In the

Supreme Court of the United States

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DENNIS STEPHEN DUNCAN,

Petitioner,

vs.

THE STATE OF TENNESSEE

Respondent.

No. 70-5122

Washington, D. C.
January 13, 1972

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DENNIS STEPHEN DUNCAN, Petitioner	
v.	No. 70-5122
THE STATE OF TENNESSEE, Respondent	

Washington, D.C.

Thursday, January 13, 1972

The above-entitled matter came on for argument at 10:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROGER N. BOWMAN, ESQ., 208 Legions Street, P.O. Box 76, Clarksville, Tennessee 37040, for the Petitioner.

EVERETT H. FALK, ESQ., Assistant Attorney General of Tennessee, Nashville, Tennessee, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first in No. 70-5122, Duncan against Tennessee.

Mr. Justice Douglas will participate in this case on the basis of all the briefs, records, files and the tape recording of the oral argument, since as I have stated, he is unavoidably absent today.

Mr. Bowman, you may proceed.

ORAL ARGUMENT OF ROGER N. BOWMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BOWMAN: Mr. Chief Justice, may it please the Court:

This is a case arising in the State of Tennessee, on a writ of certiorari to this court.

The facts in this particular case are of grave importance. June of 1968, Dennis Stephen Duncan, and another defendant were indicted by the Montgomery County Criminal Court, charged with armed robbery. Said indictment charged robbery in the normal common law terms and added that said robbery was accomplished with the use of a deadly weapon, to-wit: a gun, to-wit: a .22 caliber pistol.

The matter proceeded to trial, a jury was selected and sworn, the defendant entered his plea of not guilty, the State put its first witness on the stand. The first witness, Mr. Kenneth Albright, was asked the type of gun they were

looking for. His answer was a .22 caliber rifle. To this, Counsel for the Defendant objected on the basis that the indictment charged the robbery was accomplished with a .22 caliber pistol. After much argument, out of the presence of the jury, the judge ruled in favor of the Counsel for the Defendant and the Attorney General said, "Well, in this case then I think what ought to be done is the jury to be instructed to return a verdict of not guilty" and this was done. The judge instructed the jury that because of the fact there was a mistake in the indictment, that he was instructing the jury to return a verdict of not guilty for the Defendants.

A short time later the Defendants were again indicted, charging the same facts as had been charged in the original indictment, except this time charging that the robbery was accomplished with a deadly weapon, to-wit: again, to-wit: a .22 caliber rifle. That was the original difference in the two indictments: in the first indictment, a finding of double jeopardy was found, alleging both a violation of the State of Tennessee Constitutional provisions and the United States Constitutional provisions. This plea was overruled and the matter went to trial.

At the trial, when the prosecution was asked, "was there any other robbery at this service station on this day," the answer was no.

As a result of this second trial, the defendant was

found guilty. After this occurred, proper appeals were perfected, the Tennessee Court of Criminal Appeals, with one judge dissenting, overruled the Montgomery County Criminal Court and ordered the Defendant's release. The State of Tennessee petitioned the Tennessee Supreme Court. As a result of this, certiorari was granted by the Tennessee Supreme Court and the Tennessee Criminal Court overruled the Tennessee Court of Criminal Appeals.

The question involved is, is the mere changing of the type of weapon in this indictment, does this create a different offense, so that the double jeopardy provisions do not apply? Now there are several tests that have been applied over the years to determine whether or not the double jeopardy provisions of the Constitution apply, and one of these, are they the same offenses?

Tennessee's Armed Robbery Statute, No. 39-3901, sets out, in the common law terminology, the robbery provisions, just as would be in the common law, all those things which are necessary, and adds the punishment. Then it goes on to say "But if said robbery is accomplished with the use of a deadly weapon, then the punishment, such-and-such."

The Tennessee Supreme Court has held that this particular statute, when the punishment was increased by the legislation of 1955, for armed robbery, they did not create a separate offense, but the only offense was robbery.

Now, back at the original trial of this case, when

the Attorney General asked that the judge direct the jury to return a verdict of not guilty, Counsel for Defendant objected. We felt that they could go ahead and proceed because robbery was still there, even if they could prove a weapon, even if they could prove the particular type of weapon that was involved.

Q Mr. Bowman, under Tennessee practice, did the State have any remedy by way of amendment on the indictment available at this point, or was it stuck with the indictment as drawn?

