Supreme Court of the United States

October [redacted] TERM 1969

In the Matter of:

Docket No. 57

BOB FRED ASHE,

Petitioner,

vs.

HAROLD R. SWENSON, WARDEN

Respondent.

Place Washington, D. C.

Date November 13, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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BENHAM

IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner

vs

HAROLD R. SWENSON, WARDEN

Respondent

No. 57

Washington, D. C.
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The above-entitled matter came on for hearing at 12:35 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 57. Ashe against Swenson.

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

ORAL ARGUMENT BY CLARK M. CLIFFORD, ESQ.

ON BEHALF OF PETITIONER

MR. CLIFFORD: Mr. Chief Justice and may it please the Court: I represent the Petitioner in this case, Bob Fred Ashe who, as a result of the verdict of guilty, was sentenced to a 35 year term in the Missouri State Penitentiary.

The case involves the construction of the basic theory of double jeopardy. In this action, four men were charged with holding up a poke game, and as a result of that informations were returned charging each of the four alleged robbers with six separate offenses, because there were six men in the poker game. Each was robbed, so each of the four defendants was charged with a separate offense.

In this instance, Ashe, my client, was tried and acquitted at his first trial. He then was tried a second time and that time was convicted.

The facts of the case are paramount in purpose. So, if the Court will bear with me while I trace briefly what these facts are.

In this town in the Northwestern portion of Missouri, called Lees Summit, it was known that from time to time a

group gathered to play poker at the home of a man named Gladson. And on this Saturday evening there were six men playing. It was a game in which bets were made as much as a hundred dollars. So, from time to time there would be a good deal of money on the poker table.

Early that morning -- it would be early Sunday morning on January 10, 1960, there was a disturbance at the door which led into the basement of Mr. Gladson's house where they were having the game. One of the men got up; the door was pushed open in his face and three men entered; one of them with a shotgun and two of them with pistols. They said, "this is a stickup." They forced the six poker players over with their backs to the wall. These men gathered up the bills and currency that were lying on the table; they removed from the persons of the six poker players, their watches, any other valuables that they might have.

When the case came to trial against my client Ashe, he was charged with armed robbery against one of the six poker players whose name was Knight, K-n-i-g-h-t.

Q Mr. Clifford, I want to be sure I fully understand the facts. I think you said, if I understand it correctly that these men not only picked up what was on the table, but also personally went into the pockets of each one of the players?

A Yes, Your Honor, and I was going to give you

more detail in this regard. I first stated the general proposition.

They forced the six men over with their backs facing the wall, with their backs to the room; they took whatever cash and valuables there were on the table, then in each instance, they removed from the person of the six poker players, their watches, their rings, their billfolds, whatever they could find of value on th se six men who were there.

The question is a curious one: as to whether there were three or four of the alleged robbers who came in, but in any event, after they had performed this robbery these men were tied up; their trousers were taken away from them in an effort, perhaps, to prevent pursuit, and the robbers left.

So that just taking Ashe alone, the Petitioner here, he had six informations filed against him, alleging the six offenses against the poker players.

But when the first trial came on, four of the poker players were called as witnesses. Among a number of other witnesses -- the fact is that 15 witnesses were called by the State in this first trial against Ashe.

Gladson, at whose house the game was held, identified one of the robbers, a man named Brown. Because, as the robbers came in they had hats on; they had bandanas around their face and were difficult to identify, but in the course

of the proceedings Brown's bandana fell down and Gladson identified him. He knew him there in town so he identified him but could not identify any of the others.

Knight, the second witness at the first trial, said he had heard that some people claimed there were four men in the holdup and he only recalled three and he couldn't identify any of the three.

McClendon, the third poker player said that he remembered only three men in the basement and he identified all three of them as Johnson, Larson and Brown. He was asked about Ashe at this particular stage and he said, "no, he couldn't remember seeing Ashe in the basement in where they were having the game.

Roberts, the fourth member of the game did identify Ashe as one of the robbers, but in a curious manner. He said, I didn't see his face that evening in the room where the poker game was held; I didn't see his hands, for these men all had gloves on, and I really couldn't identify his voice, but Ashe was one of the robbers and he's sitting over there at the trial table when the case came to trial and that is Ashe and he was one of them.

From there the trial -- the first trial went then to the question that the robbers escaped, stole one of the cars belonging to the poker players and escaped.

