OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5189

TITLE LAMONT JULIUS McLAUGHLIN, Petitioner V. UNITED STATES

PLACE Washington, D. C.

DATE March 31, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

LAMONT JULIUS McLAUGHLIN,
Petitioner
v.
UNITED STATES

No. 85-5189

Washington, D.C.

Monday, March 31, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:41 a.m.

APPEARANCES:

STEPHEN J. CRIBARI, ESQ., Baltimore, Maryland; on behalf of the Petitioner.

CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Cribari?

ORAL ARGUMENT OF STEPHEN J. CRIBARI, ESQ.

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether an unloaded handgun is a dangerous weapon in violation of Section (d) of the Bank Robberty Statute 18 U.S.C. 2113.

There are two points that I would like to make. First of all, that an unloaded handgun on the facts of this case is not and should not be a dangerous weapon.

Secondly, that even if an unloaded handgun can be a dangerous weapon, it ought not to be determined to be a dangerous weapon by a decision of the Court of Appeals, but rather should remain a factual question for the fact-finder.

The facts in this case are extremely, concisely stated and are in pages eight to ten of the Joint Appendix.

The short of the matter is that Mr. McLaughlin and a co-defendant entered a bank and while the co-defendant emptied several teller stations of funds, Mr. McLaughlin remained in the lobby area of the bank, pointed a handgun generally at the people in the bank and told them not to move.

QUESTION: What do you suppose they thought about that gun?

MR. CRIBARI: Sir, I think they thought that that gun was probably loaded and I think there is no argument to be made that they were not in some degree frightened and there is no argument to be made that they had the duty to examine that gun.

The question is how will we determine for 2113(d) purposes that the gun was dangerous. Certainly if the gun was loaded the gun could inflict a harm that it threatens to inflict and under the courts that have applied an objective test that has been the test.

QUESTION: Would a club, a metal club be a dangerous weapon in such an incident?

MR. CRIBARI: Justice Marshall, I think that a club could be a dangerous weapon in such an instance. If the person remains in the lobby area of a bank --

QUESTION: That could be?

MR. CRIBARI: I think that almost anything --

QUESTION: Well, could a gun be a club?

MR. CRIBARI: Well, certainly --

QUESTION: Could a gun be a club?

MR. CRIBARI: Yes, certainly a gun could be a club and probably a metal club at that.

QUESTION: Well, it is dangerous then, isn't

it?

MR. CRIBARI: Well, I think it is only dangerous, and this is certainly the analysis used by some of the courts, it is only dangerous if there is a threat to use it as a club. If the only threat is to use the gun as a gun and the gun does not work as a gun, the gun is not dangerous as a gun.

Now, the courts that have adopted -- like the Fourth Circuit -- a presumption that any weapon, loaded or unloaded, used during a bank robberty is, as a matter of law, a dangerous weapon.

I have certainly reasoned that the fear of the victims, the potential for using the gun as a club, or the potential for third-party response, for example, by police forces, makes the situation dangerous, but should we reason from the situation back to the gun? If we do, then even non-guns would be dangerous weapons.

The person who goes into the bank, puts his hand in his pocket and claims that he has a gun could create the same amount of danger as the person who actually displays a gun.

By the reasoning of those courts, a dangerous weapon has been used even though in one instance no weapon at all has been used.

After this Court's decision in --

QUESTION: Well, I think there you can say there is, in fact, no weapon or device, so that isn't covered, but certainly the legislative history of this particular language would indicate that the sponsor of it thought it would include fake guns, for example, does it not?

MR. CRIBARI: Justice O'Connor, I think in one reading it does and I think in another reading, which is my reading, of course, that it does not.

Certainly the sponsor envisioned fake guns or what were referred to as Indiana six shooters or bottles of water claimed to be nitroglycerin, certainly they were included somewhere. The question is where were they included?

One of the congressmen, I think the bill's sponsor, says, in response to questions about the fake weapon, that he does not object to the word "device" being added, but also thinks these might be covered under Section 2 of the statute which at the time was bank robbery by trick or fraud.

Also at the end of the legislative history which is extremely meager, the statement -- the suggestion that instrumentalities which could cause fear was rejected as an amendment to the Act.

So, on one hand, I think, yes, the subject of fear of the victim was sought to be protected by the Act.

But, on the other hand, the question is how. I think the Act can be read consistently with those courts who have applied an objective standard to amount to the following: If a weapon is used and that weapon is dangerous in itself or can carry out the harm that it threatens you have a dangerous weapon. If it can't, then you might have bank robbery by trick, you might have assault on the teller, but you may not have a dangerous weapon.

The statute doesn't punish bank robbery with a weapon, it doesn't punish bank robbery with an apparently dangerous weapon, it doesn't punish bank robbery because a dangerous situation is created. It punishes bank robbery during which an assault is committed using the dangerous weapon.

If we reason from the assault --

QUESTION: Mr. Cribari, it punishes bank robbery with a dangerous weapon or device if the device or weapon is used in an assault on a person or puts in jeopardy the life of any person, doesn't it?

MR. CRIBARI: Yes, sir.

QUESTION: So, it really doesn't punish bank robbery with a dangerous weapon.

