Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

EARL PRICE,

Petitioner

vs.

GEORGIA,

Respondent

Docket No. 269

Place Washington, D. C.

Date April 27, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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Washington, D. C.,

Monday, April 27, 1970.

The above-entitled matter came on for argument at 10:37 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGIAS, 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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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: Mr. Wallace, you may proceed whenever you are ready.

ARGUMENT OF ALLYN M. WALLACE, ESQ.

ON BEHALF OF PETITIONER

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

As I stand here in this place, where many great men have stood before this august body of government, I am reminded of an incidence that occurred in the Supreme Court of Georgia in my early years in the practice of law.

In addressing that body, I was arguing with all my might the point of law and the late Chief Justice of that court said to me, "Mr. Wallace, we are not interested in hearing your version of the law. Remember, we make it here. We would rather hear something about the facts."

With that thought in mind, and this being my first appearance before this great body, and with the indulgence of the Court, I would like, if permissible, to give a thumbnail sketch of just what happened.

MR. CHIEF JUSTICE BURGER: You do it in your own way, Mr. Wallace.

MR. WALLACE: Thank you, Your Honor.

In 1962, in October, petitioner in certiorari, Earl Price, was indicted in Effingham County, Georgia Superior

Court for the offense of murder. The following day he was tried in that court for murder before a jury. The judge, the trial judge is now deceased. The jury brought in a verdict on the trial of murder of voluntary manslaughter. They said nothing about the murder charge in their verdict.

The verdict merely said, "We, the jury, find the defendant guilty of voluntary manslaughter, and fix his punishment at from 10 to 15 years." I took that case to the Court of Appeals, for review, of Georgia. It was reversed on an erroneous charge of the late Judge Walton Usher.

In 1967, in October, this same man was called upon in the same court, under the same indictment, for the same offense of murder, to answer and to plea to the charge of murder. Prior to the case the second time, in 1967, I filed a plea in the court for double jeopardy. The plea was argued at length and the court overruled my plea of double jeopardy and the case went to trial the second time, not for manslaughter but under the same indictment, a grand jury indictment, for the same offense before a jury and before the same trial judge.

That jury had brought in a verdict of guilty, and said nothing about murder, of voluntary manslaughter, as did the first jury, fixing his sentence at ten years rather than 10 to 15 years, as the first jury did.

The usual procedure was followed and the case was again appealed to the Court of Appeals of Georgia -- the Supreme

Court of Georgia, I believe, and they sent it to the Court of Appeals and then it went back by certiorari to the Supreme Court of Georgia, and we are now in this Court for an opinion.

There are two constitutional questions that we raise.

Q Could I ask you a question?

A Yes, sir.

Q What grounds did the Supreme Court give for overruling your motion for a plea in bar, whatever you choose to call it?

A I believe, if Your Honor please, the appendix will show that no reason was given except that the motion was denied, if my memory serves me correctly.

Q There was no opinion?

A That is correct.

Q Is your position, Mr. Wallace, at the second trial he could be charged and tried only under the charge of voluntary manslaughter?

A Yes, sir.

Q Nothing more?

A Yes, sir.

Q Did you cite Greenvs. United States Supreme Court?

A I think the appendix will show that. Not only, Mr. Chief Justice, did I cite the Green case, but there was a case out of the Second Circuit Court of Appeals, and I believe

Justice Marshall wrote that opinion, when he was on that bench. I may not pronounce that word correctly. There is no set rule for pronouncing proper names, but I believe it is Hetenyi, is that right?

Q Hetenyi.

A And in that decision that Justice Marshall wrote, or that opinion, he used the Green case, and I used both of these cases in my argument in the trial court. Now --

Q May I ask, Mr. Wallace --

A Yes, sir?

Q -- if you had been right, would it have been necessary to have a new indictment limited to a charge of voluntary manslaughter?

A Under Georgia law, I believe that is correct, and that was what I insisted, that a new indictment be brought. Now --

Q Will the statute of limitations run on the new indictment? Supposing you prevail here? Your man will be re-indicted, will he?

A I believe he could, yes, that is my humble opinion.

Q Well, were you so much concerned about whether he was reindicted or whether he was tried on any charge higher that voluntary manslaughter?

