ORIGINAL

In the

Supreme Court of the United States

DONALD L. BROOKS,

Petitioner,

vs.

TENNESSEE,

Respondent.

No. 71-5313

Washington, D. C.
March 21 & 22, 1972

Pages 1 thru 54

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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No. 71-5313

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Washington, D.C.
Tuesday, March 21, 1972

The above-entitled matter came on for argument at 2:30 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
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:

JERRY H. SUMMERS, ESQ., 205 Professional Building, Chattanooga, Tenn. 37402, for the Petitioner

ROBERT E. KENDRICK, ESQ., Deputy Attorney General, State of Tennessee, Supreme Court Building, Nashville, Tenn. 37219, for the Respondent

C O N T E N T S

[Second day -- pg. 25]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear No. 71-5313, Mr. Brooks against Tennessee.

Mr. Summers, you may proceed.

ORAL ARGUMENT OF JERRY H. SUMMERS, ESQ.

ON BEHALF OF THE PETITIONER

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

I represent the petitioner Donald Brooks who was convicted of armed robbery under the laws of the State of Tennessee, and sentenced to ten years in the state penitentary.

Because I consider this to be a novel question of law, I would like very briefly to spend some time on the facts of this particular case. The sole question which the Court has granted certiorari is on the question of whether the trial court was in error in refusing to allow the defendant to be placed on the witness stand after other witnesses testified in his behalf, under Tennessee Code Section 40-2403.

Said Tennessee statute requiring defendant to be first witness is unconstitutional and in violation of the Fifth, Sixth, Fourteenth Amendments of the Federal Constitution, and Article 1, Section 9 of the Tennessee Constitution.

This question is presented in two phases. The other section, Code Section 40-2403 deprives a defendant of due process of law, in violation of the Fourteenth Amendment to

the United States Constitution.

Now, this question, the statute involved in this particular matter, was enacted in Tennessee in 1887. I would like to very briefly present the matter in which this question was raised in the trial court, and to do that I would very briefly like to direct your attention to pages one through three of the Appendix in which is an excerpt of the testimony at that particular trial.

Found at the bottom of page one, my question with regard to a motion to the court outside the presence of the jury:

"Your Honor, of course, this is merely for the record. I know what the law is, but it's something that I would like to preserve for the record. At this time, of course, you realize we have a statute in Tennessee, which states that this defendant has to testify first.

"THE COURT: That's right.

"MR. SUMNERS: I would like, for the purpose of the record, to object to my client, at this time, I really do not feel that I know if I want to put him on or not, and I would like, I have another witness, two more witnesses, I'll use Chief Cornish to put on the stand, and I would like to reserve the right to call Mr. Brooks after they have testified, if the facts should warrant it. And that's my motion I'd like to--

"THE COURT: Well--

At this time, the Assistant Attorney General, Mr. Donald Poole, interposing, said, "Sir, we'll waive the statute if you would waive the statute."

The Court responded, "No, sir, I'm going to follow the law, and the law is, as you know it to be, that if a defendant testifies he has to testify first. And so, during the recess you can consider that. Do you have anything else to bring before the Court before we recess?"

I made other motions and a recess was taken, and we came back after a short recess, with the Court saying further, "Mr. Summers, you do want this witness to testify and that you're not going to use the defendant, is that right?"

My response was,"Not at this time, your Honor. I will--"

The Court interposed, "Well, I've ruled on your motion on that. So, in other words if you intend to let the defendant Brooks testify, he'll have to be first.

"MR. SUMMERS: Your Honor, of course, I understand the Court's ruling on this. I would like, for the purpose of the record, like I explained, I would like to later move to put him on again if I should decide. I'll do it out of the presence of the jury though.

"THE COURT: Well, no, I've already ruled on that, but I'm just again reminding you, in case you have thought about it again. If you're going to use him, if he wants to

testify on his own behalf, he'll have to do it now.

"MR. SUMMERS: All right, your Honor. We respectfully note an exception."

This is the manner in which the question was raised in the trial court.

Very briefly, I would like to read for you the statute which is involved in this particular matter.

In 1887, the Tennessee General Assembly enacted a statute entitled "An act to permit parties defendant in criminal causes to testify in their own behalf."

The statute is actually twofold: first is 40-2402 which gave the defendant the right to be a competent witness in his own behalf.

The second part of the statute which is 40-2403, on which the Court has granted our writ and that is: Failure of defendant to testify Order of testimony in his own behalf shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."

Now this statute prior to 1887, a defendant was incompetent to testify in his own behalf in the State of Tennessee in a trial court.

QUESTION: Mr. Summers, in Tennessee, if you put the defendant on first, may he also be used in rebuttal?

MR. SUMMERS: Yes, your Honor.

QUESTION: And may he be used in rebuttal, even though he doesn't take the stand in his own defense?

MR. SUMMERS: Your Honor, this is a case that is cited in the brief which I believe is Clemons versus the State, which held that he could testify in rebuttal.

This statute enacted in 1887 in conjunction with 40-2402, it's my contention that the purpose of the legislators at that time was that 40-2403 was to be a safety valve, because this was a new concept and I have cited in my brief, Ferguson versus Georgia. It recites the history of defendant to testify and this was a new concept in 1887. It had just been recently enacted in several states, granting to defendants the right to testify. In Tennessee, it is my opinion that the reason this was enacted was it was a safety valve because there was a fear as cited by Wigmore in the brief and the state relies on it considerably in their brief, that this would incur perjury, that it would give a defendant the opportunity and they had been afraid he would color his testimony, having the right to sit there as a witness, at the witness stand, hearing his own witnesses testify, and then mold or doctor his testimony. This is the reason I feel that Tennessee adopted this statute in 1887.

It is our contention that as cited in the brief on constitutional grounds, that this fear of the legislature is not sufficient, that the constitutional violations in the

Fifth, the Fourteenth and Sixth Amendments of the United States Constitution, Article 1, Section 9 overcome this and make it imperative that we ask the Court to reverse this--

QUESTION: How many other states have such a statute do you know?

MR. SUMMERS: Yes, your Honor, Mr. Justice Stewart. Tennessee and Kentucky are the only two states and these are some of the reasons why I am urging that this decision be declared unconstitutional.

Tennessee and Kentucky are the only two states that my research has been able to find that the state agrees to have this type of statute. Now of course there is no federal rule that requires this. Now, 18 USCA 3481 allows the defendant to testify, granting him the competency to testify but there is nothing that states when he must testify.