MR. CRIBARI: It punishes an assault or placing in jeopardy during a bank robbery.

QUESTION: Yes.

MR. CRIBARI: Yes, sir.

In Mr. McLaughlin's case, only the assaultive clause of 2113(d) is operable.

QUESTION: No one claims he put anyone's life in jeopardy with the starter pistol or whatever it was.

MR. CRIBARI: It was an unloaded handgun and the claim was not made that he put someone's life in jeopardy.

QUESTION: You don't deny that he technically assaulted someone, do you?

MR. CRIBARI: No, he plead guilty to the assault. He plead guilty to the (a) and (b) sections of that statute which prohibit the bank robbery assault and the bank larceny and we had a bench trial on the (d) section on the issue of, number one, the unloaded handgun and, number two, the Fourth Circuit's decision which makes it presumptive guilt if you have any weapon.

When this Court decided Simpson in 1978, this Court applied the phrase "dangerous weapon" to both clauses, the assaultive clause and the putting-in-jeopardy clause.

Much of the case law developed prior to that time and much of the case law reasons that an assault under (a) that one could reasonably determine to be an aggrevated assault, if there was a weapon used amounted to a violation of (d), but it is unclear whether those courts read the dangerous weapon phrase as modifying the assault.

After Simpson, when the courts had to read that, I think what has happened is, so as to not to lose the aggrevated assault punishment, all of that case law was simply applied to the dangerous weapon in the following two ways:

Number one, if there is enough evidence for the jury to conclude the weapon was loaded it is a dangerous weapon. We don't contest that.

Number two, the creation of presumptive -- the creation of presumptions of dangerousness by the circuit court, the Fourth Circuit, the Fifth Circuit, possibly the Tenth and Eleventh Circuits, have rules that state a weapon, loaded or unloaded, used during a bank robbery is a dangerous weapon. There is no argument.

The effect of that is read in the indictment of this case which is on page five of the Joint Appendix where Mr. McLaughlin is not charged with using a dangerous weapon, he is charged with brandishing that weapon, with pointing a firearm at the tellers in the bank.

If the jury or a factfinder concludes a weapon was used, and Mr. McLaughlin admitted one was, he is, therefore, guilt of using a dangerous weapon without more. I do not think that that is correct. I do think that that is a violation of Winship which was decided 16 years ago today.

QUESTION: Would your position be the same if he had the gun loaded but with blanks?

MR. CRIBARI: No, sir, my position -- Yes, sir, my position would be the same. I would see no difference between a gun that was loaded with blanks or a gun that was unloaded or a starter pistol or a gun that was not loaded but there was ammunition in the person's pocket. If the gun cannot function as the weapon that threatens, it ought not to be a dangerous weapon.

If Mr. McLaughlin had approached one of the people in the bank and had struck them with the weapon or if he had approached someone and grabbed someone and held the weapon in a threatening manner to threaten bludgeoning, then it becomes dangerous as a bludgeoning, but that is not here.

QUESTION: May I interrupt? Supposing on the facts we have got here but we have a trial, they couldn't prove there were bullets in the gun. Say they had a chase and the man threw bullets out the window of his car, but you couldn't prove whether they were in the gun or not at the time of the transaction, who would have the burden under your view of the law? Who would have the burden of proving that they were in the gun?

MR. CRIBARI: Well, I am not sure that the -- I think the burden is on the government to prove a dangerous

weapon.

QUESTION: So, if the government cannot, in fact, prove by some evidence, by reasonable doubt, that the bullets were in the gun at the time of the bank robbery, the defendant would always win on that.

MR. CRIBARI: I don't think that is correct. I think if the government puts forth enough proof for a jury to conclude that the gun must have been loaded, that is sufficient.

For example, in this case, if there had been no evidence other than Mr. McLaughlin pointing the handgun -- The cases, I think, establish that a factfinder, judge or jury could conclude that gun was loaded and dangerous since there is no evidence to the contrary.

QUESTION: On the other hand, is there any evidence to show that they knew that the gun was unloaded?

MR. CRIBARI: In this case there is. The government conceded that --

QUESTION: No, I am talking about the people in the bank.

MR. CRIBARI: No, sir, there is no evidence to show that the people knew the gun was unloaded and there is no attempt to diminish the fear of the people and there is no attempt to say that people ought to know the gun was unloaded.

QUESTION: If they got fear -- Can you get fear without fear of a deadly weapon?

MR. CRIBARI: Sir, I think there is as much fear in the case of an unloaded handgun as there is in a loaded one.

QUESTION: Well, that is what a deadly weapon is.

MR. CRIBARI: I don't --

QUESTION: That is why a weapon is deadly because it can harm.

MR. CRIBARI: I agree, sir, that the weapon is deadly because it can harm.

QUESTION: What size gun was it?

MR. CRIBARI: I don't know. All we have in the record is that it was a dark handgun.

The weapon is dangerous because it can harm, but, if, in fact, it cannot harm in the manner in which it is used --

QUESTION: Supposing he had bullets in his pocket?

MR. CRIBARI: Then the weapon didn't work as a gun.

QUESTION: What if he has the safety device on?

MR. CRIBARI: Well, Justice O'Connor, I think at some point we have to draw a line. The line I drew was the fact that the gun was loaded.