Early that next morning witnesses saw this group and

two or three witnesses saw the stolen car with three men in or around it; one lying on the ground next to it; two sitting on the other side.

And the next morning, Sunday morning, maybe eight o'clock or so, these three men were picked up. That's Johnson, Larson and Brown. Those were the three that Mc Clendon, incidentally, had recognized in the basement. They were picked up by a Missouri Highway Patrol.

Ashe was not with those three men, also these three men picked up near the stolen car, all had money on them: ones, fives, tens, twenties, something of that kind, the same kind of currency that had been used in the poker game. Then the stolen car was found near which one witness had seen these three men; a shotgun was found some few steps behind the car; two pistols were found inside of the car.

Now, some time later at a point removed from this location where the three men were found, Ashe was walking along the highway and a separate state patrolman was driving along, saw this man walking along the highway, stopped him and the word had gone out to be on the lookout for this particular fellow. He arrested him at the time, had him come over and stand with his hands against the automobile, and searched him.

All Ashe had on at the time was a pair of pants and a white shirt. And the officer said he had nothing in his pockets; he had no money of any kind. I mention this because

the identification of Ashe was extraordinarily flimsy from the witnesses who were in the game. The cases against the other three who were supposedly implicated were quite strong, because they were found with money on them; they pretty well stayed together; they had been seen near the car and so forth.

Ashe was separate. For all that one might know, he might have just been walking down the highway and the policeman saw him.

After the submission of the case to the jury, the Defense did not put on any witnesses. The jury went out and brought in a verdict of not guilty against Ashe.

Incidentally, and interestingly, the jury was given a verdict that said not guilty. And they added to it, "not guilty due to insufficient evidence." They supplied that themselves.

The State tried the case on the theory that the four men were acting in concert and that all four took place in a robbery that involved all six poker players. No effort was made to show that any particular defendant robbed any particular poker player. The fact is there is some evidence exactly to the opposite when one witness said, "I don't know which man of the four or three did what. We were just all hurdled over there and I just saw them scoopingoup the money." So, there is no specific act on the part of any defendant alleged. It is merely the four men acting in concert, robbed

each of the six men. So that's why all four of the alleged robbers, each having informations issued against them for all six poker players.

Now, in the case of the first trial of Ashe, there was only one issue in the case. The issue was: was Ashe one of the robbers who was in the basement that evening? There is no doubt about what else took place; there is no doubt that the poker game took place. There is no doubt that the robbers came in with guns; there is no doubt that a substantial amount of money -- maybe as much as $2,000 or so was taken from the table. There is no doubt that they lost personal funds. All of that is uncontroverted. It went in; very little cross-examination; no contradictions.

So, we have those facts established with any doubt or question. The one real question, however, was was Ashe one of the men? It was greatly complicated by McClendon, for instance, saying that there were only three men and they were Johnson, Larson and Brown, and I didn't see any of them.

Other men said, well, I don't know who they were. So, that by the time the jury had to consider it, a reading of the record showed that they really had but one issue submitted to them.

Q Was it the State's theory at all that four men were uinvolved, but that only three came into the basement and that the other was the driver of the get-away car or anything

along those lines?

A It was not explained. The State alleged that there were four men and whether three came in all alone and then one came in afterwards, there was a good deal of confusion. But the State's charge was, in effect, there were actually four robbers at some time or another in the basement.

Q Is it not normal or usual in a situation where you have three people or four people robbing or committing some other crime against four or five or six that you have this kind of a confused picture where the identifications aren't always precise or the identifications or the particular movements aren't always precise. It is not uncommon, is it?

A It is not uncommon. I am sure that with the excitement of the moment and with these men coming in, the fact that they had their faces concealed, I think all of that is likely to create difficulty in identification. I accept that. However, the fact is that when the State brought its first case against Ashe, all of the facts of the game, all of teh facts of the holdup, all of the facts of the loss by each of the six was all put into the case and the one real question the jury had to determine is: was Ashe one of the four men?

The jury concluded, from the reading of the record -- the jury concluded after the case -- I concluded also from the reading of the record, that it would be very difficult to associate him with the case. The jury found him not guilty.

Thereafter, in the case the State proceeded on the second information against Ashe. The first charged him with robbing Knight. An identical information then was used as the basis of the second trial. It charged him with robbing a man named Roberts and the case came on for trial.