This is not the rule in several cases in Tennessee. Defendant does not have to be the first witness. There is no such rule as this requiring order of testimony in a civil case.

QUESTION: Are there some courts of appeal that follow this rule?

MR. SUMMERS: Your Honor, there is one decision, United States versus Shipp, which is 359, Federal Second, 185 which has held that it was a matter of discretion, the use of discretion to allow the trial court to control the order of testimony. That is cited. The state relies upon that case

very heavily.

QUESTION: That is the Sixth Circuit?

MR. SUMMERS: Yes, I would like to refer to that a moment.

QUESTION: Before you do, if you were to prevail here, do you feel you are entitled to a new trial or merely a remand for consideration of whether prejudice existed?

MR. SUMMERS: Your Honor, we respectfully feel that we should be entitled to a new trial.

I would also like to point out and it's not cited in the brief and I ask the Court because this has only recently come to my attention, that a special committee of the Tennessee Legislature appointed by the Governor has--in Tennessee we are presently studying to revise our rules of criminal procedure, to completely revamp the rules in Tennessee--that a special committee appointed by the Governor and the legislature has recommended that this statute be repealed in the State of Tennessee, which gives the right,-- that is, that should either the defendant or the state request it, the judge may exclude from the hearing at trial any witness of first petition not at the time under examination so he may not hear the testimony of other witnesses. This provision shall not apply to the defendant, the attorneys in the case, or the first witness for the state. And in the comment to that it says the purpose of this section is to replace

T.C.A. 2403, which forces the defendant to testify first in his defense if he intends to testify at all. It is felt that the defendant should be allowed to testify any time if he wishes, and should not lose the right to be heard merely because he does not testify first.

QUESTION: Mr. Summers, is the rule in Tennessee also on behalf of the state that the prosecuting witness must testify first if he or she is to testify?

MR. SUMMERS: Mr. Justice Rehnquist, there is no statute that requires it but there is case law to that effect.

QUESTION: Would the committee's recommendation be changed on that too, or is it just for the defendant that the committee recommends a change?

MR. SUMMERS: Under this statute, this is also discussed under this amendment also, Mr. Justice, and it held that the proposed section which I read would in effect allow the state to choose a witness that it wanted to help with the case. The state would merely put its most helpful witness on the stand first. That is what they have proposed under the statute.

QUESTION: What happens if they don't? Does the prosecution collapse?

MR. SUMMERS: Your Honor, under the coding of the Smartt case, they would not be allowed to use that witness, as I understand it.

QUESTION: Even though it is by definition

the prosecuting witness?

MR. SUMMERS: Yes, sir.

QUESTION: Doesn't that mean there is no prosecution?

MR. SUMMERS: I think, yes, sir, normally this case that cited this was the Smartt decision which is relied upon in the State's brief, a very old case, also, as all of these cases relying upon this are very old.

QUESTION: I understand that the state need not pick a prosecuting witness to sit at the witness stand, if he or she was the victim; if the state wants to choose somebody else to sit at the trial table, it's that person who must testify or not at all?

MR. SUMMERS: Yes, Your Honor, very often they will use a police officer, the detective who handled the case and he will be designated as prosecutor and he sits there at the witness stand.

I might say that this question you have brought up is not very often raised. In fact, many times he will not testify. It's not a statutory requirement.

QUESTION: Maybe you can clear up confusion for me. In this case, when the prosecution rested, did you put on some evidence?

MR. SUMMERS: No, Your Honor.

QUESTION: None whatever?

MR. SUMMERS: Yes, I did, later on.

QUESTION: I am aware that you made your motion. Then you put on some evidence?

MR. SUMMERS: Yes, I did. I called two witnesses, Your Honor. One, the detective, the prosecuting witness in this matter, who had as my original assignment bears. I raised a confession question and a line up question, which you did not grant certiorari on, but the detective who had conducted the line up in which this young man was picked out, he was not called by the state as a witness.

Now I called him as a witness for the--they relied merely on the identification of the victim. I called the detective who conducted the line up as my own witness. I further called an inmate in the jail who was in the same line up. I called those two witnesses that I put on.

Now the Court may wonder, did I remove my motion after they had testified. I did not do that and I felt like the court's ruling in itself, I certainly felt like it would have been improper for me to do so.

QUESTION: Did the state put on any additional evidence?

MR. SUMMERS: No, sir, they did not put on any in rebuttal, after I put on my two witnesses.

I felt I had raised this question in two or three other cases, and fortunately I got acquittals in them, and at one time I had done this before the presence of the jury.

I moved to call him and then the court said no, you cannot put him on. I didn't do that in this case, because I thought it might be improper because it got before the jury the fact, why can't the defendant testify so I did not do it. I thought it would be improper. I did it at one time and then I thought it might be improper.

QUESTION: Would you spell out for me where the prejudice exists as you tried this case?

MR. SOMMERS: Yes, Your Honor, this is our theory very simply: The prejudice involves that as you all know and it's cited in Williams versus Florida, Justice Black's opinion, no matter how hard you prepare your law suit, no matter how well you know your witness, no matter how well you have talked to the government's witness or state's witness, a law suit can change, and it's our contention that my client--my theory is this, that making me choose at the beginning of the trial, I did not feel that the state had made out a sufficient case in which I had to put my client on the stand. My client had no criminal record. It's stipulated in this. I was not trying to keep him off the stand because he had a long criminal record which is normally the case, but I did not feel that I should have to put him on, but the prejudice involved is that if during the course of--I wanted to put on two other witnesses which would help my side. The problem is if I put these witnesses on and something happens that the

state in some way affects their testimony and something comes out which can only be explained by the defendant taking the stand, or a non-available witness, then I am precluded from putting him on in the Tennessee procedure.

QUESTION: I know what your theory is. My question is, was there prejudice in this case and could you so prove if necessary?

MR. SUMMERS: Your Honor, I respectfully submit that the prejudice in this particular case--this came up after the Court had ruled that I could not put him on and then it developed, the prejudice that came up was not answered because of the fact I could not put him on the stand.

QUESTION: You couldn't put him on at all?

MR. SUMMERS: No, sir.

QUESTION: Well, let me follow up on Justice Blackmun's question a little bit. I take it that your initial tactical decision was you've got two witnesses you are going to call. If they go well, so to speak, you're not going to call your own client, and you put those two witnesses on. Now, how did they go?