Now, if a factfinder could conclude that the safety device was not -- even though it was on -- the gun being otherwise operable and loaded, the factfinder could conclude that that didn't matter. That is such a small thing and so easily changed that it did not effectively negate the harm the gun threatened. Then, fine, you can convict someone of using that weapon. But, it ought not to be taken from the factfinder as a matter of law.

QUESTION: Well, can't you push a bullet into a six shooter chamber as easily as you can take off the safety device?

MR. CRIBARI: Well, I don't know. I don't know if you can because it certainly has to be opened, it has to be taken out and put in. And, I don't think that it is a workable standard simply to say that if the bullets are within a foot of the gun maybe it is dangerous, maybe it isn't, if they are far away maybe it is less dangerous.

I think we look at the gun and then we look at the way it is used and if it is used in such a way that it can readily inflict the harm it threatens, then it is used as a dangerous weapon.

But, if it is used in a manner that cannot inflict the harm threatened, it cannot be seen as a dangerous weapon unless you look just at the fear of the victims which is certainly a concern.

QUESTION: Do you say it is a charge to the jury upon a question of fact then in every case?

MR. CRIBARI: In every case the jury or the fact-finder should have to make the finding that the weapon was dangerous beyond a reasonable doubt, yes.

QUESTION: You don't mean as a special verdict, but they just be charged to look to find that as a fact along with the --

MR. CRIBARI: No. That is correct, sir.

In the Fourth Circuit that is not what is done, of course. Because of the Bennett decision, if there is a weapon, it is a dangerous weapon. And, there is no argument to present to the jury.

The fact that in this case Mr. McLaughlin had an unloaded handgun, no bullets, could not have loaded it and did not use it in any other way was meaningless at trial. There was no argument to be made because that was a dangerous weapon when he admitted to the assault using the handgun.

QUESTION: Your position is that a firearm is never dangerous until it is loaded.

MR. CRIBARI: No, sir, because the firearm could certainly be used as a club. It is not dangerous until it is loaded or until it is used in some way that creates a danger from its being there other than just the fear.

QUESTION: Well, what if it is loaded, but he doesn't find it necessary to pull the trigger.

MR. CRIBARI: Well, then I think it is a dangerous weapon because it can immediately inflict the harm that it threatens.

QUESTION: That is contrary to your earlier definition used for the purpose intended; that is to kill or wound somebody that resists.

MR. CRIBARI: Well, I have no trouble reaching the conclusion that a handgun that is loaded and operable is immediately a dangerous weapon and can be found that way by a jury simply on that evidence.

QUESTION: Why isn't it dangerous because it can be used as a club?

MR. CRIBARI: Because -- Unless there is evidence that it was threatened to be used as a club, it wasn't used as a club.

We look at someone with a handgun and we say, well, that gun could be used as a club. Of course. But, if the person uses it in such a way that there is no threat that it is going to be used as a club, should we infer since it is metal it could be used as a club?

If someone robs a bank carrying a heavy briefcase, should we infer that since it is a heavy briefcase it could be used as a bludgeon and, therefore, it is a dangerous

weapon?

Once the gun ceases to be used as a gun, what is it? Certianly it is a heavy piece of metal that could be used as a bludgeon. In this case, there is no evidence that it was used as a bludgeon, was about to be used as a bludgeon or that any threat was made to use it as a bludgeon.

In almost all of the cases that deal with the bludgeon issue one of two things is present. First of all, it was used as a bludgeon. Even as late as last year in the Wardy case the Second Circuit finds the gun could be used as a bludgeon, it was used as a bludgeon, and in addition t here was enough evidence from which the factfinder could conclude it was loaded.

QUESTION: May I ask this question? Assume that instead of this case involving a revolver, which found that it was, it was an automatic weapon like a Colt 45. Let's say there were ten bullets in the clip but none had been moved up into the barrel so it couldn't fe fired without making that movement, would it be loaded?

MR. CRIBARI: I think it would be loaded. I think even if it isn't loaded, it can be loaded so quickly that the distinction is meaningless. But, I think it should be a factual question for the factfinder to give the evidence of how that gun was at the time of the robbery, to hear

testimony, if the defendant wants to testify, as to why it wasn't loaded and make a decision.

QUESTION: Or there is only one bullet in the cylinder that holds six in a revolver and that bullet was several cylinders away from the barrel, you would make the same answer?

MR. CRIBARI: The same answer. I would conclude that it was loaded, but I would also want to give in to the factfinder to draw the conclusion of dangerousness.

In all of the state cases, virtually every state case that is cited for the proposition that an unloaded handgun is a dangerous weapon, there is involved a statute making an unloaded handgun a dangerous weapon.

QUESTION: Have the courts of appeals had occasion to construe the word "assault" in Subsection (d)? Is it treated as the common law definition of assault as simply pointing a weapon at someone is an assault?

MR. CRIBARI: Let me answer by saying yes, but I am going to say that the cases -- the language in the cases is not as simply as a yes answer.