MR. BOWMAN: There is a statute in Tennessee, Mr. Justice, that provides that by agreement of counsel, an indictment can be amended, so that if this had been done, yes, the indictment could have been amended. My thoughts on the matter were, had the Attorney General said to counsel for the defendant, and I was counsel for the defendant at that stage, "Let's amend the indictment, or if you refuse to amend the indictment, then I will ask the judge to grant a mistrial," we may have been in a different situation, but this was not the case.

The Attorney General said to the Court, "We will either go ahead and try him on this one, or I'll have him re-indicted," and he chose to have the request of the judge to instruct the jury to return a verdict of not guilty, and then did re-indict, so there was a procedure if it had been followed,

but it was not.

Q You have told us that you objected to the idea of having the jury return a verdict of acquittal on the first indictment?

MR. BOWMAN: Yes, your Honor.

Q It doesn't appear in the record?

MR. BOWMAN: Yes, it does, your Honor. It's not in Appendix, but it is in the record. We did request that the jury not be instructed to return a verdict of not guilty. We felt that this would be a problem that would arise in the future, if this was done.

Q It was your objection, however, to put this whole business in motion, wasn't it?

MR. BOWMAN: Yes, your Honor.

Q And none of this is in the Appendix that I can find.

MR. BOWMAN: It appears in the order--let me see what page that is on. It appears on page 5 of the Judgment of the Criminal Court of Montgomery County.

Q Thank you.

MR. BOWMAN: And I think in there it states--I believe it states that we objected, but it does appear in the opinion of the Criminal Court of Appeals in Tennessee, I know, and it is not recorded that we did object to this being done.

Q Mr. Bowman, I take it from your answer to

Mr. Justice Rehnquist, that you were unwilling to agree to an amendment of the indictment?

MR. BOWMAN: Your Honor, to be perfectly frank with you, at the time that this was tried originally, I had been practicing for some five months or six months and was not even aware of the statute that allowed an amendment of the indictment. I think the record will show I stated to the Court I did not know whether the indictment could be amended or not at that time, but since that time, and doing much research on this case, of course I have found that there is a statute which would have allowed the indictment to be amended.

Q I am not suggesting by any means that you should have consented. That was a matter of your choice as an applicant, and perhaps even without knowing the statutes, you may have made the correct choice.

MR. BOWMAN: Thank you.

The particular law involved in this case, there isn't any that is directly in point. A complete search of the records, or I say as complete a search as can be done, as I have been able to do, has not revealed a case that is directly in point with the facts and situation in this case. There are cases which hold that it is not double jeopardy to indict a man the second time, where the item stolen, we'll say, was described improperly, such as in one case the serial number of an automobile was misstated in the indictment.

There are cases which hold that if you indict for stealing a white horse, you can't be convicted for stealing a black horse. To be indicted for stealing a black horse, then, it is not double jeopardy. But each of these cases involve a particular thing stolen, the description of a necessary element of the offense, and this case, the second indictment charges that $70 was taken from the person of Johnny Bryant, the proprietor of the Red Ace Service Station, exactly the same things as are charged in the first indictment.

Q Mr. Bowman, under Tennessee practice, is it necessary to be specific about the deadly weapon?

MR. BOWMAN: Your Honor, from reading the cases in Tennessee, it would have been sufficient for the indictment to have merely said robbery accomplished with the use of a deadly weapon. Period. It went a little bit further and said it was done with a gun, but it was not necessary to specifically describe the weapon used. This was just a matter that was added to make it more particular.

Q In effect then the rulings of the Trial Court was that since the state had chosen to be particular in the indictment, it was stuck with the particular language it used, granting your motion to refuse the offer of the gun?

MR. BOWMAN: Yes, your Honor, that was their position. Of course it was our position at the time that a conviction for robbery, which is the old defense under Tennessee law, could

still have been obtained, even if they had not been able to prove the type of weapon or prove that there was a deadly weapon used, and of course it is our contention that the acquittal of the original indictment accorded the Defendant of the very crime of robbery, of the very crime of taking $70 from the person of Johnny Bryant, being proprietor of the Red Ace Service Station.

Q Do you think the white horse and black horse case in Tennessee was wrongly decided?

MR. BOWMAN: No, your Honor, I can distinguish--

Q Certainly there is nothing in the Tennessee statute, in the statutes now I am talking about, that makes it an offense to steal a white horse and quite a separate offense to steal a black horse?

MR. BOWMAN: No, Mr. Justice.

Q It's larcency;if it's over a certain amount, it's grand larcency, and if it's under a certain amount, it's petty larcency ?

