ORIGINAL

In the

Supreme Court of the United States

ILLINOIS,

PETITIONER

V.

JOHN M. VITALE,

RESPONDENT.

No. 78-1845

Washington, D. C.
January 8, 1980

Pages 1 thru 43

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

ILLINOIS, Petitioner, v. JOHN M. VITALE, Respondent.	No. 78-1845

Washington, D. C.,

Tuesday, January 8, 1980.

The above-entitled matter came on for oral argument at 11:49 o'clock a.m.

BEFORE:

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

APPEARANCES:

JAMES S. VELDMAN, ESQ., Assistant State's Attorney, Cook County, Chicago, Illinois; on behalf of the Petitioner

LAWRENCE G. DIRKSEN, ESQ., 3612 West Lincoln Highway, Olympia Fields, Illinois 60461; on behalf of the Respondent

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

M MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1845, Illinois v. Vitale.

Mr. Veldman, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES S. VELDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. VELDMAN: Thank you very much, Your Honors. Good morning. My name is James S. Veldman, and I represent the people of the State of Illinois. We are your petitioner here.

We are concerned in this case with the applicability or I might say our position being the complete lack of applicability to the facts in this case of the double jeopardy provisions of the Fifth Amendment to the United States Constitution.

On November 20, 1974, John Vitale struck with his automobile and killed two young children. On December 23, 1974, he was found guilty on a traffic ticket which was issued at the scene of the collision, charging him with failure to reduce speed to avoid an accident. On the following day, December 24, 1974, Vitale was charged with two counts of involuntary manslaughter and because he was a minor at the time those charges took the form of a petition for adjudication

of wardship.

The judge in the juvenile court branch of the Unified Circuit Court of Cook County finally dismissed the involuntary manslaughter charges out among other basis, on the basis of double jeopardy and the people have appealed up through the state court system and now come before Your Honors.

As Your Honors undoubtedly know, the Supreme Court of Illinois has certified that its decision was based squarely upon its interpretation of the Fifth Amendment double jeopardy clause.

As you also know, I am sure, there was a very strong dissent in this case and I rely on a great deal of the logic and thinking of that dissent in my argument here.

It is our position that these offenses are not the same offenses for double jeopardy purposes in that, one, they are not the same offense as defined under double jeopardy purposes and, secondly, that the traffic offense is not a lesser included offense of the offense of involuntary manslaughter.

It is absolutely clear, Your Honors, that a person may not be twice placed in jeopardy for the same office. What the clause protects is it prevents multiple prosecutions and/or punishments for the same offense.

And those are the critical words, as this Court well knows, the same offense.

The identity of the offense and not the act or series of acts involved is the crucial question presented in a double jeopardy case. Blockburger v. United States, Ciucci v. Illinois.

Where one act or a series of acts is a violation of more than one statutory provision and where those violations are not the same offense as defined under Blockburger, that there is no prohibition about twice trying, convicting or punishing the defendant upon those charges, Blockburger as I have indicated, and Gavieres v. United States.

QUESTION: My problem, Mr. Veldman, in this case is, as you might have anticipated would be the problem of one or more members of the Court, is that whatever we might independently think about it, the Supreme Court of Illinois through the opinion of the late Mr. Justice Dooley has told us that in Illinois this is a lesser included offense. And to be sure, there was a very vigorous dissenting opinion, but that is the construction of the law of Illinois by the Illinois Supreme Court and we have no choice but what to accept it, don't we?

MR. VELDMAN: Might I suggest to Your Honors

that you do have a choice, and I suggest to you this: In Brown v. Ohio, as I attempted to note in my secont point in my reply brief, in Brown v. Ohio the question of whether the offense was a lesser included offense came before this Court more or less as a fait accompli.

QUESTION: The Supreme Court of Ohio or the Court of Appeals of Ohio held that it was a lesser included offense.

MR. VELDMAN: Precisely.

QUESTION: And here the Supreme Court of Illinois has held that it was a lesser included offense.

MR. VELDMAN: But I believe that the difference here is that it was not contested.

QUESTION: There is a dissenting opinion that -- I used to have a law teacher who told the whole class that dissenting opinions were subversive literature.

(Laughter)

MR. VELDMAN: If that were --

QUESTION: In any event, the court has spoken through the late Mr. Justice Dooley, that is your court, the highest court of your state, and it has told us that in Illinois this failing to stop or rather driving at excessive speed is a lesser included offense of manslaughter. And we can't independently reexamine that holding, can we?

MR. VELDMAN: I believe that you can, Your Honor,

because I believe that this Court must look at Mr. Justice Dooley's holding and I believe that you must consider it in light of, number one, the dissent, which I don't think of as subversive in this particular case at any rate, and also in light of the very clear definition of what is a lesser included offense.