MR. SUMMERS: Well, in regard to the way that they went, I put on the detective. I called him as my witness. A trial judge in Tennessee would not declare him a hostile witness, and I put him on, as to the question of the fact this was a very highly suggestive line up, in which this young man

had been arrested for other charges, his picture had been on T.V. and this detective made the statement when he called this prosecution witness to come on down here, we got the boy that held up the store, and my client indicated he was present when that took place. This came out, in putting on this state's witness who I had to call myself because they did not put him on. Therefore, this situation, the rebuttal of this could only have been by my particular client and my client, I could not rebut this statement, when I put the detective on and questioned him about the line up, that he denied it, it could only be rebutted by my client and my client could not take the stand.

QUESTION: Did you at that point or at any point in the trial, then out of the presence of the jury , make a proffer of what your client would testify to if he had been permitted to take the stand in the order that you requested?

MR. SUMMERS: No, Your Honor, I did not.

QUESTION: Don't you think that would have helped somewhat?

MR. SUMMERS: Yes, I think it certainly would have at that time.

QUESTION: Even if your client had testified first, he wouldn't have been able to respond to what the detective said

MR. SUMMERS: No, sir. Well, I had put him on as my own witness and of course I wasn't in a situation where I had been cross-examining my own witness. But I would at least have

made an attempt to put him on. Under the statute I can't even attempt to put him on.

QUESTION: I go back to my other question. Suppose you had put him on and then you put the detective on, and then you wanted to have him respond to what the detective had testified to, could you then put him back on?

MR. SUMMERS: No, sir, not under the State of Tennessee procedure, I could not.

QUESTION: Then where is your prejudice?

MR. SUMMERS: Well, Your Honor--

QUESTION: This was a not guilty plea, was it not?

MR. SUMMERS: Yes, sir, it was.

QUESTION: And I suppose unless he was going to change his plea to guilty if he had gotten on the stand, he would have denied the commission of the offense?

MR. SUMMERS: Yes, sir.

QUESTION: And if one can assume that as I suppose one can, the jury believed that and if he wasn't able to get on the stand and testify that he hadn't done it, I suppose it's a little hard to say that you can't show there is no prejudice?

MR. SUMMERS: Yes, sir.

It was a not guilty plea and he was tried by a jury and the jury convicted him. As I stated, there's very little case law on this proposition. It's a very unique situation where the outstanding case for the petitioner is

Bell versus Mississippi which is an 1895 case, in which this was held--this does not rely on the statute--but it held that it was an abuse of discretion and improper for the trial court to require the defendant to be the first witness.

QUESTION: Is that the case relied on by Judge McAllister in the dissent in the Shipp case?

MR. SUMMERS: Yes, sir, it is and also the '67 decision of Nassif versus D.C., which cites the Bell case as being the authority and a very lengthy opinion which states in effect that it was still good law, a proper ruling in 1895 by the Mississippi Court and the D.C. Court bought it in 1967.

Now, we take the position that the defendant in a criminal case--this statute is unconstitutional in that it denies the defendant a right to testify in a criminal case.

QUESTION: Is that fully true? He may testify. What it denies him is the complete choice of when he may testify.

MR. SUMMERS: Yes, Your Honor.

QUESTION: And I go back to my prejudice again by saying that you haven't convinced me I think that there is any prejudice here as to the order of testifying.

MR. SUMMERS: Well, Mr. Justice Blackmun, our contention is that we have alleged under this matter that under this amendment, what we're contending is that it's been held by the Court that he is entitled to the guiding hand of counsel.

Now, as stated by Mr. Black in the Williams versus Florida case which, stated very briefly, is the law changes quite frequently, in the trial of law suits, in which he said that any lawyer who has actually tried a case knows regardless of the amount of pretrial preparation, the case looks far different when it's actually being tried than when it is only being thought about.

We say that this statute--how the prejudice comes about is the burdens it puts upon the defendant and his counsel.

QUESTION: Well, in this case what prevented you from putting him on after the officer testified? Someone has asked you that before but I am still not clear.

MR. SUMMERS: The statute.

QUESTION: You could not put him on after the--

MR. SUMMERS: No, sir. The statute precludes it.

QUESTION: You said before they have modified this with respect to rebuttal, in answer to an earlier question of Justice Blackmun, you said the Supreme Court of Tennessee has permitted him to be put on out of order for rebuttal testimony only. Now that would be to rebut, and surrebuttal is what it would really be, wouldn't it? That would come only after the state had put on some new evidence following your testimony, and then you could put your man on, is that correct?

MR. SUMMERS: I am looking in the brief for the Tennessee situation which discusses the question of rebuttal.

QUESTION: Did I correctly understand you to say that in response to Justice Blackmun's question, that he can be put on in rebuttal?

MR. SUMMERS: May I have just one moment, your Honor. I think I can find that.

QUESTION: Go right ahead.

MR. SUMMERS: Your Honor, in the case of Arnold versus State, which is cited in the brief, a case where the defendant was convicted of assault with intent to murder, in the second degree, in this case the defendant didn't testify in the defense proof. Now he attempted to call as a rebuttal witness, his client. He attempted to call him as a rebuttal witness to deny that the defendant and his attorney had offered the victim $500 to drop the case. In that case, the Court declined to allow the defendant to testify on objection by the State, and of course in our state the Supreme Court held it was error for the defendant not to be able to be called as a rebuttal witness, so to answer the question, he could. I may have misinformed the Court. He could be called as a rebuttal witness.

QUESTION: At what stage? Rebutting the state's--

MR. SUMMERS: Rebutting the state's proof, yes, sir.

QUESTION: That's surrebuttal?

MR. SUMMERS: Yes.

QUESTION: And wouldn't it be a proper argument for

the state to make, if you tried to call him on surrebuttal, after the state put on rebuttal, to answer the officer's testifmony that you had brought out on your own case: that this isn't legitimate surrebuttal, even though in Tennessee you could testify, your client could testify in surrebuttal--wouldn't the state have an objection if you tried to produce your client on surrebuttal in this case just to rebut the officer, just to refute what the officer had said when you had him on the stand on direct?

MR. SUMMERS: Yes, sir, I'm sure they would.

QUESTION: The officer was your witness, as I understand it?

MR. SUMMERS: Yes, sir.

QUESTION: You weren't allowed to claim him as a hostile witness?

MR. SUMMERS: No, sir, as a matter of fact, I asked the Court--

QUESTION: That's by your own testimony--that was your own testimony, own evidence?

MR. SUMMERS: Yes, sir.

QUESTION: Mr. Summers, don't misunderstand me. I don't think much of your system. What I'm concerned about is whether it is unconstitutional.