MR. BOWMAN: Yes, but now if I were charged with going out and stealing your automobile, and it turned out it was Mr. Chief Justice's automobile that I had stolen, the first indictment, charges would be dismissed on that. I could be indicted on the second one because of the fact I did steal that particular automobile but there are two separate offenses committed there; in this particular situation, especially under

the Tennessee Robbery Statute, there is only one offense in Tennessee, and that is robbery.

Q There is only one offense I suppose covering larcency, grand or petty?

MR. BOWMAN: Right.

Q And how about the other cases, the brass and bronze rollers?

MR. BOWMAN: In the brass and bronze roller case, a mistrial was granted, and they were reindicted after mistrial. There was not a directed verdict of acquittal in that particular case, and I am not satisfied, particularly, that that case is right.

Q In this case, it seems strange to people familiar with the present federal practice and procedures in criminal cases, this Tennessee practice seems pretty archaic, but as I understand the Tennessee law, it is simply this, that if, as or when the state chooses to be very specific in its indictment, to describe the horse as a black horse, then that is a separate offense. That's the only way these cases can be understood, at least by me, from a charge that somebody stole a white horse.

MR. BOWMAN: Yes, your Honor.

Q And under Tennessee practice and procedures, these then are separate offenses because the prosecutor or grand jury has chosen to make them so.

MR. BOWMAN: Yes, your Honor.

Q Regardless of what the statute may say?

MR. BOWMAN: Yes, Mr. Justice, but what I am saying though is the fact that you describe a horse a different way, you are describing a particular element differently, and that element of the offense is describing the thing stolen, the larcency committed, in the armed robbery statute, you are not describing a necessary element of the offense difficulty at any time because in the Tennessee statute, whether a deadly weapon is used or not, only goes to the punishment, not to a description of the offense whatsoever.

Q Well, I don't want to push the matter, but surely it's not a different punishment in Tennessee for stealing a black horse than there is for stealing a white horse, is there?

MR. BOWMAN: No, your Honor, there is not, it would be the same thing, but you would have committed an entirely different offense by stealing the black horse than you would by stealing the white horse.

Q That is what Tennessee law says? It seems very odd but that is what it says, is it not?

MR. BOWMAN: That's right. Of course my interpretation of the federal law is you would have the same problem. I think it was the general case where a man was indicted in the Federal Court and charged with stealing an automobile and the serial number was listed and it turned out that the serial number was wrong. The Federal Court then held he could be reindicted,

re-tried, and the double jeopardy provision would not apply.

Q Mr. Bowman, would you back up a minute. You did definitely refuse to permit the indictment to be amended?

MR. BOWMAN: Yes, your Honor. I think I stated that I didn't think the indictment could be amended. At the time I was not aware of the particular statute involved.

Q There is no way for Counsel to agree to amendment and indictment, you said.

MR. BOWMAN: That's correct, your Honor.

Q Mr. Bowman, in Tennessee is it lawful to carry a .22 rifle around? Is there any inhibition on it?

MR. BOWMAN: There is a statute dealing with deadly weapons, and a .22 caliber pistol would definitely be illegal to carry around.

Q That is what I am trying to get at. Is there a difference in the legality of walking down the street with a .22 rifle as against a pistol in your pocket?

MR. BOWMAN: There is some case law in Tennessee which holds that it is not illegal to carry a rifle per se but it would be to carry a pistol.

Q You don't get a license to carry the pistol, special permit or something?

MR. BOWMAN: We have no special permits in Tennessee.

Q Hand guns are illegal in Tennessee?

MR. BOWMAN: If you carry them with the intent to go

armed and the presumption is, as far as a hand gun, if you have got it in your possession and loaded, that you are carrying it with an intent to go armed. A rifle, the presumption doesn't arise, neither does it arise with a shot gun , because people go hunting.

Q Well, do you think that there is a substantive difference, then? One offense charged here was the gun which is legal to possess and the other one, a pistol, which is illegal to possess.

MR. BOWMAN: No, your Honor, I don't because the statute charges "with a deadly weapon" and of course even under the deadly weapon statute in Tennessee, if it can be done, the presumption is if you carry a hand gun, it's with intent to go armed, but it can be also with a rifle where it was used for the purpose of going armed. That is, if I did use the weapon to shoot somebody or to hold up a service station.

Q Mr. Bowman, in Tennessee, is there a difference between a mistrial and acquittal in Tennessee?

MR. BOWMAN: Yes, your Honor.

Q Is there any reason why this couldn't have been declared a mistrial rather than acquittal?

MR. BOWMAN: I think the same question would have been raised all the way up the line, Mr. Justice, if there had been an acquittal as there has been now.

Q It wasn't discussed, this trial point was never

discussed as I read the record.