The Beasley case which Judge McCree's dissent worked its way into this Court's decision in Simpson that the dangerous weapon phrase applies to the assault clause discusses common-law assault, discusses what an assault is under (a) and says, as does Bradley and many of the

other cases on my side of the fence, you need more than an assault to get from (a) to (d). You need a sufficiently aggrevating factor that takes the case out of the violation of (a), taking the money by intimidation, and getting into (d), using a dangerous weapon.

QUESTION: It is hard to imagine intimidation really without a technical common-law assault.

MR. CRIBARI: Well, it is, but it is not hard to imagine it without a gun. I think you do reach the common-law assault, but when do you get from the assault to the dangerous weapon?

QUESTION: What about intent? Suppose he had come in there and said this is an unloaded gun and I am going to rob you, what would have happened?

MR. CRIBARI: Certainly there is a violation --

QUESTION: I mean outside him being shot. What else would happen?

MR. CRIBARI: If the man comes in and says his gun is unloaded and I am going to rob you --

QUESTION: Yes.

MR. CRIBARI: -- he probably would be caught. In addition, he may well get money from the tellers who might be frightened any way. He also could --

QUESTION: Do you actually believe that?

MR. CRIBARI: That he might get money?

QUESTION: Yes.

MR. CRIBARI: Well, based on some of the people I have represented, yes, I do. I also know they get caught outside the bank.

(Laughter)

CHIEF JUSTICE BURGER: We will resume here at 1:00.

MR. CRIBARI: Thank you.

(Whereupon, at 12:00 noon, the oral argument in the above-entitled matter was recessed, to reconvene at 1:00 p.m., this same day.

A F T E R N O O N S E S S I O N

(12:58 p.m.)

CHIEF JUSTICE BURGER: You may resume your argument, counsel

ORAL ARGUMENT OF STEPHEN J. CRIBARI, ESQ.

ON BEHALF OF THE PETITIONER -- CONTINUED

MR. CRIBARI: Thank you, Mr. Chief Justice, and may it please the Court:

I would like to discuss briefly the second point that I wanted to discuss today which is the Fourth Circuit's decision in the Bennett case that establishes that a weapon, loaded or unloaded, used during a bank robbery is a dangerous weapon.

We think that is a violation of this Court's decision in Winship because it takes from the government the burden of having to prove beyond a reasonable doubt that a weapon used in an assault during a bank robbery is a dangerous weapon as a matter of fact.

QUESTION: That assumes, Mr. Cribari, that Congress intended it to be a question of fact in each case.

MR. CRIBARI: It does indeed. If Congress were to pass a definitional statute saying unloaded handguns are dangerous weapons within the purview of this Act we are not here, but that is not there.

It is there in other firearms legislation. It

is there in 924, but it is not there in 2113, and because it is not there the Fourth Circuit shouldn't put it there. It should leave the question, a question of fact for the factfinder and not foreclose the factfinder from considering all the circumstances involved in making a decision whether that weapon was dangerous.

QUESTION: Suppose the gun were loaded, either a magazine or an automatic or a cylinder revolver, but there was no firing pin.

MR. CRIBARI: If there is no firing pin and the weapon cannot function as a weapon, then I don't think it is dangerous as a weapon.

QUESTION: You mean if it can't function as a firearm.

MR. CRIBARI: As a firearm. If it can't function as the weapon it appears to be, unless it is used as a different weapon. If the threat is made to bludgeon, then we can determine from the facts regarding its uses as a bludgeon.

QUESTION: Let's take it one step further. The firing pin is defective but nobody knows that. That happens sometimes. What about that?

MR. CRIBARI: My position would be, first of all, that that weapon that could not operate as the handgun, without more, that is all it is used as, is not a dangerous

weapon. Just like white, powdery substances that test out to be baking soda are not heroin.

If the Court doesn't want to go that far and the Court wants to leave that question about dangerousness for the factfinder, that also is an acceptable position. Either of those positions cut against the Fourth Circuit's decision in Bennett.

QUESTION: Well, your position would mean that before the government could present the case they would have to test the gun and see whether the firing pin was really working.

MR. CRIBARI: It might mean that. It certainly would mean the government could not sustain or might not be able to sustain a verdict of guilty given evidence that the person who used the gun knew the firing pin was defective. In fact, the person who used the gun may have caused damage to the firing pin just so no one would be injured by use of the gun.

QUESTION: Well, there could be worse cases than that for the government. Supposing in the case of your client, except that the gun is loaded but never fired, and the gun just simply disappears. The guy gets away for awhile and the government never recovers the gun.

If the burden was on the government to prove that it was loaded, it probably won't be able to do it.

MR. CRIBARI: Well, Justice Rehnquist, the cases are clear, and once again we do not dispute the cases that say from circumstantial evidence the jury would be warranted in inferring the gun was loaded. If the defendant testified that at the time of the crime the gun was not loaded, and there is the testimony from the victims, bystanders, or whatever, it would be a question of fact first.

QUESTION: But, the testimony of the bystanders, all they can testify is what happened, they were afraid because the guy had a gun. They wouldn't have seen any bullets fired from it.

MR. CRIBARI: That is true, but they can testify to what the person who perpetrated the robbery did with the gun.

QUESTION: Well, he is going to tell them it is loaded.

MR. CRIBARI: He is going to tell them -- The bystander is going to say that I saw a gun. The defendant is going to say it was not loaded.

