In the

Supreme Court of the United States

MICHAEL LEE SIMPSON AND TOMMY WAYNE SIMPSON,

PETITIONERS

V.

UNITED STATES; AND
MICHAEL LEE SIMPSON,

PETITIONER

V.

UNITED STATES

No. 76-5761
C.S

No. 76-5796

Washington, D. C.
November 1, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LEE SIMPSON AND TOMMY WAYNE SIMPSON, Petitioners	
v.	No. 76-5761
UNITED STATES; and MICHAEL LEE SIMPSON, Petitioner	
v.	No. 76-5796
UNITED STATES	

Washington, D.C.

Tuesday, November 1, 1977

The above-entitled matter came on for argument at 1:05 o'clock, p.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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT W. WILLMOTT, JR., ESQ., First National Building, Lexington, Kentucky 40507
For Petitioners -- Appointed by the Court

continued ----

APPEARANCES ..... continued

H. BARTOW FARR, III, ESQ., Department of Justice, Washington, D.C. 20530
For the United States

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 next in No. 76-5761, Michael Lee Simpson and Tommy Wayne Simpson versus the United States and No. 76-5796, Michael Lee Simpson versus the United States which have been consolidated.

Mr. Willmott, you may proceed when you are ready.

ORAL ARGUMENT OF ROBERT W. WILLMOTT, JR., ESQ.

ON BEHALF OF PETITIONERS

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

The question that I present to the Court today is whether or not an individual can be charged, convicted and sentenced under the aggravated bank robbery statute, 18 2113(d) and additionally charged, convicted and sentenced under 924(c)(1) for using a firearm during commission of a felony.

The tenor of our argument has changed somewhat from a double jeopardy question to a question of multiplicity but I still think that the dictates of the Blockburger case are applicable in that we must show that each offense requires proof of an element that the other does not and it has been our contention since the inception of this case that, in order to sustain a conviction under 924 (c)(1), that all of the elements under 2113(d) must be proven.

Now, the Fourth and Fifth Circuit and the Sixth

Circuit in following the Fourth and the Fifth Circuit in their opinion, the Lower Court stated that they thought there was a difference in proof of the elements and they based their decision on the language contained in 2113 wherein the Government is required to prove that an individual's life was endangered by the use of a dangerous weapon or device and that a dangerous weapon or device was not always a firearm and it is my contention that in getting to the elements in 2113(d) that you have to prove every single one of them to prove that the felony in 924(c) was committed and that you can't sit back and judge the facts of each case in a vacuum, you have to look at the weapon that was used.

And when a firearm or a handgun is used, it fits both in 2113(d) and 924(c).

QUESTION: Well, when you said the Blockburger test is not one where you compare the statutes but when you simply compare the evidence in each particular case --

MR. WILLMOTT: I think the test is -- it is set down in Blockburger -- is that you compare the statutes.

QUESTION: I do not see how you can advance the proposition that you compare the weapon involved in each particular case because here clearly, a dangerous weapon or device includes other things than a firearm.

MR. WILLMOTT: That is correct but I do say that you have to look at the factual elements and fit them into

the statutes. You have to draw the statutes sufficiently broad to encompass all the factual situations that may occur.

But I do not think that in viewing 924(c) as opposed to 2113(d) you can just say, "Suppose something else was used."

QUESTION: Well, then, it is a case-by-case, exhibit-by-exhibit test, so far as you are concerned.

MR. WILLMOTT: I believe that that interpretation can be used and should be used in a case where the facts do not really fit into either one of them.

QUESTION: Well, your submission is, as I understood it, that whenever the weapon is a firearm, then these charges are necessarily duplicitous.

MR. WILLMOTT: Yes, Your Honor, that is exactly my position.

QUESTION: What if it were a handgrenade?

MR. WILLMOTT: Well, now, I do not think you could prosecute under 924(c) because it specifically has to be a firearm. I do think that the legislators, in drafting 2113(d) had to have thought that the most common weapon or dangerous weapon or device to be used would be a handgun or a firearm or a rifle or a shotgun, something that would be encompassed by 924(c).

I think that -- we see about it on tv and we read about it occasionally, other weapons are used to rob

banks and usually, they are more dangerous than a firearm.

QUESTION: It is only when a firearm is involved that this question could ever arise because that is the only time that 924 is involved.

MR. WILLMOTT: That is correct.

QUESTION: That is your point, is it not?

MR. WILLMOTT: That is exactly my point and --

QUESTION: My brother Stewart asked you a question a moment ago which I am sure he knew the meaning of and which you doubtless knew the meaning of but which I think I did not understand the meaning of one of the words of and that is that the indictment is necessarily duplicitous in this context. What does that mean?

MR. WILLMOTT: Well, I think the charges --

QUESTION: I think maybe I used the wrong word.

MR. WILLMOTT: Well, I think it is duplicitous or multiplicitous .