Now, I submit to you, as I would, the appendix of the second trial. I found it a shocking experience. The case had changed very considerably. Gladson, who at the first trial had said, "I could only identify Brown because his mask fell off," now says, "yes, Ashe was one of the robbers." Just a flat, categorical statement. "It was tied up with -- when I saw the four men in the police station the next day I could see those were the four and Ashe was one of them." So, he then changes his story. He apparently knew more about what happened that night at the second trial than he knew after the first trial.

Knight, who didn't know anybody at the first trial, maintained his same position: he didn't know anybody at the second trial.

McClendon, the man who at the first trial had said there were only three men and those are Johnson, Larson and Brown, was not called by the State the second time because he had been so positive about the identity of the three robbers which did not -- his identification did not include Ashe, so he was not called by the State.

Q Was there any legal impediment to the Defense calling him, that you know of?

A They did not.

Q What was the interval between the two trials?

A Six and a half weeks.

Roberts, the fourth man, called again, although still having difficulty with the fact that the man had also flatly said that he had identified Ashe. And he now, between the first and second trials, had concluded that he had identified him as a result of his voice, which he had not done at the first trial.

Now, in that case, after this finding the case went on and obviously, as you look through the record, you see a process going on: witness's stories were strengthened, they pick up little details here that they testified to at the second trial which they didn't at the first trial. Weak places are bolstered up.

Here is a perfect illustration: Obviously the prosecution was very concerned that when Ashe was picked up he just had a pair of trousers and a shirt on and had no money of any kind on him. S

So, at the second trial an effort was made to show that he did have some money on him, but they couldn't get it in on the first statement of the highway patrolman, that he had searched Ashe and found nothing on him. So, they put on a Deputy

Sheriff who was at the jail in Jackson County and this, it seems to me, is really quite significant. I want to read just two or three questions and answers.

He said he had found some money on Ashe. "Where was the money?"

"A In his pocket. He had some in his coat pocket, I think.

"Q Did he have some in his shoe or sock?

"A That is the mistake I made. I got it all out of the pocket of his coat."

Well, that's a little troublesome to the State because he never had a coat. They found him at the very beginning with just pants and shirt and he had never had a coat on. Then this:

"Q Didn't you tell me prior to this you took it out of his shoes?

"A No. I said I made him take his shoes and socks off. That was a misunderstanding because I had heard it four or five times."

Sometime betweenthe first trial and the second trial this paticular witness had had suggested to him four or five times that he had found some money in Ashe's shoe between his sock and his shoe, because there was no evidence of any kind about any money inhis shoe in the first place.

And to compound what I believe is the gross injustice

here: although this witness, whose name is Otto Ray, the Deputy Sheriff who took his shoes and socks off, had testified at the first trial and said nothing about finding any money in his shoes and socks at the first trial. The prosecutor in the second trial was very anxious to get this deputy sheriff to say that and when he didn't say it, then the Deputy Sheriff claimed surprised and asked me to cross-examine him as a hostile witness, although he had testified six weeks before at another first trial, he never mentioned about the money in the shoe.

Q Now, was he impeached with these inconsistencies?

A Yes. And the Court permitted him to do it and eight pages in this appendix is devoted to the Prosecuting Attorney trying to get this deputy sheriff to say that he found the money in his shoe.

Q But then the jury had all of this picture before it and resolved these conflicts, did it not?

A They did, Your Honor. And the second time they said -- they brought in a verdict of guilty and it was on that guilty finding that he was sentenced to serve the term in the penitentiary.

Now, the point is that it is our contention on behalf of Ashe, that the substance, the thrust of the double jeopardy clause of the Fifth Amendment is carried over into the Due Process Clause of the 14th Amendment. And it is our contention

that after he was acquitted of the first trial when there was only one real issue, and that is: was Ashe there? That that then became the finding of the jury and he should not have been tried again on that issue. That is the contention that wemake.

Now, in this regard when our brief was filed there was a Federal rule regarding the application of double jeopardy and a state rule. It was perhaps best stated by the decision in State versus Palko, with Justice Cardozo, it seems to me. The State versus Palko where it wasalleged and held that there was one rule for Federal cases and one rule for state cases. And in the state case a very watered-down requirement was leveled against the state. I think it was Justice Cardozo in the Palko case who said, "We will not disturb a second finding of guilty in a state case unless the hardship is so shocking and acute as to be unendurable." That's his substantial language and the Palko decision was followed for quite a long time.