A Well, Mr. Chief Justice, I felt that to try him

again would be double jeopardy, trying him twice for something that the first juror, the second time, that the first jury had acquitted him of.

Q What I was thinking of is, if as a practical matter in the second trial, if the trial judge had ruled that he would submot no charge to the jury higher than voluntary manslaughter, would that have satisfied your situation?

A Yes, sir. Yes, sir.

Q Could he have done that under Georgia law?

A Yes, he could have done that under Georgia law, yes, sir.

Now, when this jury -- and my position is the same as the Green case and the case in which Justice Marshall rendered his opinion -- when that first case jury came in and said, if my memory serves me correctly, "We, the jury, find the defendant guilty of voluntary manslaughter, and fix his punishment at from 10 to 15 years," it was the same, even though they were silent on the murder charge. It was the same as if the jury had come in and said, "We, the jury, find the defendant not guilty of murder, but guilty of voluntary manslaughter."

Now, my humble opponent here may argue the point that he got a lesser sentence at the second trial, even though he was tried for murder, and the appendix will show that the second trial, the jury was given the charge of murder. They could have selected either -- they could have found him guilty

of either murder or voluntary manslaughter, as they saw fit.

But, as I started to say, my friend here on my right will probably argue that this was a lesser sentence, 10 years or with regard to 10 to 15 years. I am sure that my friend will admit that under the rule in Georgia our pardon and parole board, when you have served a third of your minimum sentence, you are eligible for parole.

Now, I take the position that there was no less sentence in the second trial than in the first trial. Now, as I stand here and argue this question that is presented here for you, I feel that that issue has been decided by this Court in June of last year in the Benton vs. Maryland case.

I came here on a pauper affidavit of certiorari. We have asked the Court to pass on these questions, and the state, if I may refer to their brief, has admitted that my questions have been resolved.

Does the double jeopardy clause of the Fifth Amendment apply? And, if so, under the facts in this case, was the defendant subjected to double jeopardy?

Q What is the injury that your man suffered in this case?

A Well, Mr. Justice Black, I feel that the injury was -- you got me a little ahead of my thought, I was going to bring that out, but if you will give me just a second --

Q You go right ahead.

A I feel that the injury is that if the jury had been given the opportunity to decide the question of whether or not he was guilty of voluntary manslaughter, rather than murder, they would have given -- and I may not be stating that as it was said in the case of Justice Marshall, that he wrote the opinion on, in the Green case, but I feel that they would have considered his innocence, probably given more thought or more consideration to his innocence rather than to considering his conviction, if he had been tried for manslaughter, because he was tried the second time for murder.

Does that answer your question as to my position, sir?

Q It probably answers it about as well as can be answered.

A Yes, sir.

Q And I don't say that it is not a good answer.

A Yes, sir.

Q Mr. Wallace, if he had been indicted the second time for voluntary manslaughter, under Georgia law what other offenses are lesser included offenses under that charge?

A I believe the court, under the statute, would have -- they could have found for a misdemeanor and given him possibly a sentence of one year maximum, $1,000 fine, plus six months in jail. I believe that is the maximum --

Q There are lesser included offenses under Georgia law?

A Sir?

Q There are lesser included offenses?

A Yes, sir. Yes, sir.

Q And your position is that, faced with that, the jury might have found then one of those lesser included offenses if the --

A That's correct.

Q -- murder indictment were not taken over?

A That's correct. Now, when the appendix came up and was printed, this was a pauper cause and I paid for that myself out of my pocket. I did not bring the whole record, because it was rather expensive. I merely got the record from the lower appellate court covering this one issue.

Now, as I said, I feel like that the Benton case has now resolved this issue, and when I read the Benton case then I received instructions from this Court, when I argued this case, to argue the retroactivity of the Benton case in connection with this case.

Now, if I may, if there are no further questions of the Court, I would like at this time to reserve the remaining few minutes that I have to argue that point, after the Attorney General or the gentleman from the Attorney General's office, of Georgia, has had an opportunity to present his side of the case.

Thank you.

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

Mr. Robins?

ARGUMENT OF MATHEW ROBINS, ESQ.