QUESTION: What does that mean?

MR. WILLMOTT: That they are charging two distinct crimes out of the same offense.

QUESTION: And what is the objection to that? Blockburger?

QUESTION: Yes, and Bell against the United States, cases like that.

QUESTION: Are there any other objections?

MR. WILLMOTT: I think I stated it simply for the district court and again in Cincinnati that they have charged the Petitioners here with robbing a bank using a gun and using a gun to rob a bank and I think that that is duplicious.

I think you can adopt the lesser included offense arguments in saying that, you know, the elements in manslaughter are the same as murder but you ought to be required to go one way or the other.

I think you, in looking at the legislative history, the United States has said that you should not put much weight on Representative Poff's comments. He was the sponsor of the 924(c) amendment and I guess my case rests on -- in part on his comments in the legislative history wherein he says, "It should be noted for legislative history that my amendment is not to apply --" and he named several additional statutes in addition to the 2113(d) statute.

QUESTION: Where was that statement by Representative Poff made, do you know? Was it on the Floor?

MR. WILLMOTT: I believe it was during the Floor debates.

QUESTION: During the Floor debate.

MR. WILLMOTT: And there was, as pointed out in Counsel for the Government's brief, an abrupt cessation of talking about that amendment or that part of it. They just went right on to another part of it.

QUESTION: Is there any kind of a weapon or any kind of a dangerous device that could be used, in your view, that would be sustainable with convictions under both Sections as you have here?

That is, you are arguing that when it is a firearm, a pistol, for example, there cannot be two. Is there any kind of a weapon or device that would warrant the conviction under both Sections?

MR. WILLMOTT: Mr. Chief Justice, I do not believe that there is. I believe that Congress provided the enhanced penalty under 2113(d), if any sort of weapon, dangerous weapon or device was used and it endangered anybody's life and I think that 924(c) was enacted in response to the growing concern for the use of firearms specifically in committing crimes and I have to agree with Representative Poff's comments that it was not intended to be used in cases where there was already an enhanced punishment provided.

Since the time of submission of our briefs, I was sent a copy of a letter written from the Department of Justice to the United States Attorney in Maryland, Mr. Beall wherein the Department of Justice said it was their policy not to prosecute on a 924(c) when the principal offense was a 2113 (d) charge and they cited the general principal of law that when a specific statute and a general statute are involved in the same set of facts, that the general statute should be

used and additionally, they cited Representative Poff's comments.

Now, I think that the legislative history in enacting the statutes should be considered in cases where the statement that Congress best means what it says has to be looked at when you can't really determine what Congress says.

Now, in a case of this nature, where the Government is arguing that they do not mean what they say and that you should not listen to Representative Poff's comments and the fact that you do have what on its face is a conflict that this Court has to use the tools that are available to it to determine exactly what they did mean and as I have stated before, I think that they have created an absurdity and they could carry it one step farther by saying that whoever uses a Saturday night special which costs less than $50 shall be guilty of an additional offense and I think that would fall in line with the logic that has been used in allowing a 924(c) charge to be tacked on to a 2113(d) charge.

And basically, I rest my case on Representative Poff's comments and the absurdity that is committed when you let a person be charged with robbing a bank using a gun and using a gun to rob a bank.

QUESTION: What if the indictment had been -- this was 924(c)(1)?

MR. WILLMOTT: Yes, Your Honor.

QUESTION: What if it had been an indictment under (c)(2)?

MR. WILLMOTT: Well, that was the case, I believe, in the Crew case, where the Fourth Circuit said that that was perfectly acceptable.

QUESTION: And do you agree with that?

MR. WILLMOTT: No, Your Honor, I don't.

QUESTION: Because under the 2113 you have to put someone's life in jeopardy.

MR. WILLMOTT: Your Honor, I think that is conditioned on using the gun. It says, "By use of a dangerous weapon or device," and I think that when you use a dangerous weapon or device, you automatically put somebody's life in danger.

QUESTION: Well, but 924(c) says, "Carries a firearm."

MR. WILLMOTT: The (2) charge?

QUESTION: Yes.

MR. WILLMOTT: Well, if you --

QUESTION: You don't have to use it while you are robbing the bank.

MR. WILLMOTT: I can see the circumstance where it would be, say, in your pocket. Then I don't think they could charge him under 2113(d). And I think there is a further

fact in this case which is that the indictment itself specified that the dangerous weapon or device was a handgun under the 2113(d) charge and then specified that the firearm was a handgun under the 924(c) charge and so that they removed any possible distinction or difference between the two in each statute.

QUESTION: Mr. Willmott, do I understand from your comment before my brother White's question that, absent Congressman Poff's comment, you would not be here?

MR. WILLMOTT: No, Your Honor, I say that I rely heavily on it.

QUESTION: You said you rely basically on it and I wanted to be sure of your status.