QUESTION: Yes, but the defendant, at the time of the bank robbery, isn't going to tell the bystanders it is not loaded.

MR. CRIBARI: Of course not, which is why at the very least we have a factual question for the factfinder. Do we believe the testimony of the defendant, do we take

the testimony of everyone else and draw the inference that the gun was loaded?

QUESTION: Well, supposing that you have a trial of this issue and the defendant either says nothing or takes the stand and says it wasn't loaded. The bystanders say he was going to shoot us if we moved. None of them can testify to the fact that it was, in fact, loaded. Is that enough to even take the case to the jury under the reasonable doubt standard?

MR. CRIBARI: My position would be that if the evidence is conclusive that the weapon was not loaded, no. But, if it is a question of fact --

QUESTION: Just the hypothesis I gave you. Could the judge charge the jury that they could find it was a dangerous weapon with only the testimony from the bystanders that the fellow brandished a gun at them.

MR. CRIBARI: I think the matter could be submitted to the jury with the instruction that from the evidence you have heard, if you disbelieve the defendant and believe the other testimony, you would be allowed to infer that the weapon was loaded and operable. Nevertheless, you must find beyond a reasonable doubt that it was a dangerous weapon.

QUESTION: This case was tried before a judge, wasn't it?

MR. CRIBARI: Yes, sir, it was.

QUESTION: It wasn't a jury?

MR. CRIBARI: It was not. There was no jury in this case.

QUESTION: Well, what does that tell me that the judge didn't decide that it was a dangerous weapon?

MR. CRIBARI: I think the Bennett decision, which is clear in its instructions that the weapon is dangerous, period.

QUESTION: But, did the judge decide that in order to convict him?

MR. CRIBARI: It does not appear from the record that the judge said --

QUESTION: How else did the judge convict him other than that?

MR. CRIBARI: I don't think any way. I think the judge was bound by the Fourth Circuit decision in Bennett and I think that it is not going outside the record to say that at the beginning of the proceeding it is put on the record why we were having a guilty plea as to some --

QUESTION: But, you have been arguing that it is up to the trier of fact. Well, the judge was the trier of fact.

MR. CRIBARI: But, in this case --

QUESTION: Wasn't he in this case?

MR. CRIBARI: He is the trier of fact in this case, but because of the Bennett decision there was no factual matter for him to decide. It was taken away by the Bennett decision.

QUESTION: Did he say that?

MR. CRIBARI: He did not say that in those words.

QUESTION: Well, how do you know he did.

MR. CRIBARI: We know he did that because it is explained in the record that the purpose of the proceeding was to test Bennett.

QUESTION: Where in the record?

MR. CRIBARI: At the beginning -- In the Joint Appendix at the beginning of the trial proceeding which is on page seven and eight and I think it is inferred again on page eleven at the top. "The reason we are here is to preserve the issue of law that under Bennett the government has no burden of proof at all concerning the fact the gun be loaded or not."

That under the Bennett decision --

QUESTION: Well, then, I get to my next question. You answered the Chief Justice's point about the firing pin, suppose the firing pin was okay but the gun just jammed when he shot it. He shot at one of the people and the gun jammed. Would that be under this statute?

MR. CRIBARI: Well, I would prefer --

QUESTION: I know you would.

MR. CRIBARI: Well, I would prefer that in that case there is a dangerous weapon. Fortuitously it didn't work. Just as if there were bullet-proof glass that was up and the bullet didn't penetrate the glass. That does not render the weapon not a dangerous weapon.

I don't think the question is --

QUESTION: Well, is that weapon any more dangerous than this one?

MR. CRIBARI: The weapon that jams when used?

QUESTION: Yes.

MR. CRIBARI: I think there that that weapon is much more dangerous than the weapon that can't work at all.

QUESTION: Why?

MR. CRIBARI: Because the weapon that jams when used is nevertheless a weapon which, when exhibited, was a weapon that could actually inflict the harm threatened until the fortuitous accident of jamming. Whereas, an unloaded weapon cannot inflict the harm threatened at all unless it is used in a different manner and then you look at the manner in which it was used to determine if it is dangerous.

QUESTION: I am looking at the manner -- It was used for the purpose of frightening the people. Do you agree?

MR. CRIBARI: I agree.

QUESTION: And to scaring them.

MR. CRIBARI: I agree.

QUESTION: But, you say it is not a dangerous weapon.

MR. CRIBARI: I say that that is a violation of Section (a), the assault. That does not also amount to a violation of Section (d).

QUESTION: Well, what was the purpose of the assault?

MR. CRIBARI: The purpose of the assault was to take money by intimidation.

QUESTION: Well, isn't that what happened?

MR. CRIBARI: That is exactly what happened which is why Mr. McLaughlin plead guilty to taking money by intimidation.

If that is also a violation of Section (d), then there is no distinction between (a) and (d). Taking money by intimidation, the source of the intimidation being an unloaded weapon, is also taking money by a dangerous weapon and I don't think that is warranted on the wording of the statute or on the history of the statute. And, for the Fourth Circuit to establish that as a matter of law, I think, is a violation of Winship.

If Congress wants to make that change, it can

make that change. If the government had put 924(c) at the bottom of the indictment instead of 2113(d), we wouldn't be here.