MR. BOWMAN: It never was even mentioned that the proceedings--

Q Well, is there any peculiar rule in Tennessee that makes that necessary?

MR. BOWMAN: Mr. Justice, not that I know of. Now it's possible there was, but I do not know of any.

What would have been the situation if this man had walked in with a .22 caliber pistol in one hand and a .22 caliber rifle in the other hand? I daresay that this Court nor any other Court would allow a prosecution to establish for armed robbery with a pistol, then for armed robbery with the rifle. The question of being two separate offenses I don't think would arise under those circumstances, but if I apply it to the facts as we have here, that is exactly what is trying to be done, trying to make it two separate offenses by a change in the weapon.

Q You haven't mentioned one of the tests in some of the cases, in evaluating double jeopardy, and that is whether the same evidence is involved?

MR. BOWMAN: Yes, Tennessee has applied over the years the same offense tests and there have been cases in Tennessee as far back as the early 1800's, Hite versus State which made the distinction between where a bank note was stolen payable to one bank, the man was indicted and acquitted and because it

turned out that the bank note was payable at the other bank, and they reindicted him, and the Court said this was not double jeopardy. But here again, it would just like if the first time they had said he had stolen the property of Mr. Justice and the second time he had stolen the property of another one of the Justices, so Tennessee says those two cases are not the same offenses, and of course it is our contention that the robbery, the basic argument of this crime is the same offense in both cases.

Q Mr. Bowman, a moment ago in your argument you said that you thought the State could have proceeded notwithstanding exclusion of the gun for simple prosecution for robbery. Would that have carried as severe a maximun penalty as if they had been able to introduce evidence of the gun?

MR. BOWMAN: No, Mr. Justice, under Tennessee law for armed robbery you can be given the death sentence or any time less to a minimum of 10 years, for simple robbery, and I may be mistaken as to what the punishment is, I believe it is three to ten years. The punishment would not have been affected by not having been able to prove the gun.

This was the big thing, to increase the punishment was the purpose in alleging the gun, but there would have been nothing that would have kept it from going on and proving it was simple robbery, and the only robbery involved here, and that was the robbery of this service station.

Now the tests that have been applied have been the same as in the same offense test and you read the cases over the years and it's really hard in lots of those cases to determine what is being held but in most of the same offense tests, it's talking about the white and the black horse, a bank note payable at the Mechanics Bank instead of at the American Bank, a car bearing a wrong serial number as compared to a car bearing the right serial number, brass and bronze roller, banks, and so forth. But each of these cases deals with a substantive matter in the indictment,a substantive matter of that particular, whether it be common law or statutory crime.

Q Now when you are talking about this series of cases, Mr. Bowman, are you talking about Tennessee cases and Federal cases?

Up until Benton against Maryland , decided in 1969, Tennessee wasn't obligated in any way to follow the Federal test of double jeopardy, was it?

MR. BOWMAN: No, your Honor.

Q Well, those are of interest as far as Tennessee law goes, but we are here to determine the Federal constitutional issue only after Benton against Maryland, is that correct?

MR. BOWMAN: Yes.

The Federal Courts have applied and have held it is constitutionally proper to apply the same offense test and

there have been cases even recently in the various Circuits holding that this is a proper test to determine the double jeopardy provisions.

Q And that is easy enough in the Federal system, where we are at least more or less familiar with the rules and practices of procedures on indictments but when we run into this archaic Tennessee system, it becomes a little hard to apply, particularly when Tennessee seems to say that if a grand jury chooses to be specific in its indictment, then it carves out that offense only: a dark horse larcency, and that's a separate offense from a white horse larcency. That's the only thing that those cases can mean, isn't it?

MR. BOWMAN: I think you're right.

Q Then they are different offenses because the grand jury has chosen to specify the offense and make a distinguishing offense .

MR. BOWMAN: That's right. If they would have said larcency of the horse of Sam Jones.

Q Larcency of a horse of Sam Jones, then black or white would come under the indictment ?

MR. BOWMAN: That's right, but if they had said, the horse of Sam Jones and it turned out to be Bob Marshall's, of course we have a different situation.

Q A different situation.

MR. BOWMAN: When you look at the facts in the

situation and the various opinions in the particular case, then I feel that whatever test you would apply, either the same evidence or same offense, you are going to find that there is the same crime in all situations, that the robbery was the only crime that was committed under Tennessee law, and that applying this and to the standards set forth by this Court, that there is double jeopardy.

Q But to show it was larcency committed with a dangerous weapon, the evidence is not the same, is it?