MR. SUMMERS: Yes, sir, I realize that and this Court has held under the Fifth Amendment, particularly under

Griffin versus California, that the defendant has a constitutional right to remain silent. Of course that case was dealing with comment on the failure of the defendant to testify.

We respectfully submit that this procedure that we have in the State of Tennessee is so far in the minority, it's not been adopted by any state except the State of Kentucky, it's not been adopted by the Federal Rules, it's not the rule in civil cases, and I respectfully submit the real issue in this case is whether the constitution implies or states that the defendant has the right to be heard in any case.

We respectfully would like to save our time for rebuttal.

QUESTION: Mr. Summers, before you sit down, in the part of the record you read to us, that state in this case offered to waive the statute and the court was unwilling to do so. Is it a fairly frequent occasion that the statute is waived by agreement between the parties and the court or is it not?

MR. SUMMERS: Your Honor, this particular matter has been brought up. I have brought it up three times prior to this case, and I was fortunate enough to win the cases. I brought it up last Friday in a case and the state offered to waive it again. The court would not allow them to waive. They have taken the position now that they will not allow it

to be waived.

Now, this has been the position of our trial judge there in Chattanooga at the times that I have tried to raise it.

QUESTION: Is this generally only regarded as a rule of procedure? How is it regarded? Apparently this judge treats it as a matter of substantive law in some way.

MR. SUMMERS: I feel it is more a matter of procedure, your Honor, but it has not been raised--this is considered a statute which has been on the books for this period of time, under which very few cases have been raised. We have one late decision which came out of Chattanooga. Another attorney raised this proposition, the Harvey case, but it based its ruling just on the Clemons case which is an old decision.

QUESTION: Mr. Summers, one last technical question. Areyou arguing the Sixth Amendment here as well as the Fifth?

MR. SUMMERS: Yes, your Honor.

QUESTION: Secondarily are you foreclosed by our limited grant of certiorari? Wasn't our grant of certiorari here limited?

MR. SUMMERS: Yes, your Honor. By an oversight, when this matter came up, it was on the Fifth, Fourteenth, and Sixth Amendment, and also Article 1, Section 9 of the

Tennessee Constitution which I think is similar to the Sixth Amendment in certain respects, the right of the accused in criminal prosecution, page 3 of the brief, "In all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him." It favors speedy trials and he should not be compelled to give evidence against himself.

QUESTION: My question was whether a limited grant of certiorari restricted you to the Fifth?

MR. SUMMERS: Your Honor, I think probably it should. We are primarily relying on the Fifth and Fourteenth Amendments. I put the Sixth in but I think the Court is probably correct we should not be allowed to consider it but because of the similarity I did argue the Sixth in this matter.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Kendrick, we have only three minutes left. If you would prefer not to submit your argument, we will defer it until the morning.

MR. KENDRICK: If it please the Court, I would prefer it in the morning.

MR. CHIEF JUSTICE BURGER: We will take it up the first thing in the morning.

(Whereupon, at 2:58 o'clock, p.m. the Court was recessed, to be reconvened at 10:00 o'clock, a.m. the following day, Wednesday, March 22, 1972.)

IN THE SUPREME COURT OF THE UNITED STATES

DONALD L. BROOKS,

Petitioner,

v. No. 71-5313

STATE OF TENNESSEE,

Respondent.

Washington, D. C.,

Wednesday, March 22, 1972.

The above-entitled matter was resumed for argument at 10:13 o'clock,a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
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:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume argument now in No. 71-5313, Brooks against Tennessee.

Mr. Kendrick, you may proceed.

ORAL ARGUMENT OF ROBERT E. KENDRICK, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Reference was made to the State of Tennessee here today in an effort to maintain a statute that our elected representatives enacted some 85 years ago, and have maintained until this day. This statute is well known to Tennessee lawyers and judges, and has been routinely applied in settling questions.

I believe I am correct in saying that its constitutionality has not been challenged in the Appellate Court of the State of Tennessee nor in the United States Court, until this case, until the case of Harvey vs. State, which our Supreme Court decided last year on the same statute.

It is not in the record, and I had not known until Mr. Summers brought it forward yesterday that some nine-member committee had recommended -- not a committee of the Legislature -- had recommended that the Tennessee Legislature both codify sequestration of witnesses rule that is now a rule of court, or by its decision, and also repeal or amend the statute which

is before the Court today.

To my knowledge, no bill has been introduced to do that, but the legislative branch agreed to the statutory rules, and is its prerogative to change it or to remove it or to replace it, if it wishes, and I don't see that that's particularly relevant here today.

I'd like to remind the Court of something that Justice Cardozo said a number of years ago which we believe to be apropos here. He said to the Court, in Schneider vs. Commonwealth of Massachusetts -- not cited in our brief, but at Vol. 91 U.S. 97, at page 105:

"The Commonwealth of Massachusetts is free to regulate the procedure in its courts in accordance with its own set of policies and fairness, unless in so doing it offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental."

And further, at page 122, he says:

"But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained until it is narrowed to a filament. We are to keep the balance true." Unquote.

Justice, therefore, is due to the accuser, to the victim of a crime, to the people of the State; and we ask the Court today, in the words of Justice Cardozo, to keep the balance true.

The Balance is already weighed in favor of the defendant in a number of well-known ways to the Court, and I shall not go into those.

I will refer to one of them, which is pertinent here; that is, that ift he defendant testifies, unlike all other witnesses he may not be compelled to be outside the courtroom while other testimony is being given. The petitioner here would like to be favored even further.

He would like, uniquely among all the witnesses, to be able, after sitting in the courtoom and hearing the testimony of his own witnesses, to be able to follow them to the stand and to testify in conformity to what they said.

Q That's not really unique, because that's what's done in 49 States of the Union.

MR. KELLEHER: Well, it's not unique -- it is done in 49 States; but unique among the witnesses, he's the only one who can do that. And he would like to be able to do that in Tennessee.

But to proceed under the sequestration of witnesses rule, none of the State's witnesses have that privilege or is favored, as this petitioner seeks to be, in Tennessee. Not even the prosecuting witness.

Thus, a citizen may be assaulted and robbed or raped and, as the prosecuting witness he or she may not, under the sequestration rule remain in the courtroom and hear the

other witnesses for the State before testifying. No, in order for the prosecuting witness to be in the courtroom and to assist the District Attorney General in putting on the State's side of the case, the prosecuting witness must go on first.