ON BEHALF OF RESPONDENT

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

I rise now to respond to one of the two directives of this Court wherein this Court asks to show why Benton vs. Maryland may or may not be applicable to the facts of this case, and I respond to that firstly.

I would say, as reluctantly as I can, that Benton vs. Maryland is applicable to this case but not so much because of what Benton vs. Maryland says but because it made Green applicable to this case, and the implied acquittal doctrine which was the federal principle prior to Benton vs. Maryland. I don't believe that I can escape the implied acquittal doctrine of Green.

I am particularly persuaded to this decision by the fact that the Chief Justice, in his dissent in Ash vs. Swenson, emphasized the fact that the phrase "run the gauntlet in Green meant as to that charge." I am afraid that in this case that is perhaps what has happened to Mr. Price, he has run the gauntlet on the murder charge.

Q How would you respond to argue that while under the law of the District of Columbia there might be a prior

acquittal for first degree murder under these circumstances of a general jury verdict of manslaughter -- still the law of your jurisdiction is different, and a jury verdict of manslaughter, after a trial and indictment for murder, is not, nnder the law of your jurisdiction, an acquittal of first degree murder.

A Yes, I am suggesting that because in the State of Georgia, of course, they do not come back and say that he is acquitted of murder and he is found guilty of voluntary manslaughter, as for the facts in this case. But in the State of Georgia, they can return a verdict for manslaughter and it may be because -- and this is just conjecture -- it may be because the crime does not warrant the punishment which murder would require, that is death or life imprisonment, that is required by statute. It may be that the facts as presented to the jury are such that they may feel that this doesn't warrant that kind of punishment, and yet there is sufficient evidence that would warrant a voluntary manslaughter conviction.

I might also that in the State of Georgia a jury may bring back a conviction for a lesser crime, even though they were not charged on that lesser crime, where the evidence warrants it.

Q Well, they were in this case, weren't they?

A Yes, they were in this particular case. But I emphasize the point that there was discretion --

Q What lesser crimes were they charged on?

A In this case?

Q Yes?

A Voluntary manslaughter, I believe, Your Honor.

Q Is that all?

A I am not certain, Your Honor, but to my knowledge that is all. The only other lesser crime as such would be involuntary manslaughter. Now, the judge, upon the recommendation of the jury, may reduce the punishment to that as for a misdemeanor, where the jury recommends it, of voluntary manslaughter and involuntary manslaughter, but not for murder.

The jury is compelled on the murder charge to either recommend mercy or, in their absence it would be a death sentence.

Q Under Georgia law does the jury fix the penalty in every case or is it just an option to the jury?

A Well, it is a strange relationship, if Your Honor please. In the murder situation, they indirectly fix the sentence. If they do not bring back a recommendation of mercy, the sentence is automatically dead. If they bring back a recommendation of mercy, it is automatically life. In the other situation, of voluntary manslaughter and involuntary manslaughter, they may fix the punishment, then they recommend the punishment, I believe, within the prescribed range.

I cannot state with all certainty whether the judge is obligated to follow that recommendation of the jury. In this particular case, the punishment for voluntary manslaughter is one to twenty. They fixed punishment at 10 to 15 initially, and subsequently at 10.

This brings to mind a very important point, and I want to emphasize this: It is my contention, as my brother set out to the Court, that I would urge this Court to find that this man has not been harmed. I recognize the harmful error is a proposition that states perhaps overemphasize, the fact that there is not harmful error. I say here there was not harmful error. This man was initially sentences to 10 to 15 and, under the old law of Georgia, that would have meant that he would have been eligible for a conditional release, which is tantamount to a parole, at the end of ten years.

In 1964, the Georgia General Assembly changed the law and required that sentences be made definite, and subsequently at his second trial, Mr. Price was sentenced to ten years. This meant that he could get out at the end of five years and nine months, assuming that all good behavior -- time off for good behavior. So he has received a material benefit by the act of the General Assembly but, more importantly, he has not been harmed in what has happened, I would submit.

If the Court is going to consider that a tenure proposition, then it is considering that perhaps the jury could

not or would not do its duty, that it would not follow the directions of the Court. In this particular situation, the jury rejected the charge of the court as to murder and brought back the lesser charge.