MR. BOWMAN: It could have been shown if the indictment simply said--

Q Well, we are looking at the indictment as it was in each of the two indictments. It's different evidence in the second case as to the nature of the dangerous weapon from what it would have been in the first case.

MR. BOWMAN: Yes, Chief Justice. It would have required that a different type of weapon be proven.

Q You couldn't have established the case under the second indictment, from what you say of Tennessee law, by showing a kind of weapon not described in the indictment?

MR. BOWMAN: Your question, as I understand it--

Q I have forgotten which came first, the pistol or the rifle, but--

MR. BOWMAN: The pistol was the first indictment and the rifle was the second indictment.

Q Well, in the trial on the rifle indictment, could they have made a case by showing that he used a pistol?

MR. BOWMAN: In the rifle indictment could they have made a case showing he used a pistol? I don't think so, but I don't know.

Q One short answer, that the same rifle was used in both--

MR. BOWMAN: Pardon me?

Q The exact same rifle was in both?

MR. BOWMAN: Yes, it's the same weapon both times. There weren't two weapons used in the commission of this crime. There was only one.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Falk.

ORAL ARGUMENT OF EVERETT H. FALK, ESQ.

ON BEHALF OF THE RESPONDENT

MR. FALK: Mr. Chief Justice, and may it please the Court:

The central issue, of course, in this case is whether these two indictments, the first charging robbery accomplished with a pistol and the second charging robbery accomplished with a rifle charges two separate offenses. If they do, then of course the Defendant or the Petitioner here is entitled to his plea of double jeopardy. If not, we contend that he is not entitled to his plea of double jeopardy and he

was convicted of robbery with a rifle.

Now, in Tennessee, as the questioning of Mr. Bowman has indicated, where the indictment describes with particularity the state is required to prove with particularity and where there is a material variance between the indictment and the proof, the prosecution can be terminated at that point, either by dismissal or by a directed verdict or by a mistrial.

Q Well, doesn't the very fact that there was a directed verdict of acquittal under the first indictment show that in Tennessee, at least there was a separate offense, having indicted him for armed robbery by use of a pistol, and that the grand jury carved out an offense and the state said he is not guilty of that offense, or else they couldn't have had a directed verdict of acquittal?

MR. FALK: That's correct, Mr. Justice, that is our position that it is a separate offense and that the second indictment charged a different offense and that the second indictment charging a different offense, it would preclude the Petitioner from prevailing on his plea of double jeopardy.

It is our opinion that the Fifth Amendment through the Fourteenth Amendment applicable at Tennessee prohibits successive prosecutions only for the same offense, and not necessarily for the same act. The same offense is the proscription to which the Fifth Amendment applies and incidentally to which the Tennessee constitutional provision

also applies.

Q Wouldn't you be in better shape if you had two statutes, one for robbery with a rifle, one for robbery with a pistol, which you don't have?

MR. FALK: We would be in better shape, Mr. Justice. I don't think that it would necessarily be controlling in this case. I think that the statute in Tennessee prescribes or carves out or describes the offense of robbery, robbery being the forcible taking of property from the person through violence or through putting in fear. Now, the deadly weapon in this case or in any case would be the means by which the person from whom the property was taken was put in fear.

Q Under the pleading rules in Tennessee, I gather, archaic as they seem to be, it would have been sufficient for the indictment to have alleged robbery by use of a deadly weapon, to-wit: a firearm.

MR. FALK: It would have been permissible and the State would have been allowed to prove a deadly type of weapon under such description.

Q A firearm.

MR. FALK: A firearm, yes, Mr. Justice. If, however, the indictment describes the particularity, the type of deadly weapon or the type of firearm, then the State is required to prove that.

Q In Tennessee?

MR. FALK: In Tennessee.

Q The State has elected to make a separate offense, otherwise there could not have been a directed verdict of acquittal.

MR. FALK: That's right, Mr. Justice.

Q Well, what is a directed verdict of acquittal in this case?

MR. FALK: In this case, a directed verdict of acquittal, in our opinion, acquits the Petitioner of the crime on the basis of the material variance. The issue decided by that directed verdict of acquittal is the issue which was the subject of the material variance, to-wit: that the Petitioner did not rob this person with a pistol. That is the issue.

Q Well, the verdict said, "We find him not guilty of what"? Not guilty of violating the statute of Tennessee, which says robbery with the use of a deadly weapon. Isn't that what it said?

MR. FALK: I believe, Mr. Justice, that the directed verdict said he was not guilty as charged in the indictment.

Q Well, I ask you the same question I asked Mr. Bowman. It was the same weapon that was used in both cases?