Q Mr. Kendrick, supposing in a Tennessee trial that the defendant does take the stand as the first of the defense witnesses, then other defense witnesses are called, and one of those witnesses deals with a factual element which the defendant did not deal with in his testimony. Could the counsel for the defense then recall the defendant to deal with that particular point as a part of the defense case; or does discretion exist in the trial judge to permit that?

MR. KENDRICK: Mr. Justice, we don't have any decisions on that point, but it's my opinion that that could be done.

Why may not the people of Tennessee, through their duly elected representatives, enact and maintain a statute which requires, in at least this area, that the defense be subject to the same procedural requirements as the prosecution? That the accused, if he is to testify, like the prosecuting witness who testifies and remains in the courtroom, must testify first for his side.

Why, in the name of truth and justice, and to keep the balance true, may the people of the State not require that?

Now, the court --

Q Couldn't, either, the Constitution require that the defendant be in court?

MR. KENDRICK: Yes, indeed, it does, Mr. Justice.

Q And it doesn't require that the prosecuting witness be in court?

MR. KENDRICK: It does not.

And that's part of the problem, of course, that the defendant -- and I referred to that a moment ago; that the defendant has the right, he's favored in that ways and we're not contesting it, to be in the courtroom. But under the sequestration of witnesses rule the prosecuting witness may not be there and do the same thing and hear the other witnesses for his side, and then testify. If he's to be there, he has to testify first.

Now, this is closely connected, of course, with the sequestration of witnesses rule, and all we submit, that all the policy arguments and statements that favor the sequestration of witnesses rule argue in favor of the Tennessee statute. To make this sequestration of witnesses rule more effective, some States in fact do subject the parties tothat rule, in civil cases.

And a number of courts, in civil cases, have required the parties to testify first. We note these on page 7 of our brief.

Q Do you know when it was in Tennessee that

defendants were -- became privileged to testify?

MR. KENDRICK: It's stated, I think, in the brief for the petitioner, but I don't have that date at hand, no, sir.

Q I think it was 1887, wasn't it, when this statute came in? That's what we were told yesterday.

Up until --

MR. KENDRICK: I think perhaps --

Q -- the late Nineteenth Century, the defendant couldn't testify at all; and when they were permitted to testify, this condition was put on, and it's remained ever since. That's what we were told yesterday.

MR. KENDRICK: That perhaps is right. I think that's right.

Q And it's never been changed in that State?

MR. KENDRICK: Never, never been changed in the State, never to my knowledge been challenged until the last year or two; and I think, if I may go even further, it's not even being challenged anywhere except in the City of Chattanooga. And finally Mr. Summers has gotten here.

Q You mean challenged here?

MR. KENDRICK: Yes, sir; yes, sir. And, by the way, and I'll get to this in a moment, Mr. Summers is in error in saying that only the Sixth Circuit Court of Appeals has sustained such a rule in the Federal District Court. As we point out in our brief, the Ninth Circuit has also sustained

that procedure in the Federal District Court.

Q Do you think the defendant has a constitutional right to testify in his own behalf?

MR. KENDRICK: He has that right in Tennessee, he has it by statute; I don't think that's really in issue.

Q It was Ferguson v. Georgia, I think, that held that he does, isn't it?

MR. KENDRICK: Well, that his counsel has the right to direct a statement in behalf of the defendant, and I would not quarrel with that. We certainly believe the defendant ought to be able to testify in his own behalf, and our statutes provide that.

Q But you claim you can condition the right to some extent?

MR. KENDRICK: Well, it's simply a matter of procedure, the order in which the witnesses go on.

Further --

Q What's the rule in Tennessee if a witness from the group that's sequestered testifies and then they hear four or five other witnesses, and he is asked to retestify; is that discretionary with the court?

MR. KENDRICK: Yes, sir.

Q But it's not discretionary here?

Because in this case the man asked and he was denied that right because of the schedule?

MR. KENDRICK: Yes, that's the way that the trial court viewed it, and the statute reads somewhat in that way, although our appellate courts have been somewhat liberal in the interpretation of it in permitting the defendant to testify on rebuttal, even when he hasn't testified on direct or in the main part of the case.

Q Where he hasn't testified?

MR. KENDRICK: Yes, sir.

Q What case is that?

MR. KENDRICK: That's Martin vs. State, 157 Tenn. 383. It's cited in our brief.

Q Well, what did they do with the statute? Did the court ignore the statute?

MR. KENDRICK: No, sir. It's been relaxed by decision to the extent that, although it appears to read in mandatory language, the parties may waive it, and the defendant is permitted to testify in rebuttal.

Q But it wasn't relaxed in this case?

MR. KENDRICK: Sir?

Q It was not relaxed in this case?

MR. KENDRICK: Well, the defendant wanted to go on first, and the court would not let him do that. That's right.

Q You mean he did not want to go first.

MR. KENDRICK: I'm sorry. That was a slip. He did not want to go on first.

Q And the Supreme Court of Tennessee upheld that? That his failure to go on first --

MR. KENDRICK: The Supreme Court --

Q -- mooted him from testifying any time.

MR. KENDRICK: The Supreme Court denied certiorari, and the Court of Criminal Appeals sustained the decision of the trial court, that the statute did not permit him to go on at a later time.

Q I think my whole point is that all these other decisions do not help this case.

MR. KENDRICK: Well, they were not -- I don't know whether they were invoked by anyone. They weren't referred to. And it's true that the defendant was not able to go on out of order.

Q Well, how do those other cases of relaxation help this case? Not at all. Right?

MR. KENDRICK: They -- he did not get what he wanted.

I would like to refer the Court to the fact that -- now, how important this is, I don't know -- that this is not unique in Tennessee. It's already been alluded to that the State of Kentucky has a similar statute that's been on the books for 79 years and, to my knowledge, has not been challenged or questioned as to its constitutionality.

The Court of Appeals for the Sixth Circuit, the

Court of Appeals for the Ninth Circuit, five of the six judges in those cases that heard those cases approved the rule in the federal district courts. It is a rule --

Q In the Sixth Circuit case --

MR. KENDRICK: Sir?

Q In the Sixth Circuit case, the Shipp case, I was rather interested to see that that was a Tennessee case. It came from --

MR. KENDRICK: It came up from the Western District --

Q -- Bailey Brown, Judge Bailey Brown, and the opinion in the Court of Appeals was written by Chief Judge Harry Phillips, an old Tennessee lawyer.

MR. KENDRICK: Yes, sir.

And then the three judges in the Ninth Circuit, of course, --

Q Were not Tennessee lawyers.

MR. KENDRICK: -- were not Tennessee lawyers.