I don't think this Court must find itself bound by a holding of a state court which would, of course, in effect -- if Your Honors feel bound by Mr. Justice Dooley's determination, then you must apply Brown v. Ohio, and for this Court to be put in that position where it has no choice but to follow Mr. Justice Dooley I submit is cutting unnecessarily down on what are obviously the powers of this Court.

QUESTION: Well, you would concede, would you -- you would agree, I suppose, Mr. Veldman, wouldn't you, that if a state legislature passes a law saying that something is black and the supreme court of that state says what this really means is that something is white, we have absolutely no power whatsoever to disagree with the construction put upon that law by the highest court of its state, do we?

MR. VELDMAN: Unless --

QUESTION: Do we or not?

MR. VELDMAN: I would say --

QUESTION: And why is this different? That is the --

MR. VELDMAN: I would say in the ordinary case, no, unless the construction put upon the -- of whether it is black or white so encroaches upon that constitutional question that it deprives this Court of the right to decide the constitutional question, and that is what I am saying, that --

QUESTION: Well, what authority do you have for that exceptional submission?

MR. VELDMAN: I -- I beg your pardon.

QUESTION: I mean, in other words if the statute as passed saying there shall be no hearing in this kind of a situation before somebody is fired and the supreme court of that state says, well, what it really means is that there shall be a hearing, then can we entertain a due process attack upon that statute upon the ground that it purports to provide for no hearing?

MR. VELDMAN: If the supreme court of the state had said that --

QUESTION: Construed the statute to say what it really means is that there will be a hearing in accord with due process of law.

MR. VELDMAN: No, but do you not feel, Your Honor, that if the supreme court of the state were to

hold that a statute which said there shall be a hearing and the supreme court were to say that statute means there is to be no hearing, do you not feel that this Court would be empowered to overturn that undue process grounds, notwtihstanding the state court decision?

QUESTION: Are you trying to suggest to us that when a state court is construing the federal Constitution that presents a different situation?

MR. VELDMAN: I am. I am in a very true sense because I feel that, as I have attempted to do under the second point of the people's principal brief here, there is a very definite and standard definition of what is a lesser included offense and this offense simply does not fit into that definition.

QUESTION: Well, Mr. Veldman, didn't Mr. Justice Dooley recognize that in page A7 and page A8 of the petition for a writ of certiorari, at the bottom of the page, where he says, "As is usually the situation between greater and lesser included offenses, the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter. Accordingly, for purposes of the double jeopardy clause, the greater offense is by definition the 'same' as the lesser offense included within it."

Couldn't you read that as itself being constrained by his view of the double jeopardy clause?

MR. VELDMAN: Well, I think that is his view of the double jeopardy clause. I think that the problem that I see in that is, number one, that you will notice, Your Honor, that the case law which I cited to this Court is very clear, that -- I am not attempting to depart from your question but perhaps approaching it a little --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

(Whereupon, at 12:00 noon, the court was in recess, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION -- 1:00 O'CLOCK, P.M.

MR. CHIEF JUSTICE BURGER: Mr. Veldman, you may resume whenever you are ready.

MR. VELDMAN: Thank you, Your Honor.

At the time of the luncheon recess, I was attempting to answer a question by one of the Members of the Court.

Mr. Justice Dooley, at page A7 of his opinion as it appears in the petition for certiorari seems to be defining lesser included offense under the concept of double jeopardy, and I submit to you that one of his errors is that he misdefines it. He speaks in terms of what the fact of the lesser offense must usually contain and no element not found in the greater. And I would submit to this Honorable Court that it is abundantly clear from the cases such as Brown v. Ohio, such as, for example, Virgin Islands v. Acquino in the intermediate appellate court, that for double jeopardy purposes the lesser included offense situation is thusly defined: The greater offense will always and of necessity include all of the elements of the lesser.

QUESTION: Could you cite where on page A7 he says that it is usually included?

MR. VELDMAN: He says -- if Your Honor will bear with me for just a moment. On page A7, three lines from

the bottom, a new paragraph begins.

QUESTION: Well, it says, "As is usually the situation between greater and lesser included offenses."

MR. VELDMAN: "...the lesser offense, failing to reduce..." -- but, you see, he says, Your Honor, it is usually the situation, and I think, unless I misinterpret his language, I believe that that indicates that he has misapprehended the rule, the rule of the definition there.

QUESTION: Well, he says, in any event, in this case the lesser offense requires no proof beyond that which is necessary for a conviction of the greater.

MR. VELDMAN: Which, of course, I submit to this Court is totally not true.

QUESTION: Certainly the corollary is not true, that the manslaughter charge requires proof of the homicide, whereas the lesser included offense doesn't involve a homicide or even an accident.

MR. VELDMAN: Yes, the so-called lesser included offense involves no element of death, it doesn't even necessarily involve an element of collision with any person. The so-called greater offense, on the other hand, can be easily proven in a number of instances without proving the lesser, since voluntary manslaughter, as Your Honors can see defined statutorily, and I have set

it out at page 16 of our principal brief, clearly you can commit involuntary manslaughter in Illinois easily without the use of an automobile and therefore under no stretch of the imagination.