MR. WILLMOTT: No, Your Honor, I do rely heavily on it and we were not aware of Congressman Poff's comments until the decision in the Eagle case came down and --

QUESTION: In other words, if the Congressman had not made his statement, you would be here anyway?

MR. WILLMOTT: Yes, Your Honor.

QUESTION: And then you would rely on what?

MR. WILLMOTT: Our argument that it is duplicitous and possibly places a person in double jeopardy by trying him twice for the same offense at the same time.

QUESTION: Do you feel the Eighth Circuit case in Eagle is essentially at odds with this case? Or is it rather

a collateral slantwise differentiation?

MR. WILLMOTT: I think it is on all fours with this case.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Farr.

ORAL ARGUMENT OF H. BARTOW FARR, III, ESQ.

ON BEHALF OF UNITED STATES

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

Within a two-month period in the fall of 1975, Petitioners in this case robbed two banks in Middlesboro, Kentucky. They carried and used firearms in the commission of each robbery and while attempting to escape from the second robbery, engaged in an exchange of gunfire with the police.

Petitioners' conduct quite plainly violated several provisions of federal law and the juries in both cases so found.

In each instance, Petitioners were convicted under 18 U.S.C. 2113 (a), which makes it a felony to rob a federal bank and under 18 U.S.C. 2113 (d), which provides an increased penalty for anyone who while robbing a federal bank, in the words of the statute, "Assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device."

Petitioners were also convicted under 18 U.S.C. 924(c)(1), a part of the Gun Control Act of 1968 which provides an additional term of imprisonment for anyone who in the words of that statute, "Uses a firearm to commit any felony for which he may be prosecuted in a court of the United States."

The trial judge sentenced Petitioners to the maximum term for each crime, 25 years for each offense under Section 2113(d) and another 10 years for each offense under Section 924(c), all sentences to be served consecutively.

Petitions have attacked their sentences on the ground that 924(c), while seeming on its face to apply to any federal felony, is not available to punish bank robbers whose use of firearms has made them subject to punishment under Section 2113(d) as well.

They rely for this proposition on a statement by Congressman Poff, who sponsored Section 924(c) on the House Floor, that his bill was not intended to apply to various federal offenses of which bank robbery, under Section 2113 is one.

This argument, in our view, raises two questions. First, did Congress intend Section 924(c) to apply to bank robbers simultaneously subject to conviction under Section 2113(d)? And if Congress did so intend, secondly, does the double jeopardy clause in any way prohibit that result?

For reasons we shall discuss in a moment, we believe that the intent of Congress to punish for both offenses is evident from the statute itself and from the weight of the legislative history.

We furthermore believe that the double jeopardy clause is not prohibited from doing so.

Looking at the language of Section 924(c) we do not perceive any serious question about the meaning of the statute on its face. Indeed, we do not understand Petitioners today to say anything to the contrary.

By its terms, it applies to any felony for which a person may be prosecuted in accord with the United States, a definition that plainly includes all degrees of bank robbery.

Had this case been argued before this Court 50 or 75 years ago, that clear language would likely have been not the starting but the stopping place for an inquiry into Congressional intent, according to the rigid and venerable dictates of the plain meaning rule.

Although that rule no longer commands absolute allegiance, even today we think that the language of a statute must remain the most pure evidence of the legislative intent.

As Justice Jackson stated, "It is the business of Congress to sum up its own debates and its legislation and

where Congress is unable to do so clearly --"

QUESTION: Mr. Farr, could I interrupt? Supposing a man was indicted for violating 924(c)(2), carrying a firearm? Could he, for the same transaction, also be indicted for violating 924(c)(1)?

MR. FARR: That is the situation that came up in the Crew case, Your Honor. The Fourth Circuit held that he could not.

QUESTION: Well, do you think that decision is right?

MR. FARR: I think in terms of whether he could be indicted, it perhaps may not be right, but I think he could not properly be convicted and consecutively sentenced for both the violation of (c)(1) and (c)(2).

I think it might be permissible to indict him so you could see what the proof shows.

QUESTION: Well, do not each of those two sections have an element the other does not? One has -- he has to carry it and the other, he has to use it. I suppose you could use it without carrying it, give someone else orders to shoot or something like that.

MR. FARR: Well, I think that even if that were true, that there is no evidence that Congress intended, in fact, to get at the situation where you were carrying one yourself and also --

QUESTION: Well, what, other than the literal language of the -- I mean, then you are not relying on the literal language. What evidence is there that Congress intended to get a 2113(d)?

MR. FARR: Well, I think we are not necessarily relying -- we are not suggesting that you can rely only on the language of 924(c) in order to support this.

In fact, we agree that one of the situations which Congressman Poff posits, which would be other offenses set forth in the Gun Control Act of 1968 itself, might be situations in which the Congressional intent was really not to impose punishment for 924(c) and perhaps purchasing a gun.