Q Do you know what law was involved in the Ninth Circuit case?

MR. KENDRICK: It was a court ruling, there was no federal statute involved. The District Court Judge simply -- well, it's quoted on page 8 of our brief, the defendant wanted to -- well, the court said if the defendant was going to testify in his own behalf he'd have to precede all the other witnesses. And the Court of Appeals said, and I quote just a

little bit from that, said: "The trial court's ruling seems to be a sensible approach to the problem of what to do with a party who is also a witness when the exclusion of witnesses is called for in order to prevent fabrication of testimony." And cites Wigmore on Evidence, and goes on to say that there is no prejudice shown, and "the only connection we can think of would be that appellant was rendered incapable to tailoring his own testimony to fit in with what previously was said by other witnesses."

Now, besides the American jurisdictions that we've referred to, a number of English-speaking jurisdictions have had this rule and still have it. We refer, on pages 10 and 11, to a case from Alberta, Canada, in which the court said: "to be called as the first witness for the defense" -- or that the accused "ought to be called as the first witness for the defense, because, otherwise, it is open to observation to the jury that the accused has coloured or adapted his evidence to fit in with the evidence of the witnesses who have preceded him".

And we refer to an Australian case upholding the rule. And I think, significantly, in England, a rule that's been a matter of practice since at least 1911, only recently in 1958 by the Court of Criminal Appeal -- or the Court of Appeal in the Criminal Division in England, in a unanimous decision, was made a rule of court for England. And the

justice who wrote the opinion for that court in 1968 said in part: "The reason for this is obvious. It is that if they are permitted to hear the evidence" -- that is the defendant -- "of other witnesses they may be tempted to trim their own evidence."

And I will get to this a bit later if I have the time, this shows the reason or the rationality of the rule. And Mr. Summers for the petitioner contends that under the Fourteenth Amendment it's an unreasonable rule; and we contend that's eminently a reasonable rule. And these courts all have said so, that I've referred to.

So we take the position that the Tennessee rule is a truth in testimony law; that it promotes useful testimony; that it's a rational, a logical, a legitimate complement of the sequestration of witnesses rule.

Now, I think remarkably, if the Court would look at the pages that I'm going to refer you to now in the petitioner's brief, that there's a concession of rationality there. So, at page 9 of the petitioner's brief, he says that "The fact that a party may not be placed under 'the rule'" -- that is the sequestration rule -- "was probably one of the chief reasons for the requirement."

And then he says at page 9 that, "Requiring the defendant to testify first, if he testifies at all, ensures that he will not be tempted to alter his own testimony after

hearing other evidence presented in his behalf."

And the petitioner says further, at pages 7 and 8, that the occasional readiness of the interested person to adapt his testimony, when offered later, to victory rather than to veracity, so as to the meet the necessities as laid open by prior witnesses is a rational basis, for the Tennessee statute in question.

And then finally, at page 17 of the petitioner's brief, the petitioner says: "The purpose of this Code section to ensure that a defendant not be tempted to color his version of the circumstances by hearing witnesses in his favor prior to his own testimony" is perhaps legitimate.

Q Mr. Kendrick, as I read that section of the petitioner's brief, I had the feeling he was dealing very fairly with the arguments against him and felt, nonetheless, that it was a burden on the right he was asserting; he certainly didn't concede that the point was invalid.

MR. KENDRICK: He said all of these things, and I applaud him for his fairness, true. But -- and he does view this as a burden and the State will say that at some times it may appear to be an inconvenience to the defendant, but it's an inconvenience to the State to have the limitation that's placed upon it.

Q Mr. Kendrick, it wasn't an inconvenience to the State in this case, was it?

MR. KENDRICK: No, I think that --

Q If I remind you that the State offered to waive it?

MR. KENDRICK: True. And I wasn't present at the trial, the District Attorney General took care of the trial, and this was --

Q Well, he did it. You don't contest that he did say it was all right with him?

MR. KENDRICK: True, and I can only speculate that it really probably didn't make any difference to the State in this case, because they had a confessed accused person.

Q My other question is: when was the sequestration rule adopted in Tennessee?

MR. KENDRICK: Oh, my, it's very ancient. I think it's been in effect all the way back as far as --

Q Well, you keep saying that this is tied in to, and I didn't find anything in the statute that even hints that it's tied into the sequestration rule.

MR. KENDRICK: Well, as I understand --

Q But it was that the State of Tennessee, in granting the defendant the right to testify, put this limitation on it.

MR. KENDRICK: That's when the limitation was first put on.

Q So where do we get this reason for it was the

reason that the prosecuting witness had to go first?

MR. KENDRICK: It did not state it there, but we have, by judicial decision, the requirement that the prosecuting witness go first.

Q Sort of hindsight, isn't it?

MR. KENDRICK: I don't know that, Your Honor. I think when it first came up that the court ruled that way.

Q You don't think it's a matter of due process that a person is entitled to control his witnesses, as to when he puts on his proof and how he puts it on?

MR. KENDRICK: I don't think it's a matter of due process, Your Honor. I think it's a matter -- and in fact a number of courts have done it by court rule, simply as a procedure for regulating the order of testimony.

Q But would your case be different if the statute had said that all witnesses who are going to testify must testify first?

MR. KENDRICK: I don't understand the question.

Q Well, you said the prosecuting witness has to go first.

MR. KENDRICK: That's true, Your Honor. If he's going to testify, he has to testify first.

Q Standard rule?

MR. KENDRICK: And I think it's proposed in this committee recommendation.

Q Well, you equate the prosecuting witness with the defendant, and I suggest that that's improper.

MR. KENDRICK: Sir?

Q I suggest that the prosecuting witness and the defendant are not in equal positions. As I understand it, this is Donald L. Brooks versus the State of Tennessee?

MR. KENDRICK: It is, yes.

Q I don't even know who the prosecuting witness was.

MR. KENDRICK: Well, he was the man who had his store robbed.

Q Well, I mean he wasn't a party.

MR. KENDRICK: Well, the State --

Q The State was the party.

MR. KENDRICK: The State is the party, that's true. But I don't think it's correct to say that the prosecuting witness has no interest in the outcome, when he's been robbed and he wants to see justice done, and he's the chief witness for the State.

Q Mr. Kendrick, the petitioner concedes that there is a tie-in between the sequestration rule --

MR. KENDRICK: Yes, he does.

Q -- and the order of witnesses, doesn't he?

MR. KENDRICK: Yes, he does.