Now, that was changed, but I'll get tothat. We contend that even in this instance when there is but one issue in a case and the case has full opportunity to present its case, and the one clear issue is decided in favor of the defendant in that case, that he should not be tried again for the charge for which the jury has obviously found one positive result.

So, we say that even if Palko were the law today,

with this watered-down requirement, I believe that this case would still come under the rule enunciated in Palko, but the Palko case is no longer controlling in this regard, because of the case of Benton versus Maryland in which Justice Marshall wrote the opinion in June of this year. And in that opinion this Court said that the double jeopardy concept -- the double jeopardy theory -- the core of the concept of double jeopardy applies to the states through the 14th Amendment.

So, one cannot read the Benton versus Maryland without coming to the conclusion that now this Court has stated there are no longer two rules, one for state cases and one for Federal cases. There is just one rule now and that is for the Federal rule.

Because, as the Opinion of Judge Marshall said, "the basic protection of double jeopardy is so thoroughly ingrained in our law that it was present even at the common law before it was enshrined in the Fifth Amendment. And, therefore, that you cannot permit an individual when his constitutional rights are being grossly affected, as I believe this defendant's were, to have the state court say, we'll apply one rule to that man on the double jeopardy question and another rule if this case was in a Federal Court.

I see that I have but five minutes left and I would like to use the five minutes after my colleague has argued.

MR. CHIEF JUSTICE: Thank you, Mr. Clifford.

Mr. Voights.

ORAL ARGUMENT BY GENE E. VOIGHTS, ESQ.

ON BEHALF OF RESPONDENT

MR. VOIGHTS: Mr.Chief Justice, and may it please the Court: While we agree with the facts as have been related by Mr. Clifford in detail, the sequence of events that transpired in the Circuit Court of Jackson County back in 1960 and the facts that were adduced in evidence at the time of the two trials, we, of course, disagree with the conclusions that he has drawn from these facts.

We believe, of course, that the general issue involved here in this case is whether or not the state may try a defendant for a charge of robbery if the defendant has previously been acquitted on a charge of robbery involving a different victim and different property, even though the two charges of robbery arose out of essentially the same transaction and the same point of time.

It is our belief and our contention that the state may do so and we suggest that the state may do so, first because the second trial, based upon a second, separate and distinct offense, did not amount to fundamental unfairness.

Secondly, we suggest that the constitutional prohibition against placing a person twice in jeopardy for the same offense, is precisely that: thatthe test is the identity of the offense, rather than the test being the same

transaction.

Third, we suggest that the principle of collateral estoppel is not applicable on the facts presented in this case. And finally, that even if the Court should conclude that the principle of collateral estoppel applies to the facts of this case, that it is not required by the Constitution, either under the double jeopardy provision or as part of the Due Process Clause.

We believe that these issues, based upon the questions presented in this case, must be resolved in favor of the state. If I may, then, I would like to direct my attention first, to the question as to whether or not the Constitutional prohibition --

Q What was the question? On the facts I'm a little worried.

Q It was the state's position that Ashe took money out of both of these men's pockets?

A Your Honor, I think as Mr. Clifford previously indicated, at both of the trials it was not clear and there was not any clear-cut identification as to which one of the four robbers took the money out of shall we say, Mr. Knight s pocket, who was the robbery victim in the first trial, or Mr. Roberts' pocket in the second trial.

Q Well, is it the state's position that Ashe could be charged with robbing all six?

A He was, in fact, charged with robbing all six.

Q Well, isn't that contrary to all the evidence? The evidence says that the four passed around the six. So one man didn't do it all.

A That's right, Your Honor.

Q Do you still think you could charge him with that?

A He was so charged and the instructions to the jury instructed the jury to return a verdict of guilty if they found that he had the certain specified elements, eit... acting alone or knowingly acting in concert with the others.

Q Liable for all six of them?

A That's correct, Your Honor.

Q So, he could be convicted six times?

A It is possible. I do not believe that, to sustain the state's position in this case, Your Honor, that I would need to necessarily go to that extent, but I think that my position has to simply be that by virtue of his acquittal on the first trial, the fact did not constitutionally preclude the state from trying him the second time.

Q And have you --

A Obviously --

Q Well, are the informations still outstanding for the others?

A Your Honor, I do not know. It does indicate

in the record that there were six informations filed; that he was tried in May of 1960 on the first information; acquitted. He was tried on the second information in June and was convicted. There is no indication as to what has happened as to the status of the four remaining.

Q The four might still be sitting there.