In other words, offenses that cannot be committed without a gun in the first place.

However, we do not reach that conclusion by reliance on what Congressman Poff said directly but by the fact that, one, it seems to lead to somewhat awkward results, two, the fact that it does seem to go beyond the Congressional purpose in this case, which is to attach some additional penalty. So we are doing it, really, by a construction of the statute in light of its overall purpose and the evils against which it was directed, not simply relying on one statement by the sponsor of the bill.

QUESTION: Is there anything any place to show how many bank robberies are made with non-lethal weapons?

MR. FARR: I don't have any statistics on that.

QUESTION: Have you ever heard of any?

MR. FARR: Well, I think it is possible to -- you say "non-lethal weapons," meaning not a firearm?

QUESTION: Non-lethal. Well, not those mentioned in this statute. Let's pin it down.

MR. FARR: By 924(c). Well, I think there probably are some bank robberies that were committed with knives or with some sort of blunt instrument but I would think the majority of them would be committed with a firearm.

But I also should point out that --

QUESTION: Does that help or hurt you?

MR. FARR: As far as I am concerned, it does not necessarily make any difference. It seems to me that --

QUESTION: Do you think that Congress meant to put an additional penalty on robberies that were normally going on?

MR. FARR: I think Congress meant --

QUESTION: They could have changed the statute.

MR. FARR: I think Congress meant to put an additional penalty on any crime that was committed with a firearm.

QUESTION: Then it seems to me that if they wanted to put it on bank robbery, they could have raised it, could they not have?

MR. FARR: They could, in fact, have done that. They could have gone through the United States Code and added an additional penalty to every single offense that was in it.

QUESTION: I am talking about robbery, bank robbery.

MR. FARR: They could have done it with bank robbery and they could have done it with any other offense. What they did instead, in our belief, is that it passed a single statute that applied to any felony and therefore, they just did it in one piece of legislation rather than in numerous pieces. But they could have done it the way you suggested, I agree.

Returning for a moment to the discussion of the plain meaning rule, I was about to suggest that where Congress has not been able to state its meaning clearly in a statute or where, by reading the statute in connection with the Congressional purpose, it obviously leads to awkward results or, indeed, where the subject of the legislation is so complex that Congress cannot reasonably foresee and provide for all matters that will ultimately arise, some relaxation of the plain meaning rule is inevitably necessary.

QUESTION: I might suggest that ten years is not "awkward." This is more than an awkward result. This is ten years out of a man's life.

MR. FARR: Well, I am not suggesting that this is an awkward result, Mr. Justice Marshall. I think that in this particular case that the Congress is aiming to impose what is not an awkward result, but a reasonable result on people who use guns to commit crimes.

Where, however, as we believe is true in this case, the objects of the legislation are not complex, the language is straightforward and the results of adherence to the language of the statute are equally as reasonable if not more so than the results of departure from it, then it seems that the Court should exercise great caution when it proceeds past the language of the statute to the legislative history and therefore we believe it is very important to examine carefully the legislative history of essentially Congressman Poff's statement that the Petitioners in this case find so compelling and to give it a proper place in the context of the passage of the Gun Control Act of 1968 and this perhaps will direct more to Mr. Justice Marshall's question about what Congress intended to do in these situations.

We think it is first appropriate in doing that to examine the purpose of the Gun Control Act itself.

In this context, there can be little doubt about the evils which prompted enactment of the Gun Control Act. The problem, simply put, was guns. The Presidential Commission Report, published in February, 1967 and considered by

Congress in connection with the passage of several bills, had set forth alarming figures on the use of guns to commit crimes, figures that had worsened by the end of that year.

For example, the House report on the Gun Control Act shows that in the 13 months ending in September, 1967, 50,000 people had been murdered or assaulted with guns. Well, a similar number of robberies, including bank robberies with guns, had taken place.

The Senate Report, using figures for all of 1967, showed over 60,000 murders and assaults and over 70,000 robberies, all committed with guns, an average of 150 armed assaults and 190 armed robberies each day.

The House Report, accompanying its version of the Gun Control Bill, stated plainly that no civilized society can ignore the malignancy which this senseless slaughter reflects.

I might also note that this concern was not confined to the Congress itself. The assasinations of Robert Kennedy and of Martin Luther King had mobilized public support for greater controls on firearms as well.

Indeed, Senator Javits indicated that in one month alone he received over 100,000 letters favoring gun registration.

The overriding purpose of the Act, therefore, was to take strong measures to inhibit the use of firearms in

serious crimes. Those measures took two principal forms.

First, greater federal controls over the sale and shipment of guns, provisions that are not at issue in this case.

QUESTION: Mr. Farr, could I just interrupt with another question?

MR. FARR: Yes, Your Honor.

QUESTION: What would you describe as the purpose of Section 2113(d)?