MR. FALK: Oh, yes, Mr. Justice.

Q Did the same witness testify?

MR. FALK: The same witness testified in both. Mr. Albright, I believe, who was an investigator for the Clarksville Police Department, testified in both cases.

Q Does that get into the double jeopardy problem?

MR. FALK: I don't believe it does. We don't disagree with the fact that the Petitioner was placed in jeopardy in the first trial. We will have to admit that, that he was in jeopardy in his first trial, and if this second offense is the same as his first offense, then--

Q He was put in jeopardy of armed robbery with a rifle, I submit because the state introduced the rifle in the trial.

MR. FALK: Well, the rifle was not actually introduced. The testimony of Mr. Albright, the investigator, commenced and the question was asked Mr. Albright "What type of weapon were you looking for," and he said he was looking for a .22 caliber rifle.

Q Which .22 caliber rifle was in the courtroom in view of the jury, so saith this record here.

Did Mr. Bowman object to the introduction of that rifle?

MR. FALK: Well, I don't believe that the rifle was actually introduced. Testimony was introduced but the rifle itself was never introduced into evidence at the first trial.

Q Wasn't it in the courtroom? Didn't Mr. Bowman make a motion to get it out of view of the jury? I am reading right here.

MR.FALK: Yes, it was. It apparently was, Mr. Justice. It was in the courtroom.

Q So the state through the Attorney General proceeded to try this man for robbery by use of a rifle, is that right?

MR. FALK: They tried to do that, Mr. Justice, but they were not successful.

Q He tried, didn't he? He tried it. He tried to convict him of using that rifle?

MR. FALK: Yes, Mr. Justice, he did.

Q And what did he do in the second trial?

MR. FALK: He tried and did convict him of robbery through the use of the rifle.

Q The rifle. And you don't have any double jeopardy problem?

MR. FALK: I don't believe so, Mr. Justice, on the grounds that although the state tried to prove in the first trial that he had committed the robbery with the rifle, they did not do that.

Q What you are saying is that Tennessee follows the strict variance rule. Do you happen to know how many states fall into that category?

MR. FALK: I have not been able to determine the exact number of states. I believe that the majority rule among the states is towards a more lenient determination of whether a variance is material. More leeway is given in most states, I would say, in determining whether variance is material than in Tennessee. However, I don't know whether Tennessee is the only state or how many states do follow this rather strict material variance rule that Tennessee follows.

Q May I ask, Mr. Falk, I gather the state concedes we are to decide the issue before us based on Federal double jeopardy standards?

MR. FALK: I believe that Federal double jeopardy standards are applicable to the State of Tennessee. Benton versus Maryland.

Q If I am right as to dates, I think we decided Benton, which subjected the states to Federal double jeopardy standards, on June 25, 1969. As I understand it, this second trial and conviction was on March 1969, three months earlier.

MR. FALK: Yes, that is true.

Q The state still concedes that the Federal standards apply?

MR. FALK: Well, the Federal standards were not applicable at the trial, for Benton versus Maryland had not been decided at the trial of the Petitioner, but I believe that this Court can use the Federal standards to--

Q Well, the principle of Benton against Maryland was made fully retroactive.

MR. FALK: Yes.

Q In two different cases that was made explicit.

MR. FALK: Yes, that is my understanding, Mr. Justice, that it is retroactive. It is our opinion that Federal double jeopardy standards are applicable.

Q The Federal constitutional guarantee against double jeopardy is applicable. The problem here is the impact of that standard with the--what I have referred to as the archaic pleading rules of Tennessee.

MR. FALK: That seems to be the problem. We would contend that although archaic, the Tennessee rule, the strict rule with respect to material variance actually protects the accused in several respects. First, it requires the State to prove all of the allegations contained in the indictment that are not surplusage. It has the advantage of identifying the crime with a high degree of particularity. In that respect, it would minimize the chance and accused would receive an unjust conviction.

We would also state it reduces the chance of error in the trial court in determining whether a variance is material, in that it would require the state to prove the charges as described in the indictment.

So we contend that while it may not be in the

mainstream of the remainder of the states of the Union, that it does have these three or four advantages of protecting certain rights the accused may have.

Q Mr. Falk, are you familiar with the Court's decision last term in Jorn?

MR. FALK: Yes, I am.

Q You didn't cite it in your brief and I think your opponents didn't cite it. Do you feel it has no bearing here at all?

MR. FALK: I think it has a bearing. I believe it would have more of a bearing, had a mistrial been declared in this case, to determine whether or not the trial judge abused his discretion in declaring a mistrial, if a mistrial had been declared in this case.