Q General Kendrick, are witnesses sequestered in

all criminal cases routinely in Tennessee, even if no motion is made to do so?

MR. KENDRICK: It's not a matter of law, the judge routinely says, do the parties want the rule; and, rather routinely, they say, We do.

Q Do the parties want the rule, he says?

MR. KENDRICK: Yes, sir.

Q They say, We do, and then they start.

MR. KENDRICK: Then it goes on.

Q Well, what happens if the defendant waives the rule?

MR. KENDRICK: The sequestration rule?

Q Yes, sir. Does the statute apply?

MR. KENDRICK: Both parties have to waive the rule, and then the rule is not in effect.

Q But the statute is.

MR. KENDRICK: The statute still is in effect, that's right.

Q Well, how do you meet that?

MR. KENDRICK: Well, I don't know that we have to meet it. The judges, though, will apply the statute unless it's waived by the State, and sometimes the State offers to waive it; and then the defendant may go on when he wants to. Agrees to wait.

Q Was the rule invoked in this case? The sequestra-

tion rule?

MR. KENDRICK: I do not remember that, if it was invoked.

Now, we refer the Court, at pages 13 and 14, to the decision which requires this, the --

Q Are you speaking of your own brief now? Pages 13 and 14?

MR. KENDRICK: Yes, sir; I'm sorry, Your Honor, Mr. Chief Justice.

Pages 13 and 14 of our brief, we refer to the judicial requirement that the prosecuting witness go on first.

Well, I hope we've been able to demonstrate that what we have in Tennessee here, then, is not a unique requirement, but even if it were a unique requirement that wouldn't make it unconstitutional.

Under our federal system of government, the States are, as Mr. Justice Brandeis said, are laboratories in which experimentation may be made, and we refer to an opinion by Justice Blackmun in McKeiver vs. Pennsylvania, on page 15 of our brief, to the same effect.

So we submit that a judge should not vote against this rule of procedure, simply because he disagrees with it as a matter of policy, or would personally prefer an alternate procedure. And we refer the Court to Justice Harlan's opinion in McGautha vs. California, a 1971 decision which we cite in our brief, 402 U.S. 183, at 221. And we refer the Court also

to Mr. Justice Stewart's concurring opinion in Spencer vs. U.S., also cited in our brief.

Q I believe that's Texas.

MR. KENDRICK: Against Texas. 385 U.S. 352, at 567.

Thank you, sir.

Now, in the time which may remain to me, I'd like to turn to the petitioner's objections to the Tennessee statute, and I understand from his oral argument yesterday that he does concede that the Sixth Amendment question is not before the Court in view of the limited grant of certiorari.

His Fifth Amendment argument, as I gather it, is that this rule in some way infringes upon the defendant's right to remain silent.

And, by the way, rather remarkably, I think, later on he argues under the Tennessee Constitutional provision that it also infringes his right to be heard. But now he says it infringes upon his right to be silent.

But at page 16 of his brief, he concedes, "nor does it deny a defendant the bare right to remain silent." His point seems to be that because he has to go on first, if he goes on at all, that this is cutting down on his privilege or chilling it in some way, and that it makes it more difficult.

The State's answer to this is that petitioner and his counsel ought to know before they get to trial what the

testimony will be, what the witnesses will say; and the desirability for waiving the right to remain silent and taking the stand in his own behalf.

Our feeling about it is that the only thing that is limited, as far as the defendant is concerned, is the opportunity to trim or to color or to falsify his testimony to conform with what the other witnesses on his side have said. And this is what the cases uniformly say that we have already referred the Court to.

The defendant says that in choosing to testify, or making that choice at the beginning of his proof, he then hazards himself to cross-examination, or subjects himself to the hazards of cross-examination; indeed, he does. But every witness who goes on the stand subjects himself to that hazard. And the defendant would be subjected to that hazard regardless of when he takes the stand.

Another point he makes is that choosing to testify at the beginning of his proof is a matter which should be left to his unfettered freedom. Well now, we point out at pages 18 and 19 of our brief that the defendant has the unfettered freedom to testify. He's only restricted as to when he can testify, and we cite there McGautha vs. California, to the effect that it's not unconstitutional simply to make him exercise a difficult choice.

I would like to move quickly to his Fourteenth Amendment

argument, which I view in three parts.

One is that it imposes a burden upon him. It does, to some extent, limit him; but again I remind the Court that he's not restricted from testifying, he may testify, the court, though, will require him to testify first. But there's no reason why he has to hear the testimony of his own witnesses before he takes the stand. There are a lot of good reasons why he has to hear the testimony of the witnesses of the State against him; but he ought to know, before his own witnesses take the stand, what they're going to say.

Now, if they crack up under cross-examination, then it would be beneficial to him to be able to get back on the stand and to rehabilitate the case, I suppose.

The second --

Q Well, let's assume that the defendant wants to call a police officer, like he did in this case, and the police officer hasn't testified?

MR. KENDRICK: Well, he has open to him opportunity for taking discovery deposition in advance of the trial and to know, under oath, what the officer is going to say.

Q In a criminal case in Tennessee?

MR. KENDRICK: That's my remembrance of it, Your Honor. I would not like to be held to that, but that's the way I remember it.

Q You mean in Tennessee you can get depositions of

the government's witnesses?

MR. KENDRICK: That's certainly true in civil cases, and --

Q Well, I'm talking about criminal cases.

MR. KENDRICK: I know you are. I'll just have to say I don't have a theorem on it. I'm not entirely sure of that.

Q Well, assume that isn't so, and --

MR. KENDRICK: All right.

Q -- and you want to call the chief of police.

MR. KENDRICK: But he may go --

Q He's been under subpoena by the State, it comes to trial and the State has chosen not to put him on. So the defendant asks the court: I would like to put him on and treat him as a hostile witness; and the court says, Sorry, if you call him, he's your witness.

MR. KENDRICK: If all those things are done?

Q Yes.

MR. KENDRICK: And what's the question?

Q The question is, you really don't know where you stand, do you, on your defense?

MR. KENDRICK: No, you don't know where you stand on defense.

Q And that was the case in this case; that was the situation in this case.

MR. KENDRICK: I don't remember that all of those

things were true about him having been subpoenaed as --

Q The chief was under subpoena by the State, he hadn't testified, he asked the court to let him cross-examine, who said: No, if you call him, he's your witness.

MR. KENDRICK: Yes, that's right. If he had called him, he would have been the witness of the defendant.

But we don't concede that that in any way denies this defendant of his Fourteenth Amendment or due process rights.