The effect of Bennett is to allow the government to charge the use of a dangerous weapon and convict for use of a dangerous weapon merely on the display of a weapon, loaded or unloaded. I think absent the congressional definition to that effect, that action in Bennett is wrong.

Unless there are further questions, I will reserve the remainder of my time.

Thank you.

CHIEF JUSTICE BURGER: Mr. Wright?

ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT, ESQ.

ON BEHALF OF THE RESPONDENT

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

The government's position is that an unloaded gun is a dangerous weapon or device for two different reasons.

Our primary argument is that brandishing a gun during a bank robbery is likely to provoke violence.

Many courts have recognized that the display of an apparently deadly weapon in the highly charged atmosphere of a bank during a robbery may lead to retaliation, so that harm could occur in any of a number of different ways.

As one of the many state courts that has held that an unloaded gun is a dangerous weapon stated danger invites rescue and self-help.

The Fourth Circuit noted in the Bennett case that frightened bystanders, security guards, or passing police officers might take precipitous action that could lead to harm to people in the bank at the time of the roberry.

It is, therefore, sensible to punish robbers who display guns more severely than robbers who do not and we think that that was Congress' goal in enacting Section 2113(d).

QUESTION: Mr. Wright, you take the position then that a toy gun would also be a dangerous weapon?

MR. WRIGHT: Whether a toy gun is a dangerous --

QUESTION: One that looks exactly like a real gun.

MR. WRIGHT: That is right. It depends on what it looks like. If it looks just like a dangerous weapon, just like a real gun, then we would contend that it is a dangerous weapon or device under the statute because its display is likely to provoke retaliation. If it does not look like a real gun, we would say it does not, and there might be a question of fact in such a case for a jury unlike this case where it is contested that this was a real handgun.

QUESTION: What if all the bystanders were near-sighted so they thought that the gun really was threatening, when, in fact, if you had good eye sight you would have realized it was a toy gun.

MR. WRIGHT: I have not considered that possibility, Justice Rehnquist.

(Laughter)

QUESTION: Perhaps you have devoted yourself to more important questions.

(Laughter)

MR. WRIGHT: I would contend that that would be a factual question for the jury and the nearsightedness of the bystanders would be relevant in such a case.

QUESTION: What about a toothbrush in the pocket of a coat, sticking it out and making it look like --

MR. WRIGHT: We do not think that -- The tooth-brush is similar to the finger in the pocket or the appearance --

QUESTION: I have got a weapon now, with the finger I don't.

MR. WRIGHT: I don't think a toothbrush is a weapon, although it certainly is a device.

QUESTION: Well, a toy gun isn't a weapon, say it is made out of paper mache.

MR. WRIGHT: Well, it is certainly a device and

we think that the display of a toy gun, assuming it looks somewhat real, would make it a dangerous device.

QUESTION: What if you had a toy gun but you didn't take it out of your pocket. It still manifests the likelihood that there is a real gun in there. I think your theory would apply.

MR. WRIGHT: We contend that if the gun is never brandished that that is not the use of a weapon to assault anyone within the meaning of the statute and we do not contend that it applies -- that the additional punishment of Section 2113(d) would be warranted in such a case. That is one of the many cases where we think Subsection (a) would apply, but not Subsection (d).

QUESTION: A toy gun is enough provided they see the toy gun.

MR. WRIGHT: We think under our view -- We believe that the brandishing of the weapon is quite important. We think that is what is likely to provoke retaliation. We think that a finger in a pocket or a toothbrush in the pocket simply is not nearly as likely to provoke retaliation. Bystanders may well not notice the fact that a robbery is going on at all as was the case in the Brown case which we have cited in our brief.

QUESTION: Well, to qualify under (d) you have to show an assault, don't you, when you are talking about

an unloaded --

MR. WRIGHT: You have to use the weapon to assault someone.

QUESTION: Yes.

MR. WRIGHT: That is right.

Petitioner agrees, in his brief at page 12, that displaying an unloaded gun during a robbery is dangerous, but argues that Congress did not intend to punish bank robbers who create dangerous situations because Section 2113(d) refers only to dangerous weapons or devices.

We disagree. It seems obvious that Congress enacted that aggrevated bank robbery provision in order to give enhanced punishment to robbers who act in ways that are more likely to create serious injury.

Furthermore, Petitioner neglects that Section 2113(d) refers to devices as well as to weapons.

As the legislative history shows, Congress was concerned with the psychological effect of the display of a weapon on the minds of people in the bank at the time of the robbery and added the word device in order to make it clear.

As a secondary argument, we contend that an unloaded gun is a dangerous weapon or device within the meaning of the statute because it may be used as a bludgeon as a California court noted more than 50 years ago and as

a number of courts have noted since.

The display of a gun, whether loaded or unloaded, is a threat to inflict injury by means of beating someone and a robber displaying a gun is capable of carrying out that threat.

To make our position clear, I would like to consider one other example raised by Justice Marshall. He asked whether a metal club is a dangerous weapon. We think that clearly it is.

We also think it is worth noting that a metal club is not nearly as useful as a weapon even if just used as a bludgeon as an unloaded gun is. An unloaded gun when pointed at someone will normally cause them to remain stationary so that a robber may walk over and hit them with a gun.