Q Well, is there any practical difference as to result between directing a verdict of acquittal at this stage of the trial and having a mistrial under Tennessee law?

MR. FALK: Under Tennessee law, no. Under Federal law, I would say the only difference would be that by directing a verdict of acquittal, it would perhaps raise the issue of collateral estoppel at a second trial, whether or not the same issues were decided in the first trial. A mistrial would not raise the issue of collateral estoppel but a directed verdict of acquittal would, and this is the only difference I would see.

Q But if the practical consequences are the same, it would be unusual if Federal law would provide for a different outcome in one than in the other, wouldn't it?

MR. FALK: Yes, it would.

Q Well, except clearly with mistrial there might or might not be a problem under Jorn but with acquittal it is certainly very clear he could never again be tried for armed robbery with the use of a deadly weapon, to-wit, a firearm, to-wit, a pistol, isn't that clear?

MR. FALK: That is clear, Mr. Justice.

Q It would be a separate offense and the acquittal absolutely barred subsequent prosecution for that offense. Mistrial might be up to--

MR. FALK: I think a mistrial might have raised the same issue. We concede he was in jeopardy at the first trial.

Q Under the indictment charging him with armed robbery by use of a .22 caliber pistol, isn't that right?

MR. FALK: Yes, Mr. Justice.

Q He was in jeopardy of that?

MR. FALK: Yes, Mr. Justice.

Q He was in jeopardy of that?

MR. FALK: He was in jeopardy of that, yes.

Q Had he been acquitted of that, he could never again be brought to trial for that?

MR. FALK: That is true. I think that is perfectly

clear.

Q It is probably also true under Jorn, but depending upon what the genesis of the mistrial was, isn't that what Jorn holds?

MR. FALK: Yes, that is what Jorn holds. I think it is possible he could have contended double jeopardy, even if a mistrial had been declared under the authority of Jorn.

So in summary, we would contend that the variance was material under Tennessee practice. It was material even under Tennessee's interpretation of the robbery statute, because it went to the heart of the means by which the property was taken from the individual, by violence and putting in fear. The means used to put the victim in fear was the deadly weapon. In the first indictment it was described as a pistol, and in the second indictment it was described as a .22 caliber rifle. We contend this is a material averment going right to the heart of the means by which the person or victim was put in fear, and therefore as a material alleging, a material averment, a variance between the two would be a material variance and the same evidence would not support both indictments.

Q Of course that would be, as suggested earlier, a ridiculous argument to make in the Federal system where you can amend an indictment practically right up to the time of verdict to conform to the proof. You are saying that Tennessee has held that these are separate offenses and this Court is

not entitled under the double jeopardy clause of the Federal Constitution to require Tennessee to amend its law as to the procedure in its own state Criminal Courts.

MR. FALK: That is the substance of our supposition.

Q Mr. Falk, does Tennessee criminal practice recognize the bill of particulars? Can a defendant demand a bill of particulars?

MR. FALK: Not as such, Mr. Justice. I don't know of any provision in Tennessee law for a bill of particulars as such. As Mr. Bowman stated, there is a statute that does permit an amendment of an indictment upon the consent of the Counsels involved, the prosecuting attorney and defense counsel. In this case, according to Mr. Bowman who was the defense counsel at the trial level, this was not agreed to. He stated, I believe, that he would not agree to this, so that statute, although available, was not utilized in this case.

Q Well, suppose the indictment alleges armed robbery with a deadly weapon, the defendant doesn't have any pre-trial mechanism available to him to demand from the state what deadly weapon are you charging that he used?

MR. FALK: There is no procedure that I know of for the defendant to utilize to obtain from the state or to require the state to describe with particularity the deadly weapon used.

Q Would that be a sufficient indictment as a matter

of Tennessee law, just "a deadly weapon?"

MR. FALK: I believe it would, Mr. Justice, it would be a valid indictment in Tennessee just to allege that the person was put in fear through the use of a deadly weapon.

Q Then you could show it was a crowbar, a dagger, a kitchen knife or a machine gun or pistol or hand gun?

MR. FALK: There is a substantial body of law in Tennessee as to what constitutes a deadly weapon.

Q Well, I assume there is, but let's assume those articles anyway.

MR. FALK: Well, I don't know about a crowbar, but firearms have been held to be deadly weapons. It goes more to the nature of the way the weapon is used when it gets to weapons not traditional--thought of as deadly weapons.

Q Perhaps I am repeating my brother Rehnquist's question when I ask, is there any way that a defendant in Tennessee charged under an indictment with robbery with the use of a deadly weapon, can get anything from the prosecution as to what deadly weapon you are thinking about?