QUESTION: I have two problems with your argument and I would like you to perhaps comment on it. First of all, in the statute which is set out at page A6 in the petition, there is an "(a)" on the manslaughter and there is a "(b)" that says, "If the acts which cause the ddath consist of the driving of a motor vehicle," and then it goes on, which is I take it a sub-category of the voluntary manslaughter.

MR. VELDMAN: It is --

QUESTION: Which is, of course, the sub-category we have here.

MR. VELDMAN: It is the offense which is known in Illinois as reckless homicide.

QUESTION: Right. Which is, I gather, a lesser included offense within --

MR. VELDMAN: It is characterized in the statute, if you will notice, as an included offense.

QUESTION: Now, would you say that the reckless driving of a vehicle is a lesser included offense within the offense of reckless homicide?

MR. VELDMAN: Would I say that --

QUESTION: In other words, what I am suggesting is a sort of a pyramid, the broadest category is the involuntary manslaughter, included within that category is the species reckless homicide and an even lesser within that category is the reckless driving of the vehicle. Each is lesser of the next step up.

MR. VELDMAN: Well, perhaps if we had the reckless driving of the vehicle, you might have an instance where it might be an included offense, but what I think you cannot -- even in Your Honor's pyramid of setting up sub-categories, you cannot make failing to reduce speed a lesser included offense even a reckless homicide because all that you are talking about in failure to reduce speed is a simple violation of due care by not reducing speed even to avoid, say, an empty wagon which on the highway.

QUESTION: But the statutory definition of failure to reduce speed is not limited to cases of failure to reduce speed but also include driving at a speed that is greater than reasonable and proper and so forth. There are a lot of --

MR. VELDMAN: Well, I think a great many things, as Your Honor can see at page 17 in the people's principal brief, there are a great many things which are included within this particular section of the Illinois Vehicle Code.

And I think there are a number of separate and distinct offenses which might be committed under this section.

QUESTION: Right. The question is, I suppose -- let me put it a little differently -- the indictment for manslaughter that is quoted on page 4 of the appendix alleges that John M. Vitale has on or about so-and-so committed the offense of involuntary manslaughter. In that, he without lawful justification, while recklessly driving a motor vehicle, caused the death of George Kech. COuld they prove that charge without also proving a violation of failing to reduce speed?

MR. VELDMAN: I don't think that is clear as the case in the posture in which this case comes before this Court. There was a police report which indicated that Vitale had violate a number of Illinois traffic laws. We don't -- I don't think that at this juncture, as the case presently comes before the Court, that we can say -- and I certainly personally cannot say -- whether the proof of the involuntary manslaughter would have involved the failure to reduce speed necessarily or not. I think that had the case not been --

QUESTION: Wouldn't it necessarily have proved that he was driving recklessly and without proper regard to traffic conditions and the use of the highway in a way that endangered the safety of any person or property?

Wouldn't it necessarily prove that he endangered the safety of the person he killed?

MR. VELDMAN: Oh, it would --

QUESTION: That is what the statute calls -- that is the statutory definition of --

MR. VELDMAN: But do you notice, Your Honor, that the statute -- the statute begins -- we are talking about traffic statute --

QUESTION: Right.

MR. VELDMAN: The statute begins, "No vehicle may be driven upon a highway of this state at a speed which is greater than reasonable," et cetera, and it goes on and it makes a number of what I would consider to be possibly separate and distinct traffic offenses, one of which is failure to reduce speed.

QUESTION: Yes.

MR. VELDMAN: And I think Mr. Justice Underwood commented in his dissenting opinion on this very subject, that it was impossible to know which of the number of possible violations committed under this or other sections might have been the basic proof in the involuntary manslaughter.

QUESTION: Was all of this argued before the lower court, the fact that this was not double jeopardy and the fact that under Illinois law this was not -- was

all of this argued?

MR. VELDMAN: No, actually, Your Honor, it wasn't. The --

QUESTION: Well, you had an opportunity to argue it, didn't you?

MR. VELDMAN: The way the case came, if Your Honor will note appendix B of the petition for certiorari, the way that the cause came to the Supreme Court of Illinois, the Appellate Court of Illinois for the First District had decided that they had not said much or anything about the double jeopardy question involved in the case. They had simply based it on an Illinois statute.

Mr. Justice Dooley and the majority of the Illinois Supreme Court in their opinion said we find an even more compelling rationale in the Fifth Amendment of the United States Constitution. This forum, the forum before this Honorable Court is really the first time in which a full-fleged argument on the double jeopardy aspects of this case has been made, as I see it.

QUESTION: Is this the first time there was an opportunity to argue it?

MR. VELDMAN: No, and I believe the --

QUESTION: You are not saying that you didn't have an opportunity, are you?