And may I just --

Q Well, the fact is, though, that he really sometimes can't know what witnesses you're going to call, that you're going to risk calling, are really going to say, or how they're going to hold up under cross-examination?

MR. KENDRICK: We certainly should be able to interview the witnesses in advance, unless you make a spot decision after you get to court that you're going to call some witness you never thought of calling before. And I don't know of any reason why this defendant in this case could not have interviewed the chief or anybody else if he wanted to, prior to the trial.

Q Mr. Kendrick, didn't you say in answer to an earlier question of mine that if, in fact, the police officer had covered a matter in a way that the defendant, had he elected to first testify, had not gone into, that it would have been up to the trial judge's discretion whether the defendant

might not have been recalled?

MR. KENDRICK: To allow him to be recalled to the stand, after he once had testified.

Q Yes.

MR. KENDRICK: And, Your Honor, may I -- I see the red light.

MR. CHIEF JUSTICE BURGER: Your time is up, but you may draw it to a conclusion, if you so wish.

MR. KENDRICK: I would like to make a concluding statement, if it would please the Court.

MR. CHIEF JUSTICE BURGER: Feel free to do that.

MR. KENDRICK: The only other point that I haven't covered, and I will cover it in one sentence, concerns the matter of the State constitution. It's contended that the Tennessee courts have misconstrued the statute, in holding that it is not unconstitutional under the State constitution; and I would like to refer the Court to the cases that we cite in the final proposition of our brief, to the effect that that -- that is the decisions of this Court -- that that is really a matter for the State courts to decide whether a State statute violates the State constitution, and is not a federal question for this Court to be concerned with.

In conclusion, I would simply say that the defendant has not made out a case of unconstitutionality of this truth in testimony law, and we do ask the Court, in the words of

Justice Cardozo, to keep the balance true.

Thank you.

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

Mr. Summers.

REBUTTAL ARGUMENT OF JERRY H. SUMMERS, ESQ.,

ON BEHALF OF THE PETITIONER

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

In the very short time I have remaining, I would like to elaborate on some questions that were asked by the Justices yesterday. The first one pertains to a question by the Chief Justice in regard to a question of offer of proof.

Your Honor, yesterday you inquired as to whether I should have made an offer of proof in this matter, which you thought would possibly perfect the record more fully.

I would only say that in the law in the State of Tennessee, it is that if an entire line of testimony is excluded or an entire witness's testimony is excluded, then it is not necessary to make an offer of proof under our laws of the State of Tennessee to perfect an appeal.

Q Is it permitted?

MR. SUMMERS: Is it permitted? Yes, sir.

Q To make an offer of proof?

MR. SUMMERS: It would be within the discretion of the courts. There has been a recent decision in the criminal

court which allows you to make a -- in the criminal courts they have allowed you to make an offer of proof. But that decision came after this case was tried.

In regard to Mr. Justice Rehnquist's question yesterday, I believe that, in discussion, the terms "rebuttal" and "surrebuttal" got jumbled up, and I would like to say that it is my contention under the law that the scope that the defendant, if he was not allowed to testify and put on other witnesses, the State then put on rebuttal witnesses to testify, to rebut his witness, that he could testify as a surrebuttal witness.

But the scope of his surrebuttal would be limited to those matters which had been brought out on the State's rebuttal.

Now, we say that that does not alleviate the problem created by this statute, if he could be a surrebuttal witness, because there are other matters which certainly should be submitted to the Court.

Now, in this matter, with regard to Mr. Justice Blackmun's question as to privilege yesterday, if this Court should declare this statute unconstitutional, it would be the burden upon the State to show beyond a reasonable doubt, under the prior holdings of this Court, that the error was harmless and not prejudicial.

Now, our position is that we contend nothing can be

more prejudicial than a statute which will restrict or deny a defendant from testifying in his own behalf, and that this statute is, per se, prejudicial.

We say that the defendant has a right to testify under the authority of -- an absolute right under Ferguson vs. Georgia, and, in closing, I would respectfully say that we think that --

Q Do you think that's what Ferguson held? That you have a constitutional right to testify?

MR. SUMMERS: I read it -- by implication, that was the way that I read the decision in this.

Q I thought it was the right to counsel.

MR. SUMMERS: Yes, yes, it was. But I felt that that was the interpretation -- that applying Ferguson to this case, that Donald Brooks has an absolute right to testify in a criminal case. And that the statute of the State of Tennessee is restricting that right. That is the argument.

In closing, I would say that the decisions of Bell vs. Mississippi, and of Shipp, which have been cited, which, with the dissenting opinion of Judge McAllister, we think present a logical and analytical approach to the problem.

We respectfully urge the Court to reverse the conviction and to declare the statute unconstitutional.

Q Mr. Summers, just one question. You've just made claim to an absolute right, a constitutional right to

testify on behalf of the defendant. Suppose the defendant, at the opening of the case after the jury was selected, the defendant's counsel said: "Now, before the minds of the jury are quasum, influenced by the prosecution's testimony, I would like an opportunity to put my defendant, the accused, on the stand, to have him tell his story to this jury."

Would you think he would have an absolute right as part of his absolute right to testify, that you claim, to be heard first before the State is heard from?

MR. SUMMERS: No, I do not, Your Honor. I respectfully say that --

Q Well, would you concede that it might be a very helpful thing to a defendant sometimes, to be able to get to the jury first? Before they've heard the prosecution witnesses.

MR. SUMMERS: Your Honor, I would say no, because there is the presumption of innocence, and the burden of proof to prove guilt is upon the State. I mean, that --

Q That is, now, as a tactical matter; you suggest that it never would be to the advantage of the defendant to have that opportunity to reach the jury with his story first?

MR. SUMMERS: Your Honor, being in the heat of battle in many trials, I would say, knowing how a trial can change, I would be reluctant as trial counsel to -- until I had heard some of the proof. I make the decision quite frequently as to whether I put my client on the stand by the

manner in which the State is proving; and I say it would be a very infrequent case in which I would put my client on, because we do not have full discovery in the State of Tennessee, we are very limited in criminal procedure. And I would be very hesitant to put my client on the stand, to kill the prosecution. There might be a very rare case in which it might be, such as a matter of incest, in which there would be uncorroborated testimony of an accomplice, and the State had a very weak case.

But I would be very reluctant as trial counsel to employ such a tactic, because I can foresee it could backfire very readily.

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

Thank you, Mr. Kendrick.

The case is submitted.

[Whereupon, at 10:52 o'clock, a.m., the case was submitted.]

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