MR. FALK: In Tennessee I don't believe there is a specific procedure whereby he can get that particular information. We do have a preliminary hearing procedure in Tennessee which was required recently by statute. I do not know of any way that a defendant could require the state to allege with particularity the deadly weapon used.

Q Why is it if that would be a sufficient indictment, why is it the practice in Tennessee to get very, very detailed specific, explicit white horse, black horse, brass rollers, bronze rollers, pistols and rifles? Why is it done?

MR. FALK: Well, I don't know why it is done. It's a long line of case precedents beginning back in the early 1800's, requiring where the state alleges with particularity to prove with particularity .

Q Yes, but then why does the state allege it? If it then is locked up in the duty of proving it, if it doesn't have to allege it?

MR. FALK: Well, I don't know. I think it varies throughout the state between grand juries as to how these things are alleged. It is obvious in this case, I think, that it was alleged with too high a degree of particularity. I don't know why it occurs or could occur that it would be alleged with not quite enough degree of particularity. My opinion is that a deadly weapon allegation would be sufficient. I have not seen such an indictment returned in Tennessee. I have not seen a lot of them, but I have not seen one that is returned with this little degree of particularity. Most of them allege robbery with a deadly weapon, to-wit, a gun. I think a gun is a common description of the deadly weapon where a gun is used.

Q Mr. Falk, what significance is the finding of the second jury, that they say upon their oath, that they find the

defendants, naming them, guilty of armed robbery? They didn't use the word rifle or pistol, either one. Isn't it all one crime? Isn't that the crime they were charged with in both cases, armed robbery?

MR. FALK: Well, it is our opinion that--well, first of all, there is not a crime in Tennessee such as armed robbery as such. It is robbery and if a deadly weapon is used, then the statute provides for a much greater punishment all the way up to and including the death penalty.

Q But they were found guilty of armed robbery. That is what the jury's verdict was.

MR. FALK: Well, this jury's verdict, I think, stating armed robbery, means they were found guilty of robbery accomplished by the use of a deadly weapon.

Q A .22 rifle. You didn't go that far, did you, in your answers? Didn't go that far, did you?

MR. FALK: Well, they didn't say that in their verdict, that's true.

Q So if he had been tried on the other one, they would have brought in the same verdict?

MR. FALK: That would have been the same verdict, armed robbery, or robbery accomplished by the use of a deadly weapon.

Q That gives you a problem, doesn't it?

MR. FALK: It doesn't give me any problem,

Mr. Justice, because I don't believe that the verdict is required to be that specific. I think that since what is alleged in the indictment becomes the means of putting the person in fear, the means of obtaining this property by force, this is the essential ingredient that was alleged in the indictment.

Q So they are both the same? Would there be any difference between a .32 and a .45 pistol?

MR. FALK: There would be a difference. I don't know whether that difference would be viewed as material or not. There is a much greater difference between a pistol and a rifle.

Q Well, if he were found not guilty of robbery with a .32, could you indict him and try him for armed robbery with a .45?

MR. FALK: I believe you could, Mr. Justice. They're obviously not the same type of weapon.

Q As using the same pistol as evidence? You used the same rifle in both of these cases.

MR. FALK: Well, I would have to disagree with Mr. Justice on that. I think that the rifle was never introduced in evidence at the first trial, regardless of whether it was in the courtroom or not.

Q Well, the Police Chief or whatever his title was, testified as to a rifle and I am asking you, even though it does not appear in the record, is that the same rifle that

was used in the second trial?

MR. FALK: It was the same rifle. It was, I will have to--from my reading of the record, it was the same rifle.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Falk.

Mr. Bowman, you have a few minutes left. Do you have anything further?

REBUTTAL ARGUMENT OF ROGER N. BOWMAN,ESQ.

ON BEHALF OF THE PETITIONER

MR. BOWMAN: I would just like to add that an approval of this practice would allow an Attorney General in the State of Tennessee to indict a man for armed robbery, knowing he was alleging the wrong type of weapon, try him, have a verdict of not guilty returned, again indict him, again alleging the wrong type of weapon, again try him and so forth on down the line. The Attorney General stated at the first trial, and it's in the records, "I made a mistake in the indictment."

Now the approvalwould allow him to make a mistake and try a man over and over and over again until he finally decided to allege in the indictment or have the grand jury return an indictm with the right type of weapon.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bowman. Thank you, Mr. Falk. The case is submitted.

(Whereupon, at 10:50 a.m., the case was submitted.)