the court granted respondent's motion. Although the court did not explain its reasons for dismissing the second count, it explicitly concluded that respondent had "presented sufficient proof of prejudice with respect to the first count." Pet. for Cert. 8a. The court submitted the third count to the jury which returned a verdict of not guilty.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1978

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 76-1382 United States v. Scott

Three cases have been held pending the decision in this case. The first two of them have also been held for Sanabria v. United States, No. 76-1040, so the Conference will also have the benefit of Thurgood's views before reaching a final disposition.

1. No. 76-1543 United States v. Grasso. In the midst of respondent's trial on a charge of attempted tax evasion, he moved to dismiss the indictment on the ground of prosecutorial misconduct. The claim arose from the testimony of one Harris who had been called to the stand by the prosecutor. During his testimony defense counsel stated that he had not been able to interview Harris, but the prosecutor responded that he believed Harris had been interviewed by defense counsel's associate, as was in fact the case. That night, defense counsel again interviewed Harris, who gave a tape-recorded statement recanting his trial testimony. In a hearing on the resulting motion to dismiss, outside the presence of the jury, an IRS agent testified that Harris later disavowed his recantation. Harris himself refused to testify. The district court denied the motion to dismiss, ruling that there had been no prosecutorial misconduct, but it granted a mistrial of its own motion, over the prosecution's objection, concluding that respondent could not get a fair trial under the circumstances. Respondent's counsel agreed with the court's decision, "except your Honor's decision to declare it a mistrial. We would renew our request for judgment of acquittal."

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,

John

Mr. Justice Marshall

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Personal

May 24, 1978

Re: 76-1382 - United States v. Scott

Dear Bill:

My hesitation in responding to your powerful dissent stems from my concern about suggesting that the defendant's interest in obtaining an advantage from surprise merits constitutional protection. I know that some of the commentators make this point, but I carefully avoided endorsing it when I was working on Arizona v. Washington. If you would be comfortable in omitting the references to surprise in footnote 4 on page 4, and also on page 8, I would like to join your dissent.

I have one other minor suggestion. On page 11 you state that the preindictment delay issue could not be considered in advance of trial. In some extreme cases I should think it could be. I wonder if you should not qualify this language by suggesting that it normally cannot be considered apart from the trial.

The latter is just a suggestion but the surprise point is of some importance to me.

Respectfully,

John

Mr. Justice Brennan

Wm Brennan 6/1/77

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 25, 1978

Re: 76-1382 - United States v. Scott

Dear Bill:

Please join me in your dissent.

Respectfully,

Mr. Justice Brennan

Copies to the Conference