A Yes, of course, I am sure that there are problems if there would ever be any attempt by the State to prosecute on those, because of the lapse of time that has been involved.

Q Then he would have a pretty good "speedy trial" defense claim; wouldn't he?

A I should think so, Your Honor.

Q In the trial where he was acquitted, did he plead an alibi?

A No, there was no evidence introduced by the defendant whatsover, either in the first trial or the second trial.

Interestingly enough, and purely as an aside, the Counsel for the defendant at the first trial even waived closing argument to the jury. It was simply the state's evidence.. The first part of the state's final argument, the jury retired to deliberate and then, of course, returned a verdict of not guilty.

As Mr. Clifford has indicated, it had written on it:

"Due to insufficient evidence." We submit this is really not relevant or important. We believe that would have been implied in the verdict in any event.

Q If he had been acquitted and the issue on which he was acquitted was that he was not there and did not participate would your same argument be valid?

A I think so, to the extent, Your Honor, that we suggest that the principle of collateral estoppel would not be constitutionally required to be applied by the state in this situation.

Q Does the jury have a special verdict, or a general --

A No, Your Honor, it is a general verdict. They return a finding of either guilty or not guilty. And, of course, in this situation he was charged under the Unhabitual Criminal Act, and so the jury did not have the added function of assessing sentence.

Q Well, I suppose if a man was acquitted on an issue which would absolutely absolve him from all guilt, such as that would, that you would have a pretty hard time, wouldn't you, in saying that all collateral estoppel didn't amount to double jeopardy?

A That may be, Your Honor, but what we are suggesting is that you do not go beyond those issues which necessarily had to be found. And we're suggesting that the

ultimate issue involved in this case in the first trial was whether or not Ashe, either acting alone or knowingly in concert with another, robbed Don Knight. And whether or not the jury in that case found beyond a reasonable doubt, some of the necessary elements which they would have to find on a charge of robbery in the first degree.

Now, of course, I will concede and agree with Mr. Clifford that if you examine the record, this is perhaps the really only contested issue. But I suggest if you will examine the record of the first trial, one must conclude that there was hardly any issue contested at all if you are talking about contesting issues from the standpoint of serious and extensive cross-examination by the Defense Counsel.

The state's evidence came in relatively free from any objections; relatively free from any extensive cross-examination whatsoever. The jury returned a verdict of acquittal. And we suggest that --

Q For him. Did they return a verdict of acquittal for any of the others?

A Well, this was a separate trial.

Q Separate trial.

A Just Mr. Ashe was involved in this particular trial. Prior to this he had moved for a severance of his trial.

Q How do you explain that jury verdict. You have

studied the record and I am just asking you.

A Your Honor, I cannot explain the jury verdict and I do not, frankly, believe that it is necessary that I --

Q I just wanted to know what was your impression as to why he was acquitted.

A I think it is very possible that the jury found that there was a lack of sufficient identification of Mr. Ashe, as one ofthe participants in this.

I think it was equally suggested by the Missouri Supreme and by the United States Court of Appeals for the Eighth Circuit, that even though there had been other evidence that was uncontradicted as to the taking of property or a number of other elements, that they might have found on those.

A And I think, too, it's intersting that the United States Court of Appeals for the Eighth Circuit observed that perhaps the jury, finding these six gentlemen playing poker until, I believe, about 4:00 o'clock in the morning, for, as Mr. Clifford has indicated, quite sizable stakes. The jury may simply have decided that they were not goingto extend any protection of the law to the people that were engaging in this type of activity.

Now, I cannot really stand here and argue with the Court that they found on any one of these items any more logically and reasonably than another. But what I am suggesting

is that it does not -- that the state's position in this case to go beyond that verdict and to try to make a determination or to speculate as to what facts might have been considered by the jury or as to what facts the jury might necessarily have made its verdict on.

Q And isn't it an element of the crime in Missouri that the victim be in fear of his life?

A Yes, it is, Your Honor.

Q Could that vary between victims?

A It might well have done so. I might say in all candor, though, that I don't think the record necessarily clearly indicated that this was an element. But this is, in part, why I am suggesting that one need not go that additional step to examine the record in its entirety to attempt to pinpoint and determine what specific element the jury found lacking at the first trial.

As indicated by Mr. Clifford, of course, that the time this case originally came to this Court and that the time that the briefs were in the process of being prepared and submitted, Palko versus Connecticut was of course, still the law, essentially, insofar as the application of the Fifth Amendment to state actions.

