

defense such as insanity or entrapment, the defendant is not subject to retrial.¹¹⁵ However, it may be that the trial judge will grant a motion to dismiss that is neither a mistrial nor an acquittal, but is instead a termination of the trial in defendant's favor based on some decision not relating to his factual guilt or innocence, such as prejudicial preindictment delay.¹¹⁶ The prosecution may not simply begin a new trial but must seek first to appeal and overturn the dismissal, a course that was not open to federal prosecutors until enactment of the Omnibus Crime Control Act in 1971.¹¹⁷ That law has resulted in tentative and uncertain rulings with respect to when such dismissals may be appealed and further proceedings directed. In the first place, it is unclear in many instances whether a judge's ruling is a mistrial, a dismissal, or an acquittal.¹¹⁸ In the second place, because the Justices have such differing views about the policies underlying the Double Jeopardy Clause, determinations of which dismissals preclude appeals and further proceedings may result from shifting coalitions and from revised perspectives. Thus, the Court first fixed the line between permissible and impermissible appeals at the point at which further proceedings would have had to take place in the trial court if the dismissal were reversed. If the only thing that had to be done was to enter a judgment on a guilty verdict after reversal, appeal was constitutional and permitted under the statute;¹¹⁹ if further proceedings, such as continuation of the trial or some further factfinding, was necessary, appeal was not permitted.¹²⁰ Now, but by a close division of the Court, the determining factor is not whether further proceedings must be had but whether the action of the trial judge, whatever its label, correct or not, resolved some or all of the factual elements of the offense charged in defendant's favor, whether, that is, the court made some determina-

¹¹⁵ See "Acquittal by the Trial Judge," *supra*.

¹¹⁶ *United States v. Wilson*, 420 U.S. 332 (1975) (preindictment delay); *United States v. Jenkins*, 420 U.S. 358 (1975) (determination of law based on facts adduced at trial; ambiguous whether judge's action was acquittal or dismissal); *United States v. Scott*, 437 U.S. 82 (1978) (preindictment delay).

¹¹⁷ See *United States v. Scott*, 437 U.S. 82, 84–86 (1978); *United States v. Sison*, 399 U.S. 267, 291–96 (1970).

¹¹⁸ Cf. *Lee v. United States*, 432 U.S. 23 (1977).

¹¹⁹ *United States v. Wilson*, 420 U.S. 332 (1975) (after jury guilty verdict, trial judge dismissed indictment on grounds of preindictment delay; appeal permissible because upon reversal all trial judge had to do was enter judgment on the jury's verdict).

¹²⁰ *United States v. Jenkins*, 420 U.S. 358 (1975) (after presentation of evidence in bench trial, judge dismissed indictment; appeal impermissible because if dismissal was reversed there would have to be further proceedings in the trial court devoted to resolving factual issues going to elements of offense charged and resulting in supplemental findings).