MR. FARR: I would think that the purpose of 2113(d) is to deter bank robbers from using dangerous weapons in connection with the act, not only bank robbers, but people committing any crime under 2113(a) and (b) which includes larceny and attempts to commit robbery.

QUESTION: But to the extent that the most commonly-used dangerous weapon in bank robbery is guns, the purpose is identical then, is it not?

MR. FARR: Well, I think the purpose is identical if you assume that there is no purpose to add increased deterrence to something, true.

I mean, I think that the statistics show that the most commonly-used weapon to commit murder is also a gun but this -- I do not think anyone would dispute it, because this statute would also add a penalty to that crime, that it should be read not to include coverage of murder.

The second measure that the Congress used to attack increased crime by use of guns was simply increasing the penalties for the use of the firearms in serious crimes.

We do think it is significant that every Court of Appeals that has placed principal emphasis on the language and purpose of Section 924(c) has concluded that it is available to convict and punish bank robbers also subject to punishment under Section 2113(d).

In addition to the Sixth Circuit in this case, the Second Circuit, Fourth Circuit and Fifth Circuit have so decided.

QUESTION: Well, Mr. Farr, undoubtedly, as perhaps in this case, perhaps not, there will be instances where the facts of the crime -- where the facts necessary to prove the crime under 2113 will be the identical facts which would be used to prove the crime under 924(c): if you use a gun to rob a bank and put somebody's life in jeopardy, you are going to violate both sections.

MR. FARR: That is correct and in fact --

QUESTION: And so that in the particular instance, you do not have to prove any different facts to violate one section as compared with the other.

MR. FARR: That is correct. But I think that that is coincidental, rather than something that derives directly from the requirements of the statute itself.

QUESTION: Well, it may be coincidental, but how about double jeopardy?

MR. FARR: Well, I think that the Court, as the Court said in Ianelli, if each statute requires a different element than the gun itself --

QUESTION: Well, it does not in this case.

MR. FARR: The statute does. The statute requires proof of the gun element.

QUESTION: Well, not in this case, not in this case to violate the statute, you do not have to prove any different facts.

MR. FARR: Well, it seems to me that in order to prove -- you have to prove certain different facts in order to prove a violation of the statute. The fact that you are able to prove them by the same evidence does not seem to me to put you in double jeopardy.

QUESTION: Well, you just do not have to prove any different facts in the situation that I posed to you. In other instances you will have a crime under one that is not a crime under the other.

But in this instance, the same facts prove a violation of both statutes.

MR. FARR: Well, as I say, it seems to me that there are situations -- we are not suggesting that there will not be situations where the proof does not overlap but it

does not seem to me that that --

QUESTION: Do they overlap in this case?

MR. FARR: The proof does overlap in this case. There is no question about that. These people took a gun -- the Petitioners brought guns into the bank, used them to assault people while they were robbing the bank.

QUESTION: Is it enough, Mr. Farr, to put a person's life in jeopardy in robbing a bank to point the gun at somebody? Just to say, if you use the gun to commit the bank robbery, have you put a person's life in jeopardy?

MR. FARR: If you -- well, it seems to me -- if you are using the gun, if you are directing the gun at people, yes. I do not think that it is absolutely essential --

QUESTION: Well, how do you use the gun otherwise?

QUESTION: What other purpose does the bank robber have for having a gun, except to make people believe that their lives are in jeopardy?

MR. FARR: Well, I assume that there are several reasons that he could be carrying a gun, whether he is going to use it or not.

QUESTION: I asked you about using it.

MR. FARR: In connection with using it, I suppose it is possible for him to use a gun, for instance, to shoot open the door of a bank, break the glass.

QUESTION: Doesn't he use it when he carries it in

his hand walking in the bank? Isn't he using it for the bank robbery?

MR. FARR: In that case, he certainly would be.

QUESTION: He does not have to pull the trigger.

MR. FARR: My understanding of Justice White's question is of the possible cases in which he would be carrying it and in which he would not be using it.

QUESTION: How could he carry it without using it?

MR. FARR: Well, to begin with, he could carry it in his pocket, but that would be a violation of Section (c)(2), not Section (c)(1), if he was carrying it in his pocket.

QUESTION: Well, I am just suggesting to you that even on the language of the statute, it is plain that there will be all sorts of instances where the proof is identical.

MR. FARR: I think that is correct. I think that there will be numerous instances in which the proof is identical but the fact is that there will be instances in which the proof is not identical.

QUESTION: Well, let me ask you this: In a charge of violation of 2113(d) where the dangerous weapon or device is a firearm, won't it always, inevitably, universally also include the same identical proof as necessary to prove a violation of 18 U.S.C. 924(c)(1)?

Always. Inevitably and universally.

MR. FARR: I think in the majority of cases it

will. I am not sure that --

QUESTION: When would it not? When, possibly, could it not?