MR. VELDMAN: Well, I don't think that -- I'm

sorry, I don't think I follow Your Honor's question. I beg your pardon.

QUESTION: All you are entitled to is an opportunity to present your argument, that is all you have a right to?

MR. VELDMAN: Yes.

QUESTION: You don't have a right to ask somebody else to do your arguing for you?

MR. VELDMAN: No, you do not, Your Honor, but the point is I think that --

QUESTION: I shouldn't think the State of Illinois would need any help.

QUESTION: Did you make all these arguments to the Illinois Supreme Court?

MR. VELDMAN: No, we did not because --

QUESTION: Were you arguing just the state law question?

MR. VELDMAN: Basically the people's brief which is in the Supreme Court of Illinois, which I might point I did not either write or argue -- dealt basically with the state law question which came up from the Appellate Court. We have the procedure in Illinois of leave to appeal, and one's petition for leave to appeal is normally limited to those questions in the Appellate Court which are considered error by the petitioner. So

we were somewhat limited in what we could argue before the Supreme Court of Illinois. And the briefs for respondent in the Supreme Court of Illinois really did not bring out the double jeopardy question which under Illinois court procedure, again, limited the people in that we were compelled basically to keep our answer within the bounds raised by the party appellee there.

QUESTION: You say that the Illinois Appellate Court relied on the Illinois statute barring prosecutions analogous to double jeopardy?

MR. VELDMAN: The so-called compulsory joinder statute in Illinois. The Appellate Court opinion I think can be pretty much condensed down to the fact that this prosecution violated sections 3-3 and 3-4 of chapter 38 of the Illinois Revised Statutes in that all of these offenses could have and should have been joined before a single court for trial.

The Supreme Court of Illinois totally departed from that rationale.

QUESTION: Has there ever been an adjudication on the merits of either of these two charges?

MR. VELDMAN: Of these two charges, an adjudication on the merits?

QUESTION: Yes.

MR. VELDMAN: Yes. There has been an

adjudication of the merits, although we don't have a transcript so we don't know what took place. But Mr. Vitale has been found guilty and he did not plead guilty. He was found guilty in the traffic proceeding and was fined in the sum of $15. And I can only assume that there was there some sort of trial and adjudication, although we do not have a transcript before us.

QUESTION: Mr. Veldman, it occurs to me that as a matter of Illinois law, we do have an opinion of the intermediate, the Appellate Court to the effect that these two offenses are the same offense within the meaning of the Illinois Criminal Code. That holding was not reviewed by the Illinois Supreme Court which apparently went on federal grounds. But the highest court of the state which has spoken to the issue has told us that as a matter of Illinois law we have the same offense, isn't that true?

MR. VELDMAN: The highest court that has spoken on the issue, yes.

QUESTION: And aren't we bound by the teaching of the highest court of Illinois that tells us anything about a state law issue?

MR. VELDMAN: You do not have a final determination of that issue by the highestreviewing court.

QUESTION: But it is unreversed at least.

MR. VELDMAN: Yes, it is unreversed in the sense

that it is untouched.

QUESTION: In other words, the Illinois Supreme Court may have merely said yes and, oh, by the way, it also violates the federal Constitution.

MR. VELDMAN: No, but they did not say that, Your Honor. They specifically, in answer to our petition for certiorari 78-2, when this Honorable Court sent the case back, the Supreme Court of Illinois specified that its opinion was based on the Firth Amendment, so they declined to decide the issue, and I can understand that because the committee comments appended to section 3-3 and 3-4 -- and those committee comments in Illinois are proper source of legislative intent -- indicate that what those sections were basically meant to cover was an instance involving multiple prosecutions under a single act or a series of acts which were not covered or barred by the concept of double jeopardy in the Fifth Amendment, and it may have very well been that finding, as they did, that the Fifth Amendment barred the prosecution, that the Supreme Court of Illinois thought it superfluous to discuss the Illinois statute under those conditions.

QUESTION: Suppose, Mr. Veldman, hypothetically -- this is a further hypothetical -- you could persuade us that there was some basis for reversing the Supreme Court of Illinois on their federal holding, would there be

anything to prevent that court when the case was remanded from in effect adopting the Court of Appeals opinion and putting it on state grounds and therefore impervious to any challenge?

MR. VELDMAN: I think that having determined that in the basis of its opinion was purely federal constitutional grounds, that the Supreme Court of Illinois would be precluded from so doing. I should think that --

QUESTION: How could anyone preclude them from saying, as Mr. Justice Stevens just suggested, the inverse of what you suggested, as a matter of fact, that if the is the attitude of the Supreme Court of the United States, all right, we will decide it on state grounds and then decide it just ehw ay the Court of Appeals did.