Since that time, of course, we have had Benton versus Maryland and Justice Marshall, speaking for the Court, observed there that the double jeopardy prohibition of the

Fifth Amendment represents a fundamental ideal in our constitutional heritage and that it should apply to the states through the 14th Amendment. And while that case did not deal specifically with the question as to whether it's applicable to the same offense or what type of test you would apply in determining whether a person has been placed twice in jeopardy.

I think it is significant that there was quotation in that Opinion from Blackstone. And significant that the quotation was that the plea of former acquittal is grounded on the universal maxim of law of England. That no man is to be brought into jeopardy of his life more than once for the same offense. And I submit that it is interesting that the constitutional language; the language that is used by Blackstone is the same offense. And it is interesting to note that in the common law cases of England that the emphasis was placed upon the identity of the offense from the standpoint of the same evidence test, perhaps.

And I submit that when you apply that same evidence test and that is namely: whether or not in the second trial the identical evidence which was produced at the first trial was necessary to support the indictment that we must conclude that there is not that identity of offenses.

Q What differences are you emphasizing on that?

A The difference as was indicated by Mr. Justice White, for one thing. In Missouri the thrust of the charge of

robbery is the taking of property either from the ownership or the possession of a person by threat or fear of violence to their person. And obviously this involved a different issue, that would have necessarily have had to be litigated at the first trial.

The evidence which would necessarily support a conviction on the charge of robbing Knight was not that same evidence which was necessary to support the charge as to whether or not he robbed Roy Roberts.

Q In other words, you are going on the basis that each -- the robber of each person must be considered as two separate offenses?

A That's right, Your Honor. The Missouri Supreme Court has so indicated that that is the law as it exists in the State of Missouri, and as I understand this Court's prior ruling in Hoag versus New Jersey, of course, that is a determination to be made by that Court as to whether or not at the same time you rob two people, whether or not that constitutes one offense or whether or not it constitutes separate and independent offenses as against each of those two people.

Q Any other differences?

A No, Your Honor.

Q Merely the difference in robbing two different people?

A Yes, Your Honor, if I understand your question.

Q Is there any evidence that Ashe pointed a gun at either one of them?

A I'm sorry, Your Honor.

Q Is there any evidence in the record that Ashe pointed a gun at either?

A No. Once again, Mr. Justice, at the time at both trials there was this problem of identity of robbers number one, two, three and four.

There is evidence in the record, thought, that As they came down in to the basement that one of the robbers had, I believe, a sawed-off shotgun, which is described as perhaps a 4-10; the other two had pistols of a smaller caliber.

Q Well, where was it in the record that Ashe threatened either one of these first two people?

A The evidence is essentially that at the second trial, and I believe at the first trial, once again that the people who came down in the basement, Your Honor, with the guns, forced the six participants in the card game to go over against the wall at one point. They then forced them back into the center of the room and all but one of them, I believe, removed their trousers and they were tied together at that point, and though there is testimony by each one of the witnesses as to the various people who came --

Q Despite the same witnesses --

A Except for the modifications that were indicated

by Mr. Clifford --

Q The same witnesses at both trials. And they testified substantially to the same thing at both trials.

A With the exception, Your Honor, that the question of identification was developed much more extensively at the second trial.

Q Why? I'm sure you wouldn't know because you weren't there.

A I don't know, but I think it's quite obvious, Your Honor, that this is one of the problems of -- apparently that had concerned the prosecutor in the first trial.

Q That is one of the reasons why a man shouldn't be put in jeopardy for it, too; isn't it?

A But under the test --

Q If he was acquitted this time then by the third time they really would have something.

A I'm suggesting that there is protection for this man, Your Honor by virtue of, if you will, a fundamental unfairness type test. And I cannot tell this Court whether it arises upon the second trial or the third trial or the fourth trial. I submit that will --

Q Well, that would suggest it since the second trial; wouldn't it?

A I'm sorry, Your Honor.

Q Benton would suggest that at the second stage it

becomes unfair.

A I would suggest that that's not necessarily a conclusion that must follow.

Q Well, what would you suggest? You've got six informations against this man. Where would you think the cut-off point would be?

A Once again, Your Honor, I would suggest that I donot feel I can indicate a mathematical number to this Court, but I think the protection which does extend to this defendant would be a protection as a fundamental unfairness and perhaps this Court may well conclude on the facts of this case that that arose at the conclusion of the first trial. Or it may conclude that after the second trial it arose.