MR. FARR: Well, it seems to me it is possible to use a gun in attempting to commit, for instance, a crime under the part of 2113(a) which requires --

QUESTION: Which requires more than just use of the gun but it always does require use of the gun.

MR. FARR: It does require use of the gun.

QUESTION: It does require use plus other things and 924(c)(1) requires use.

MR. FARR: However, it requires use of the gun in a bank robbery.

QUESTION: Yes. As I say, use of the gun plus other elements.

MR. FARR: Plus -- that is right.

QUESTION: But use of the gun as the single element in 924(c)(1).

MR. FARR: That is right. But, of course, 2113 --

QUESTION: And it is always going to include it.

MR. FARR: Well, if the statute said, if 2113(d) said, "Whoever puts anybody's life in jeopardy by the use of a firearm."

QUESTION: Well, I say, whenever the weapon is a firearm. It is always going to do it, inevitably.

MR. FARR: That, in fact, would be a different case. But the statute does not say that.

QUESTION: Inexorably. Universally.

MR. FARR: Right.

QUESTION: Right.

QUESTION: What about the idea of the measure that Congress could now pass one that said, if you use an automatic, that is a third one?

MR. FARR: It does not seem to me that if Congress is able to pass a statute where the terms of the statute require proof of different elements, it seems to me that it would be better to do that under the double jeopardy clause.

It does not strike me that the statute --

QUESTION: So, in fact, they could go on and on?

MR. FARR: It does not strike me that the statute you are positing would, in fact -- it would be a different element in terms of that statute would have an additional element than 924(c) does but I am not sure what 924(c) would have.

QUESTION: That it was an automatic.

MR. FARR: That it was an automatic.

QUESTION: Well, suppose it was in working condition? It says, a gun that is in working condition.

QUESTION: That would be an additional requirement that 924(c) does not have but that statute does not have --

QUESTION: It says that the person assumed it was loaded.

MR. FARR: Which person assumed that it was loaded?

QUESTION: The people in the bank.

MR. FARR: Well, in other words, you can keep on spinning examples, Mr. Justice Marshall that will add elements to a particular crime.

QUESTION: But as for me, what I am trying to tell you is, I do not have to spin but the first one.

MR. FARR: But the fact is that if the fact of one crime contains an element that the first crime did not, it does not mean that the reverse is true. And that is what the double jeopardy clause sets out.

QUESTION: What I am trying to emphasize is that in this one, it is identical.

MR. FARR: It is identical -- if 2113 (d) is --

QUESTION: It is identical.

MR. FARR: If 2113 (d) required that the weapon be a firearm, it seems to me it would be a different case. The fact that it may be a firearm --

QUESTION: But in this case, it is or was a firearm.

QUESTION: It is.

QUESTION: So you do not have to theorize.

MR. FARR: In this case, it was.

QUESTION: In every case where the weapon or device used under 2113 (d) is a firearm, proof of the violation inevitably includes the single element of 924 (c)(1).

MR. FARR: That is correct, but I don't --

QUESTION: And 924 (c)(2).

QUESTION: Probably.

MR. FARR: Well, except that that has to be carried unlawfully, so that is not necessarily true but it seems to me --

QUESTION: Well, if you proved it was in robbery of a bank?

QUESTION: That is very unlawful.

QUESTION: If that is not unlawful, I do not know what is.

QUESTION: By unlawful, does the statute mean --

MR. FARR: I am not sure that makes the carrying of the firearm unlawful.

QUESTION: Does that mean to imply that if you had a license for firearms that that would give him some immunity under that one section?

MR. FARR: That would certainly remove one of the possible ways in which the carrying would be unlawful.

QUESTION: But, as Mr. Justice White suggests, if he is carrying a gun in a bank in the course of a bank

robbery, does not the unlawful aspect taint everything?

MR. FARR: I think that is part of what we are trying to find out in this case.

QUESTION: Well, anyway, you have not answered Mr. Justice Stewart yet on why that (c)(1) would not be included in the bank robbery crime any time it is a gun that he uses.

MR. FARR: Well, any time that it is a gun -- I mean, if you take a situation and posit all the facts as to being identical or even posit some of them as being identical, you can make the statutes dovetail.

The fact is that the statutes do not have to dovetail, though. It seems to me the question that Congress is entitled to define crimes differently and still remain flexible under the double jeopardy clause even though the elements of proof may substantially overlap.

In fact, it seems that the Court said that in Ianelli.

QUESTION: Mr. Farr, could I ask it from the other point of view?

MR. FARR: Yes, Mr. Justice Stevens.

QUESTION: You stressed the fact that use of a firearm is an element in 924 (c), putting life in jeopardy is the element in 2113 (d); the elements are different. Therefore, even though the act is the same, they are two different

offenses. But is it possible that one could use a firearm? Can that fact be brought before the jury? And that that fact itself is sufficient proof of putting a life in jeopardy, so there really is no difference between the two elements.