MR. VELDMAN: Well, I suppose that in theory there is nothing to prevent them from doing it, but I think that in actuality the proper remedy -- and I think that if I were before the Supreme Court of Illinois, I would argue that the proper remedy, having decided it on federal constitutional grounds and been then reversed, would be to return the case to the Unified Circuit Court of Cook County for further proceedings under this indictment, and the question there, I think we would then have perhaps the question of the applicability of the statute but I think it would be raised properly in the trial court.

I think it would ill-behoove the Supreme Court of Illinois to say, well, we decided our opinion was on one rationale but since they won't buy that we will just go 180 degrees the other way, and I cannot conceive, being somewhat familiar with the Justices on the Supreme Court of Illinois, that they would do that.

QUESTION: They wouldn't be going the other way, they would just be reaching the same result.

MR. VELDMAN: Well, they would be reaching the same result but they would be reaching the same result on a completely different rationale.

QUESTION: That is all right but they would be going on state grounds whereas now they have decided it on federal.

MR. VELDMAN: But they have said, Your Honor, in answer --

QUESTION: At least if we disagreed with them, we would have told them that they were wrong on the federal ground and leave it to them to decide it on state grounds.

MR. VELDMAN: Yes, if nothing else. And as I have said, their specific answer to the inquiry of this Court under the petition for certiorari, the original petition for certiorari in this case was, the question presented to the Supreme Court of Illinois was have you decided this case on state grounds, federal grounds or

both, and the answer was federal grounds alone.

QUESTION: But that doesn't prevent them, if we tell them they were wrong on federal grounds, when it goes back to them, saying, all right, we were wrong on the federal grounds, we will now address the state grounds.

MR. VELDMAN: Yes, I suppose they could do that. They could --

QUESTION: You certainly took the state grounds to them, didn't you? You must have.

MR. VELDMAN: Yes, we did.

QUESTION: That is about the only ground you took to them.

MR. VELDMAN: And they ignored it. They in fact ignored it.

QUESTION: Mr. Veldman, is that really quite correct? At page A3 of the petition, after reviewing the proceeding in the Appellate Court, they conclude that that court had concluded that the Appellate Court concluded that the acts in both the offense of failure to reduce speed and the offense of involuntary manslaughter were identical with the exception in the manslaughter offense a death was involved. Then they said it follows from that that under the Illinois statute 3(b), since the prosecutor knew about both at the same time, as a matter of state law dismissal was required. Then they

said after that there is an even more compelling reason for dismissal giving this hypothesis, that is that the double jeopardy clause of the Federal Constitution also requires dismissal.

Now, what is the federal error in that analysis?

MR. VELDMAN: The federal error in the analysis of the state statute?

QUESTION: What federal error did the Illinois Supreme Court commit, given the identity of the offenses which the Appellate Court had found and which the Supreme Court of Illinois did not disagree with but merely said we need not rely on the state statute that requires dismissal when identical offenses are involved, we can rely on the federal Constitution that requires dismissal when identical offenses are involved. What is the federal error that that court committed?

MR. VELDMAN: I think the error which was committed by that court was first in its interpretation of the double jeopardy clause, and secondly in finding that under Illinois law those offenses are the same offense.

QUESTION: Well, the latter theory is a state law question. What was its erroneous interpretation of the double jeopardy clause?

MR. VELDMAN: But I don't think -- let me put it this way: I don't think -- I see my time is expired,

but I would like to answer Your Honor's question if I may. I don't think that you can quite divorce the two things in the way that Mr. Justice Dooley wrote his opinion. He seems to interpret the Illinois statutes but on federal constitutional grounds, and I think that one cannot divorce the two things. And I think the federal --

QUESTION: What do you mean by that? How can you --

MR. VELDMAN: For example, he defines --

QUESTION: -- err on state statutory law on federal constitutional grounds?

MR. VELDMAN: He says --

QUESTION: If as a matter of state law first degree murder includes manslaughter, say, how is that affected one way or the other by the federal Constitution?

MR. VELDMAN: Because unless I misread the position taken by Mr. Justice Dooley and the majority of the Supreme Court of Illinois, their position was that the offenses were the same offense for double jeopardy purposes but then the statute barred them. It would have barred them in Illinois too had they --

QUESTION: Now, he is saying it is a lesser included offense that is a matter of Illinois law.

MR. VELDMAN: Yes.

QUESTION: Therefore under Brown v. Ohio we

extended as to violate, for example, due process because one could have a conviction upon a charge never made against the criminal defendant if in fact lesser included offense is given too broad an interpretation. And I don't think that this Court --

QUESTION: What would be an example of that?

MR. VELDMAN: An example of that --

QUESTION: Are you responding to the question now or are you continuing your --

MR. VELDMAN: I was attempting to respond. I realize my time is run, Your Honor. Do you wish me to conclude?

QUESTION: Respond to the question. Respond to the question, please.

MR. VELDMAN: Thank you. All right. An example of that might -- I am trying to think very quickly of one example --

QUESTION: Well, I just wondered what sort of thing you had in mind, that's all.