Brandishing a metal club in contrast is much less likely to cause a robber to remain stationary. So, that is why we think robbers use unloaded guns rather than metal clubs in robbing banks.

The legislative history confirms that Congress intended Section 2113(d) to prescribe the use of weapons having the apparent capability of inflicting harm.

The words "or device" were added to that part of the bill that became Subsection (d) after an enlightening floor exchange.

Representative Blanton feared that courts would not construe the phrase "dangerous weapon" broadly to cover devices such as fake bombs and fake guns and he proposed amending the provision to add the word "device" in order to make clear that it ought to apply in such circumstances.

In fact, as an example of the sort of instrument that he thought ought to be covered, he referred to "one of those new kind of Indiana six shooters carved out of a piece of wood with a pocket knife."

He also noted that a bottle of water asserted to be nitroglycerin would have the same effect psychologically on the minds of the people in the bank as a real bomb.

This legislative history which, to our knowledge, has not been cited by any court, including the district court in California that ruled contrary to us on this question, and we think that it clearly shows that Congress intended that a dangerous -- that an unloaded gun would be a dangerous weapon because it has the apparent capability of inflicting harm.

QUESTION: It seems to me the legislative history cuts a little bit against that because if Congress thought that an unloaded gun would be a dangerous weapon, it presumably would have thought the Indiana six shooter would also be a dangerous weapon, don't you think?

MR. WRIGHT: I think that that is right.

QUESTION: Then why did they feel it necessary to add the word "device"?

MR. WRIGHT: Representative Blanton explained -- You appear to be looking at the reply brief, Justice Rehnquist.

QUESTION: That is the wrong source.

MR. WRIGHT: No. The exchange covered there is Representative Blanton has proposed the addition of the words "and device." And, as an example, he says that it would cover something like an Indiana six shooter. Representative Sumners then says, I think that is already covered by Section 2 which is now Subsection(b) of the bank larceny provision.

But, the point is Representative Blanton wanted Subsection (d) to cover that situation and he went on to propose the amendment which was passed by Congress that added the words "or device" to what is now Subsection(d) so that Subsection(d) applies in cases of fake guns and fake bombs and we submit unloaded guns as well.

QUESTION: Then is the government's basic argument here that although the unloaded gun is not a dangerous weapon, it is a dangerous device?

MR. WRIGHT: Well, we would argue that an unloaded gun is a dangerous weapon as eight of the nine state courts --

QUESTION: Then you don't need that legislative

history, do you?

MR. WRIGHT: Well, no, that is right, we don't. But, we think the addition of the words "or device" accompanied by the explanatory exchange between Representative Blanton and the other congressmen makes quite clear that Congress -- Representative Blanton proposed to add those words in case courts did not think dangerous weapon would apply in cases such as fake bombs and fake guns. To make it perfectly clear that he added the words "or device" to the statute.

We would contend that an unloaded gun is a dangerous weapon without that addition. With that addition it seems to us beyond doubt that an unloaded gun is a dangerous weapon.

QUESTION: May I ask you on your bludgeon theory, the second of your two principal submissions, I have seen in the movies at least some tiny things, hide them in their sock or something, a gun, but it will shoot and kill somebody with a bullet, would that be a bludgon in your view no matter how small the firing --

MR. WRIGHT: It seems to us that that may well present a fact question. If the court ruled whether an unloaded gun was a dangerous weapon depended only on its use as a bludgeon --

QUESTION: If that is the case, what about the

case in this case? All we know is it was a "handgun", don't we?

MR. WRIGHT: That is correct. There has been no evidence whatever that --

QUESTION: We don't know whether it is big enough to be a bludgeon or not. I wonder if there is anything in the record that supports your second, at least beyond a reasonable -- Could the judge find beyond a reasonable doubt that you have got a "bludgeon" in this case?

MR. WRIGHT: Well, we don't know exactly why the judge ruled it was a dangerous weapon.

QUESTION: Isn't it correct, as your opponent suggests in the colloquy, that they thought the Fourth Circuit law was a gun being capable of being fired is a dangerous weapon even if there are no bullets in it.

MR. WRIGHT: That is correct. And, the companion case, Johnson, which the court is holding, was a jury trial and attached to the petition there are the jury instructions that were given in that case which focus on the apparent capability of the weapon to inflict harm, which I presume the judge felt was the test, although he did not state it.

QUESTION: There would be nothing in the record to show whether this gun is capable of being used as a bludgeon or not.

MR. WRIGHT: Well, I think that is correct. I would add that it would seem to me it would only be the quite unusual weapon on which we have no evidence in the record that this weapon was the sort that would not be capable of being used as a bludgeon and all we know is that the judge here decided it was a dangerous weapon, so perhaps he felt it was capable of being --

QUESTION: Yes, but he decided on the basis of precisely the same written material that is here in front of us. He never saw the thing as I understand. He was acting on the submission of the government as to what they would prove if they had to go to trial. It was an offer of proof.

MR. WRIGHT: I think that is right, Justice.