But what I am suggesting is that there were not any substantial delay between the first trial and the second trial as was present in the case of Hoag. There was almost two years lapse between the first trial and the second trial in that situation.

I am further suggesting that there is no showing or indication in the record that by virtue of the delay or this second trial that the defendant lost any witnesses or had any difficulty in procuring any evidence which might have been available to him otherwise. And these are some of the factors which I submit, Mr. Justice, which would be considered in that total question of determining whether or not there was a

fundamental unfairness.

And we submit that in the facts here involved, that there was not. The record indicates clearly that Defense Counsel had the benefit of the transcript of the testimony of witnesses at the preliminary hearing;thathe was able to use for cross-examination. He apparently had the benefit of the testimony at the first trial that he was able to use in cross-examination for purposes of impeachment.

And so under those circumstances where you do have two separate and distinct crimes, I submit that the second trial presented on the facts of this case, did not rise to the level of fundamental unfairness.

We further submit that it does not constitute double jeopardy under the test that has traditionally been used to determine whether or not there is that identity of offense that results in a person being placed twice in jeopardy.

Finally, I suppose we come to the issues as to whether or not there is a collateral estoppel that is applicable as apply to the facts of this case.. We suggest very simply, first of all, that there is not a collateral estoppel because the ultimate fact that was determined at the first trial was whether or not Ashe robbed Knight. We submit that there was not any determination of merely evidentiary facts or merely evidentiary matters. And that since that ultimate fact is not, therefore, conclusive of the issue as to whether or not

he robbed Roberts, on the second separate and distinct offense and that collateral estoppel was not applicable upon the facts of the case, that perhaps more importantly, we suggest that collateral estoppel need not be applied by this Court simply because Ashe indicated in this Court's decision in Hoag versus New Jersey there was a reluctance to declare the principle of collateral estoppel as a constitutional principle that was applicable to the state action and we submit that the same reasoning which was applied by the Court at that time should once again by applied by the Court to the facts in this case.

Q Mr. Voights, let's assume that there had been a trial in the Court and the Court in the first go-around had found Mr. Ashe not guilty and made his findings. And said that I find that Ashe wasn't there. And then Ashe's finding is for robbing Roberts or whoever the second man was, in the state courts would he have a plea of collateral estoppel, in that event?

A Your Honor, I respectfully say that I don't think that that problem has been adjudicated by the Courts of Missouri --

Q Well, it's been adjudicated in the Federal Courts, hasn't it?

A Yes, sir. And I would suggest that under those circumstances if there were express findings of fact, the principle of collateral estoppel would be applicable.

without getting into the question as to whether or not the principle of collateral estoppel rises to the --

Q Well, what do you have -- let's talk about the Federal Courts. you don't think that in the Federal Courts there would be a collateral estoppel --

A As I understand it, Your Honor, there has been applied.

Q And would there be double jeopardy?

A The cases which I have examined on that question, Your Honor, deal with it, I believe, as a principle of collateral estoppel without elevating it necessarily to the level of a constitutional guarantee.

Q Well, what would be your view, though, wholly aside from that case. Would it be double jeopardy?

A Obviously, my view has to be in this case, Your Honor that collateral estoppel does not rise to the level of a constitutional guarantee; that collateral estoppel may well be applied by this Court in the Federal Court cases as a part of its supervisory power.

Q Why wouldn't it be double jeopardy in the facts I pose? Because you would still say it is a different offense?

A That's right, Your Honor. Because it is -- collateral estoppel, I would submit, is not a part of the definition of double jeopardy, as would be applied by our constitution.

Q Thank you.

A For those reasons, then, we would submit that this Court should affirm the judgment of the United States Court of Appeals for the Eight Circuit, first on the basis that the actions here broughtin question did not constitute a fundamental unfairness to the Petitioner. Secondly, that although the Fifth Amendment prohibition against double jeopardy is applicable to the states, but nonetheless they were two separate and distinct offenses involved in this particular case.

Finally, we would suggest that collateral estoppel is not applicable to the facts in this particular case and even if this Court should so find, that it is not constitutionlly required.

For those reasons we would ask affirmance of the Opinion of the United States Court of Appeals for the Eighth Circuit.

Thank you, Mr. Justices.

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

Mr. Clifford, you have about five minutes.

REBUTTAL ARGUMENT BY CLARK M. CLIFFORD, ESQ.