MR. VELDMAN: For example, one could have -- one could be convicted of murder. Take an extreme example. Suppose someone were charged with murder and then were convicted of armed robbery on the evidence presented and the legislature said, well, armed robbery may be a lesser included offense of murder, and this Court -- now, that

is reduxio absurda, I grant you, it would never be that extreme. But in much less extreme cases it might very well be --

QUESTION: Like this one?

(Laughter)

MR. VELDMAN: I hope that this Honorable Court will not so hold.

Unless the Justices have any further questions of me, as I said, I realize my time is expired.

MR. CHIEF JUSTICE BURGER: Mr. Dirksen.

ORAL ARGUMENT OF LAWRENCE G. DIRKSEN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. DIRKSEN: Mr. Chief Justice, and may it please the Court: My name is Lawrence Dirksen, and I represent the respondent, John Vitale.

Your Honors, I believe, to clarify some of the questions that first came out, I can probably fill the Court in a little bit on the history of this case because this is the first time that double jeopardy really has ever become an issue. This case has been all over and every conceivable argument that could have been made against John Vitale by the State of Illinois has been made.

Originally, they challenged us on jurisdiction. Just to take a step backwards, John Vitale was tried on the minor traffic violation. His uncle represented him

is reduxio absurda, I grant you, it would never be that extreme. But in much less extreme cases it might very well be --

QUESTION: Like this one?

(Laughter)

MR. VELDMAN: I hope that this Honorable Court will not so hold.

Unless the Justices have any further questions of me, as I said, I realize my time is expired.

MR. CHIEF JUSTICE BURGER: Mr. Dirksen.

ORAL ARGUMENT OF LAWRENCE G. DIRKSEN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. DIRKSEN: Mr. Chief Justice, and may it please the Court: My name is Lawrence Dirksen, and I represent the respondent, John Vitale.

Your Honors, I believe, to clarify some of the questions that first came out, I can probably fill the Court in a little bit on the history of this case because this is the first time that double jeopardy really has ever become an issue. This case has been all over and every conceivable argument that could have been made against John Vitale by the State of Illinois has been made.

Originally, they challenged us on jurisdiction. Just to take a step backwards, John Vitale was tried on the minor traffic violation. His uncle represented him

on that matter. He was tried in the suburban court not too far outside of Chicago. From the conversation I had with his uncle, there was a full trial. Not only did the witnesses testify against John Vitale, John Vitale testified himself, which is neither here nor there. But if I had been representing him, I certainly would not have allowed him to take the stand, but he did testify, so it was a full trial.

As I see this case, I have absolutely no argument -- in fact, I entirely agree with Judge Dooley's opinion. But really what we would be talking about here would be multiple trials if the state would prevail on this final argument because as I say, they had gone from jurisdiction originally. That didn't work. They said we can do one thing in the traffic court and we can do something else in the juvenile. Well, John Vitale is no longer a juvenile, but in those days they thought that they could prosecute him on traffic here and perhaps on the manslaughter over in the juvenile court.

The fact of the matter is that they couldn't do it as an adult. I raised that question in the Circuit Court, I raised it in the Appellate Court, and I asked the state in front of the Illinois Supreme Court.

QUESTION: You raised that on state grounds?

MR. DIRKSEN: Your Honor, my original motion

was to dismiss the petition for adjudication of delinquency and it was based on statutory and/or constitutional grounds of double jeopardy which had compulsory joinder statutes --

QUESTION: Federal double jeopardy?

MR. DIRKSEN: Pardon?

QUESTION: Federal or state?

MR. DIRKSEN: It was a joint motion, yes. I won both ways. The Circuit Court ruled on the compulsory joinder statutes that the matter should have been joined in one trial, one proceeding. The Appellate Court said the same thing and they further reiterated that --

QUESTION: Could I ask you a question about the argument in the Illinois Appellate Court. I gather you did represent --

MR. DIRKSEN: Yes, Your Honor, I represented him since the juvenile court.

QUESTION: Did the state argue that even on the assumption that the offenses are identical, one being included within the other, nevertheless the Illinois state compulsory joinder statute is not applicable because it doesn't apply to juvenile proceedings or doesn't apply to traffic offenses or something of that character?

MR. DIRKSEN: No, I think it was very clear, there was never a question that it did not apply to juveniles. The state argued that but the court --

QUESTION: The state argued that it did not apply then?

MR. DIRKSEN: Right.

QUESTION: And so is it possible that what the Supreme Court of Illinois was saying is, well, we have identical offenses here, we don't have to decide whether the state compulsory joinder statute applies because in any event when you've got the same offenses you've got the protection under the federal Constitution.