Contrary to Petitioner's argument and the argument accepted by the district court in California that ruled contrary to the government, interpretation of the aggravated bank robbery provision to cover unloaded guns and fake weapons does not render redundant Section 2113(a), the straight bank robbery provision.

Aggravated bank robbery, which is punishable by five more years imprisonment than straight bank robbery, differs from straight bank robbery in that a dangerous weapon or device must be used to assault someone during the course of a robbery.

It is, of course, possible to rob a bank without the use of any weapon at all. Robbers frequently pass notes to bank tellers demanding money, sometimes claiming that they have a weapon, when, in fact, they do not have any weapon at all.

Second, robbers sometimes grab bank employees and threaten to beat or strangle them if they are not given money and, of course, that doesn't involve the use of a weapon or device either.

And, as I mentioned earlier, it may be later determined that a bank robber was actually carrying a weapon during a bank robbery, but he never displayed it during a robbery. That does not seem to us to be the use of a weapon to assault anyone. So, while Subsection (a) applies, Subsection (d) does not.

In short, there are a number of cases in which Subsection (a) applies and (d) does not. And, so in interpreting Subsection (d) to apply in the case of an unloaded gun does not render Subsection (a) superfluous.

In that connection, it is worth noting that a number of state courts and state legislatures have construed their first degree robbery statutes to cover the use of unloaded guns. That has not rendered their second degree robbery statutes superfluous.

The fact that the state courts have unanimously

construed the phrase "dangerous weapon", or nearly unanimously -- there was one case that went the other way -- supports our contention that such an interpretation comports with the plain meaning of the phrase, and, as I mentioned before, even in the absence of the strong legislative history in this case, we would so contend.

Petitioner has suggested in his reply brief that the eight state cases we have cited are not relevant because the evidence in those cases showed that the gun was used as a bludgeon or because a state statute in effect defined an unloaded gun as a dangerous weapon or because there was evidence that the gun might have been loaded.

In one of the cases we cited, the Nichols case from Iowa, the court did, in fact, rely on a definitional statute.

In two of the cases, the Aranda case from California and the Montano case from New Mexico, there was some evidence showing that the gun may have been loaded, but we cited those cases because the courts in those cases made absolutely clear that whether or not the gun was loaded made no difference in their holding.

In the other five cases, there was no evidence that the gun was used as a bludgeon. There was no reliance upon any definitional statute and there was no evidence even attempting to show that the gun was unloaded, and

the courts nevertheless held that the unloaded gun was a dangerous weapon when used in a robbery.

The experience in the one state where a court held that an unloaded gun is not a dangerous weapon when used in a robbery is also instructive. The legislature in that state, Wisconsin, subsequently amended the state statute so that it now applies to "any article used or fashioned in a manner to lead the victim to reasonably believe that it is a dangerous weapon."

As we noted in our brief, 15 other states have statutes that on their face appear to apply in the case of an unloaded gun.

To be sure, Petitioner pointed out, those reflect legislative judgments, but we cite them to show that it is sensible to construe robbery statutes to punish robbers who brandish weapons more severely than robbers who do not.

It appears that the vast majority of the states that have considered that question have, like Congress, come to that conclusion.

In summary, the United States contends that an unloaded gun is a dangerous weapon or device within the meaning of Section 2113(d) because its display is likely to provoke retaliation.

In addition, an unloaded gun is a dangerous weapon

or device because it can be used as a bludgeon to inflict harm.

The addition of the words "or device" to that part of the statute that became Section 2113(d) makes that clear. If an Indiana six shooter is a dangerous weapon, then a real gun that is not loaded surely is.

Our construction of Subsection (d) does not render Subsection (a) redundant any more than the many state statutes and cases holding that an unloaded gun is a dangerous weapon under a first degree robbery statute makes the second degree statutes superfluous.

And, as the overwhelming weight of authority in favor of our view shows this position makes sense. It makes sense to punish a robber who brandishes a weapon more severely than one who does not whether or not the robber's gun was loaded.

Thank you.

CHIEF JUSTICE BURGER: You have one minute remaining, counsel.

MR. CRIBARI: Thank you, sir.

ORAL ARGUMENT OF STEPHEN J. CRIBARI, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

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

I agree that it makes sense to punish robbers

who display guns. That is why we have 924(c) which punishes robbers who display guns.

2113(d) punishes the use of a dangerous weapon during an assault committed during a bank robbery or used to place life in jeopardy during a bank robbery.

This Court referred to the legislative history of 2113(d) in its footnote in Simpson and it explained that dangerous weapon applies equally to the assaultive and jeopardy clauses and it notes that 2113(d) was enacted to fight gangsterism in the 1930's. What was clearly in the mind of Congress was to punish people who use weapons that can shoot people, that can explode, and that weapons that look like them are not punished as devices but are punished under the fear section of that statute.

The Wisconsin experience is instructive. What should happen is that Congress should determine that 2113(d) encompasses unloaded handguns, not the Fourth Circuit. What the Fourth Circuit has done is foreclose the question entirely.

There is a factual question to be decided during trials and it should be decided there during the trial. What the government would have this Court do is cut dangerousness from this statute.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:28 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-5189 - LAMONT JULIUS McLAUGHLIN, Petitioner V. UNITED STATES

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BY Paul A. Richardson

(REPORTER)