ON BEHALF OF PETITIONER

MR. CLIFFORD: Yes, Mr. Chief Justice. I wish to make three points and I must touch them lightly because I want to get them all in in the five minutes I have left.

The question asked by Mr. Justice White: The Federal Court for a long time has distinguished between a strict, double jeopardy case and what we will call a double jeopardy situation. The Benton case was one where a defendant had been found guilty of both burglary and larceny -- had been charged with burglary and larceny. And on trial had been acquitted of larceny. The Court held he could not be tried again on larceny, because it was now the Federal rule was applying and it was double jeopardy.

Q That didn't involve multiple pockets, did it?

A It did not in that instance.

Now, this Court -- the Supreme Court and many of the Courts of Appeals -- Federal Courts of Appeals, have met the question of what do you do in a double jeopardy situation when it is not the exact charge that is being directed against the defendant for the second time? They have in that instance to resort to the accepted rule of collateral estoppel and they have said many times that when the facts of the case show clearly that there is one major thrust to the state's evidence and the defendant has met that and has been acquitted on that one major point, then we are not going to make him run the gauntlet again. It compares the theory of collateral estoppel with the theory of res adjudicata.

The Chief Justice, himself, in the Watts case recognized the application of collateral estoppel to a Federal criminal

case.

Justice Douglas referred to it in the Sealfon sugar case and there it was applied.

Q Not as a constitutional matter, though?

A It was not. It was not. On those particular facts he said that this should apply.

Justice Holmes did it in the Oppenheimer case. There is an excellent review of the whole question of collateral estoppel in the Kraemer case where Judge Friendly of the Second Circuit analyzes the whole matter and says that it should be used in Federal cases when it's applicable.

And under the Benton decision this case now must be looked at in the light of the Federal rule and not the old state rule which has now become archaic.

The second quick point: The state of Missouri in the Supreme Court of Missouri and in the Federal District Court, in the Federal Court of Appeals and here, has cited the Hoag case as its authority for forcing this man to serve this sentence when he was tried on exactly the same issue.

A quick comment on the Hoag case: that was a case tried in New Jersey. It so happened that Justice Brennan sat in that case. It was a four to three decision; Justice Brennan dissenting in that case. It was a hold-up case like this one. That case came on to the Supreme Court of the United States. Justice Brennan abstained and it was a five to three

decision here. If he had voted I assume it would have been five to four.

So, we have a case that's four to three in New Jersey and would have been five to four in this case, I believe, had he voted.

Now, theycould no longer use the Hoag case, I submit to Your Honors. (1) The Hoag case has been repudiated by the Supreme Court of New Jersey in the Cormayer case and they specifically referred to the Hoag case and the Cormayer case and suggest they are not going to follow that rule any longer. And the language of the Cormayer decision, now in the New Jersey Supreme Court is that collateral estoppel should be ungrudgingly applied in this type of case.

Also I submit to you that Hoag is no longer an authority in this case because Benton has changed Hoag also. Because Hoag comments on the fact that there are two rules: one rule that's quite beneficial to defendants in Federal cases and one that is really hardly at all in the State cases.

Also, in the Hoag case this Court said, "We're not going to go behind the finding of the New Jersey Supreme Court to look into that record. We don't want to do that to State Courts. That was under the old rule. You can do it now because it's under the Federal rule and you have the right to look.

So, I say Hoag is no longer an authority of the case.

Last comment: Sometimes when you go through a record of this kind and look at it it's murky; it's difficult to find out, really what happened. Occasionally you come to a door and you open the door and it lets light right on in. It happened inthis case.

And I refer Your Honors to what happened just before this second case was tried. After he was acquitted the first time there was a colloquy between the trial judge and the counsel for the defendant and the prosecuting attorney. And at that --

Q Will you just give us the page cite on that?

A Yes, sir. It's 107, Your Honor, and I just want to say this: The Judge said, "In view of the wide publicity that has attended this case, the fact that the co-defendants have been tried and convicted,"so that by the time this fellow had come to trial the second time he had had one trial; the other three had been tried and convicted with resulting publicity and yet the State of Missouri said that original acquittal meant absolutely nothing.to us or to this man.

Thank you, Your Honors.

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

Now, you appear at our request, and by our appointment. We thank you for your assistance to the Court and to the Petitioner. We thank you for your submission and we thank you for your submission.

(Whereupon, at 1:30 o'clock p.m. the argument in the above-entitled matter was concluded)