MR. DIRKSEN: I believe that is correct, Your Honor. A juvnile issue was entirely dismissed because I think we all recognize, and everybody did in the courts, the nine judges from the State of Illinois thus far, that juveniles have all the same rights as adults and that is what I was saying when I back-tracked, the state abandoned that argument. They said, okay, forget about the juvenile question.

QUESTION: How are we to understand the remand and the answer that the court gave? Did they say they decided the case solely on double jeopardy grounds?

MR. DIRKSEN: I didn't read it that way, Your Honor. I read it the way Mr. Justice Stevens said.

QUESTION: Well, what did they say?

MR. DIRKSEN: They said that Appellate Court held under the compulsory joinder statute that the state --

QUESTION: I know, but what did the state say in answer to our remand?

MR. DIRKSEN: Oh, they sent us back to you and said solely on federal constitutional grounds.

QUESTION: Well, are we supposed to go behind that or not? The said solely on --

MR. DIRKSEN: Well, Mr. Justice Dooley who wrote the opinion died.

QUESTION: Well, they are clearly given, given identity of offenses which they found, then as a matter of federal constitutional law there is double jeopardy. That is solely constitutional grounds.

MR. DIRKSEN: Your Honor, there is no question they are right.

QUESTION: Of course, you agree that we can't examine the basis of the state holding.

MR. DIRKSEN: I absolutely do, Your Honor.

QUESTION: Is Mr. Justice Dooley, now deceased, the former Jim Dooley, the noted personal injury lawyer?

MR. DIRKSEN: Yes, he is, Your Honor, and I believe this was the last opinion that he wrote.

Your Honors, I think it is important for the Court to note that there is not much for me to elaborate on on Justice Dooley's opinion. I simply agree with it.

QUESTION: If you are right, there isn't

anything more to say, is there?

MR. DIRKSEN: And if there are no further questions, then I will conclude my argument.

QUESTION: May I just ask this question.

MR. DIRKSEN: Certainly.

QUESTION: Is speed a necessary element in a manslaughter conviction?

MR. DIRKSEN: It wouldn't necessarily have to be, Your Honor.

QUESTION: It would not?

MR. DIRKSEN: It would not have to be in every case.

QUESTION: You could have a guy driving down the street at four miles an hour, couldn't you or --

MR. DIRKSEN: Correct.

QUESTION: Or you could have a car trying to leave a parking space that backed up at one mile an hour and crushed somebody behind it.

MR. DIRKSEN: Certainly you would, Your Honor. I think maybe I should say something about the case because I have known it that long.

QUESTION: Doesn't that suggest that speed is not an element?

MR. DIRKSEN: You see, here we are not talking about the amount of speed, we are talking about the fact

that he failed to reduce it, the fact that he failed to reduce speed resulted in a collision with a person, and the death of that person resulted in another charge or two other charges being filed against that same man, those charges being involuntary manslaughter.

QUESTION: Suppose you had a mechanic underneath an automobile and one got in it and drove off without looking, he would drive off, how could he reduce it below zero?

QUESTION: Well, he could reduce it to zero, couldn't he?

MR. DIRKSEN: He could, Your Honor, and I think --

QUESTION: From five miles an hour he could reduce it to zero and then he wouldn't have had a collision.

MR. DIRKSEN: I say I simply think the state in this case, they simply erred and they are coming before this Court and saying would you please rectify our error because we don't want to set a bad precedent in Illinois. This wouldn't happen in an adult case. It would not have happened if the state had kept its eye on things. After all, this young man was charged on November 20, 1974, with a traffic offense. He was tried a month later. They had plenty of time. The juvenile officer in South Holland necessarily had to go to the juvenile court,

which is loaded with states attorneys, get the necessary petitions to file for an adjudication of delinquency, he obviously had those in his -- I mean this is supposition, but he had to have them at least the next day after the trial because we are talking about a trial that John Vitale went through, and now the state is saying we want another trial because he only had a $15 fine.

QUESTION: Well, you are not saying under no circumstances under federal jeopardy could he be tried for two totally separate offenses, are you?

MR. DIRKSEN: No, Your Honor. I don't have the argument with the offenses, I have the argument with the multiple trials. There can be separate offenses tried in a single proceeding, but I don't think you can take one act and carge a number of offenses out of that act and then have separate and successive prosecutions except in extremely limited circumstances.

QUESTION: How about the statement in Ash v. Swinson that you could bring a person to trial for killing six different poker players if he had not been acquitted in the first trial?

MR. DIRKSEN: Well, I agree completely with the holding in Ash v. Swanson because, as I understand that case, it was simply a question of identity and --

QUESTION: There was an acquittal in Ash.

MR. DIRKSEN: I know, but I mean double jeopardy applies whether there is an acquittal or a conviction.

QUESTION: But it doesn't necessarily mean that you can't try a man for two different offenses.

MR. DIRKSEN: In extremely limited circumstances. If they --

QUESTION: Well, that is a view that has been expressed by some members of this Court, but never adopted by the Court.