MR. FARR: I think that --

QUESTION: Would it not be a sufficient -- an instruction to the jury on the issue of when has someone's life been put in jeopardy, wouldn't the judge be correct in instructing a jury that merely evidence showing that a firearm has been used is sufficient to establish the kind of jeopardy that 2113 (d) represents?

MR. FARR: I don't think so necessarily. I don't think that the fact --

QUESTION: You do not think so during the commission of a bank robbery?

MR. FARR: Well, it depends. I mean, it depends on what the facts of the robbery were.

QUESTION: You do not think that you have to fire the firearm, do you?

MR. FARR: Pardon me?

QUESTION: You are not contending that 2113 (d) requires the firearm to be fired?

MR. FARR: No, we are not contending that.

QUESTION: It just has to be used during the crime?

MR. FARR: That is correct.

QUESTION: And as soon as it is used, someone's life is in jeopardy and also you have established the element of 924(c).

MR. FARR: Again, I think in most cases that will be true but I do not think that it is --

QUESTION: Well, when would it not be true?

That you use a firearm in a bank robbery without putting anyone's life in jeopardy, within the meaning of the statute.

MR. FARR: It seems to me, to use what is perhaps a strained example but I think one that is legitimate under the facts, if you used a firearm to shoot open the door to a bank and broke in and there was nobody in it.

QUESTION: And you do not think that evidence of that could be taken as sufficient to show jeopardy to life?

MR. FARR: Not if there was nobody in the bank, no.

QUESTION: The Blockburger case was not a double jeopardy case, was it?

MR. FARR: The Blockburger case was not a double jeopardy case.

QUESTION: But it has been used in subsequent double jeopardies' discussion.

MR. FARR: But it seems to me, for instance, in

Gore, that it was used -- clearly, they used the same sort of argument to deal with it in a double jeopardy context and in Brown versus Ohio last year it seems to me last year that the Court quite plainly stated that that was the test.

But I think in looking at the -- in speaking of Gore, it seems to me that that provides a different way of looking at the statute.

It seems to me that the Congress is free in defining crimes and fixing punishment to pass a statute that says, if you rob a bank, you face a maximum penalty of 20 years.

If you use a dangerous weapon in the course of that, 25 years. And if that weapon is a gun, 35 years is the maximum penalty.

And it does not seem to me that the effects of this statute are necessarily any different from that one.

QUESTION: What about this communication we were told about from the Justice Department to the U.S. Attorney?

MR. FARR: Mr. Justice Stewart, I am unaware of that letter. We did not get a copy of it from Petitioners and --

QUESTION: Have we been supplied with a copy of it?

MR. FARR: I am sorry?

QUESTION: Have the members of the Court been supplied with copies of it?

MR. FARR: No, Your Honor. To my knowledge, no.

QUESTION: I assumed when Counsel referred to that, that it was something that had been made available. If not, it certainly should be, if any reliance is placed on it.

MR. FARR: It is something that has not been made available to me. Now, I understand from what Petitioner's counsel said this afternoon about it that it is a policy statement by the Department of Justice which --

QUESTION: Well, I would be interested in seeing it -- either seeing it or hearing from you that there is no such thing.

MR. FARR: I will, if I can have a copy of it from Petitioner's Counsel to help me track it down, I will find out what it involves and report to the Court on the argument.

QUESTION: And make it available.

MR. FARR: I would like to point out before the questioning started a few moments ago, I was discussing the figures that were put in front of Congress showing the increasing number of crimes committed with guns and I pointed out in the course of that that among the most serious figures which Congress specifically included in its reports were figures relating to armed robbery and aggravated assault.

Now, where Congressman Poff's statements about the scope of Section 924(c) allowed to override the language of the statute, in fact the Congressional solution to the problem they perceived would be much narrower than the problem

it addressed. The Court --

QUESTION: Could I ask -- I am sorry to keep interrupting you --

MR. FARR: Yes, Mr. Justice Stevens.

QUESTION: The figures relate to crimes like armed robbery and assault. The statute relates to use of firearms and a felony for which he can be prosecuted in a federal court.

MR. FARR: That is correct.

QUESTION: Now, are most of these armed robberies and assaults federal offenses?

MR. FARR: I would think that most of them -- that this includes federal and state offenses and I would think that --

QUESTION: So most of those figures, really, are not relevant to what the ultimate statute came out on, anyway.

MR. FARR: I don't think that the figures, in terms of their absolute numbers, are necessarily relevant.

QUESTION: Do the figures tell us how many of those assaults were in violation of federal law?

MR. FARR: The figures do not, no. But what the figures do do is indicate that there is a substantial problem with which Congress was concerned.