MR. DIRKSEN: I realize that, Your Honor.

QUESTION: Your case is Brown v. Ohio which was a court opinion.

MR. DIRKSEN: Yes, sir.

QUESTION: If I were you, I would suggest you stay right there.

MR. DIRKSEN: I will stay right there. I said I --

QUESTION: I think what you are really saying is that Mr. Vitale is mighty lucky a young man to have been charged with a traffic offense --

MR. DIRKSEN: Your Honor --

QUESTION: -- when he ran down and killed two young children in a guaraded school patrol crossing.

MR. DIRKSEN: Your Honor, hard cases make bad law. I feel very bad. In fact, I happen to know one of

the parents of the children who was killed, a police officer in South Holland. It is extremely unfortunate, but I cannot, because those are the factual circumstances, take any different position than any other lawyer could as far as my client's rights are concerned. The state knew what they were supposed to do. They have certain requirements that are placed on them.

QUESTION: Would you be here, would you be making this argument except for the state statute, the compulsory joinder rule?

MR. DIRKSEN: Not --

QUESTION: Well, let's suppose that there had been no state rule at all and there had been these same prosecutions in the Supreme Court of Illinois who said this was double jeopardy.

MR. DIRKSEN: Without compulsory joinder statutes?

QUESTION: No compulsory joinder statute.

MR. DIRKSEN: Would I still be here?

QUESTION: Would you be arguing that the -- would you be supporting the Supreme Court of Illinois' result on --

MR. DIRKSEN: Yes, sir, I would.

QUESTION: Because you think it is a matter of federal double jeopardy irregardless of state law, this

is not double jeopardy?

MR. DIRKSEN: No, I do think it is double jeopardy in --

QUESTION: You think it is double jeopardy.

MR. DIRKSEN: Yes.

QUESTION: But you would say that there is a one transaction test, or don't you?

MR. DIRKSEN: No, Your Honor, I don't think we need to go that far. I am very aware of Mr. Justice Brennan's and Mr. Justice Marshall's transaction test. I don't think we even need go that far. I agree with them but I don't think we need to go that far because we are not talking about one transaction, we are talking about one act. There was an act of an accident, that accident resulted in a traffic charge and two deaths. And as I pointed out in my brief, if you can take that one act, you could create not only the offense of failing to reduce speed to avoid an accident, you could also create involuntary manslaughter, you could create reckless homicide, you could create reckless conduct, reckless driving, failing --

QUESTION: You are asking them for a principle that has never been enunciated by this Court if for one act you can only be charged once. Certainly, Brown v. Ohio doesn't say that.

MR. DIRKSEN: No, I'm not saying that, Your Honor.

QUESTION: You at least say you must abandon the offense test.

MR. DIRKSEN: Your Honor, all I am saying --

QUESTION: You suggest that even if the offenses are different, and even if to prove the one you don't need to prove something that is involved in the other --

MR. DIRKSEN: No, I say you could prosecute those offenses but you have to do it in one trial. You can't take one after the other.

QUESTION: I know you do. I know you do, but that has not been the rule --

MR. DIRKSEN: No, that is what I started with, Your Honor, in our own compulsory joinder statute.

QUESTION: I know, but I want to know, aside from your compulsory joinder statute.

MR. DIRKSEN: I still think all charges that arise out of one act, the separate offenses can be tried but they have to be tried together.

QUESTION: What case do you rely on from this Court for that proposition? Hopefully this one?

QUESTION: You are standing on the Illinois law when you make that argument, aren't you?

MR. DIRKSEN: Well, our compulsory joinder

statute does provide that, so that is a good place to start. I mean, it --

QUESTION: It is a good place to finish, too.

QUESTION: It is a good idea to abandon also, because that is a matter of your state law. That has never been held here as a matter of constitutional double jeopardy law.

MR. DIRKSEN: Judge, I am not going to --

QUESTION: On the other hand, Brown v. Ohio was decided by this Court under the double jeopardy provision as applied to the states for the Fourteenth Amendment and that involved lesser included offenses, and I would think that your argument would be based squarely on that case.

MR. DIRKSEN: Your Honor, I couldn't more agree with you. I am simply stating my position philosophically, but I do agree with the decision of Justice Dooley.

QUESTION: State that on the way home on the airplane.

MR. DIRKSEN: All right.

QUESTION: Mr. Dirksen, can I ask you, under the failing to reduce speed statute in Illinois, I notice your client was only fined $15. What was the maximum penalty under that statute?

MR. DIRKSEN: Your Honor, it was a Class C misdemeanor, it could have carried up to a $500 fine and

30 days in jail.

QUESTION: Thirty days.

MR. DIRKSEN: Yes.

If there are no further questions, I thank the Court.

MR. CHIEF JUSTICE BURGER: I hear none, counsel. Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:39 o'clock p.m., the case in the above-entitled matter was submitted.)

- - -