Now, it dealt with the state problem and the federal problem with the licensing requirements, but

obviously did not feel that was sufficient to take care of all the crimes because it did add a section, 924 (c), that applies to federal crimes alone. We are not suggesting that it will affect every crime but that the problem is both state and federal and Congress recognizes that.

QUESTION: It did not show that there was an increase in bank robberies with guns.

MR. FARR: The figures specifically did not, no. But Congressman Poff's remarks --

QUESTION: That is what we are talking of now.

MR. FARR: Well, we are talking about that in this particular case but Congressman Poff, in fact, was talking about something more than that because he said that his statute would not only be inapplicable to bank robberies under Section 2113 but certain other robberies, including the armed robberies of the mails and also to virtually all armed assaults under all of the federal assault statutes so that in order to accept his version of 924(c) you would have to believe that though Congress was very concerned about the rise in crimes, including armed robberies and armed assaults, that it deliberately enacted legislation which would not apply to federal armed robberies -- most of them or at least bank robberies and mail robberies or federal assaults, which does not strike me as making much sense.

We also pointed out in our brief that the other

amendments introduced on this subject did not make any such distinction between felonies that already have a penalty for use of a dangerous weapon put into them.

In the House, Congressman Casey had introduced an amendment putting substantial additional penalties on persons who used a gun during certain federal crimes including robbery and assault but far from exempting bank robberies and armed assaults, the Casey Amendment specifically included them.

In the Senate, Senator Dominick introduced a bill which imposed similar penalties for use of guns in any federal crime of violence and that was defined specifically to include assault with a dangerous weapon and robbery.

And Senator Dominick was fully aware that there were statutes which already provided increased penalties such as 2113 (d) and said that his amendment was not intended to detract from or repeal those provisions but would be available to prosecutors in addition to them for stronger penalties, if they so desired.

Now, the Casey Amendment was replaced by the Poff Bill and then in Conference Committee, the Poff Amendment was used rather than the Dominick Amendment but there is no indication anywhere that the House and Senate as a whole -- or the Conference Committee, of which, incidentally, Congressman Poff was not a member, deliberately endorsed an

effort to immunize serious federal crimes -- certain serious federal crimes from the remedies set forth in that act.

In fact, given the overall purpose of the Gun Control Act and given the apparent common understanding of the Poff Amendment and the alternatives in the House and Senate, it is difficult to conceive of language that would express more clearly an intent to strengthen laws relating to the use of gunmen --

QUESTION: Mr. Farr, would not the Congressional purpose in the Gun Control Act with respect to bank robberies or with respect to 2113 have been satisfied if the indictment had simply been under 2113(a) and then 18 924(c)?

MR. FARR: Well, if you assume that the purpose of Congress was to put a special --

QUESTION: Was to put a special penalty on for commiting felonies with guns, that would --

MR. FARR: If it is to put a special penalty on, that perhaps would suffice. If it was to put an additional and special penalty on --

QUESTION: That would have allowed 30 years instead of 25.

MR. FARR: In that particular case, that is true. However, there are other statutes where it does not work out so cleanly. As we have indicated in other statutes, even within 2113 (d) the governing felony statute, the larceny

statute, would provide for a much lower penalty than 20 years, which is the 2113(a) so by adding on the additional penalty, you do not really get up to the same place that you would under 2113 (d).

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Farr.

MR. FARR: Thank you, Mr. Chief Justice.

No further questions?

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Willmott?

REBUTTAL ARGUMENT OF ROBERT W. WILLMOTT, JR., ESQ.

MR. WILLMOTT: Mr. Chief Justice, I would like to make one final comment in response to Mr. Justice Stewart's comment and I think that any time a firearm is used to commit a bank robbery, that you automatically have the conditions of 924 (c)(1) and 2113 (d) satisfied but that any time a weapon other than a firearm is used, you cannot get a conviction on a 924 (c)(1) and I will be most happy to make copies of the United States Department of Justice letter wherein they refer to United States Attorney Bulletin, volume 19, number 3, February 5th, 1977 and make it available to Mr. Farr.

MR. CHIEF JUSTICE BURGER: Make it available to your friend and he will see to it that we get that and anything that may bear directly on it.

QUESTION: What is the date of the letter?

MR. WILLMOTT: The date of the letter is January 13th, 1972 and it refers to the United States --

QUESTION: Is the same bulletin extant now?

MR. WILLMOTT: Your Honor, I --

QUESTION: I mean, the same manual, is it still in effect?

MR. WILLMOTT: I received this letter through my co-counsel in Lexington and the letter itself refers to the United States Attorney Bulletin, Volume 19, number 3 and dated in February.

I just received this last week before coming up here.

MR. CHIEF JUSTICE BURGER: That is the reason for my suggestion that you give it to Mr. Farr because there may be other matters that relate to it and explain it.

MR. WILLMOTT: Yes, Your Honor. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:53 o'clock p.m., the case was submitted.]