I would submit to this Court that the record clearly shows that they did do their duty, and it would only be conjecture that they might have done something else had there not been evidence on murder.

Q As I understand it, General Robins, you're conceding, in this aspect of your argument, you're conceding at least for the purposes of argument that the trial judge should have granted the motion and should have allowed the state to try him only for manslaughter?

A Would at trial today, yes, sir.

Q You're conceding that for purposes of argument?

A Yes, I am.

Q And you're saying that since, as it came down, he was convicted of no more than manslaughter and indeed given a lower sentence than he received at the first trial. It was completely harmless --

A Yes, sir

Q -- obviously, and there would be no constitutional error?

A Yes, sir.

Q Is that your point?

A Yes, sir, that is my point insofar as the applicability of the Benton and the Green rule made, that comes under that.

Q Right.

A I am persuaded in this argument --

Q And that this is a case quite unlike Green because in Green he was tried again and that time convicted of first degree murder and sentences to death?

A Yes, sir, I --

Q And that this therefore is quite a different case, is that right?

A Yes, there is quite a bit of difference. In fact, this case actually is different from any other case that I can find in the records of this Court, with the possible exception of Chicos vs. Indiana, where factually there was a similar situation, and this Court chose not to pass upon it. However, in the Chicos case, in what I understood to be just dictum, it did say that the Fifth Amendment double jeopardy proposition was not applicable to the states.

But factually this case is different, and because of the facts it takes it out from Benton, takes it out from Green, and makes it a new case. I don't believe that we can say that Green is completely applicable, because there that man came back with a death sentence the second time. This case, this man has come back with something even less than he got the

first time insofar as time to be served in prison.

Q Has he been given full credit in serving of his second sentence for the time he served as a result of the first conviction?

A No, Your Honor, he did not serve any time?

Q None at all?

A None at all, to my understanding.

Q Has he yet?

A He is serving now, I believe, Mr. Justice White. But he did not serve any time after the first sentence. However, Georgia law does provide that where one remains incarcerated in jail during an appeal, they will receive benefit for that time. So he would have received benefit had he been incarcerated.

Q Now, General Robins, the language of the Constitution of prohibition is against being placed in jeopardy for the same offense. Now, when they tried him the second time, if the rationale of the Green case carries over and applies here, the implied acquittal, was he not then placed in jeopardy of conviction of murder, even though in fact the jury returned the lesser verdict?

A Yes, sir, I believe I would have to admit that to the Court. I have studied the cases. I have strained for some distinguishing characteristic, but I cannot find a distinguishing characteristic. And, as I stated earlier, I am

also persuaded that conclusion by Your Honor's dissent in Ash vs. Swenson, which makes reference to running the gauntlet on that charge, and if we apply that rationale to this case, Mr. Price ran the gauntlet on the charge of murder, though he was convicted of a lesser crime.

Also I must recognize that in U.S. vs. Ball, this Court said that the double jeopardy provision is not determined upon the punishment that he receives, that by the fact whether he has in fact been tried for that crime. So it is difficult for me at all to escape this.

But notwithstanding this, and even admitting, if this be an admission, that double jeopardy was a factor, I am saying there are other elements which take this out and make this harmless error and instead of harmful error. And, of course, the Chapman vs. California case is the best case on harmless error, and it applied in that case. In Fahey vs. Connecticut, which said that where there is reasonable possibility that evidence complained of might have contributed to the conviction -- well, in this particular case, in the Price case, the jury rejected that evidence of murder. It rejected the charge of the court. In essense, it is saying, 'We reject the evidence on murder; we find that it is not an applicable situation. Without finding innocence or guilt, we are saying that this is more applicable, voluntary manslaughter."

Q Mr. Robins, are you taking into consideration

where the Constitution says he shall not be tried a second time?

A I believe, Your Honor, that this Court could take it under consideration under the proposition of harmless error, were there not a --

Q But is there any provision of the Constitution that you could exclude under harmless error?

A Well, sir, yes, sir. The Chapman vs. California case specifically said that some basic rights were not harmless error, for instance the coerced confession, the right to counsel, the right to an impartial judge. It said that in the case.

Q Did it say double jeopardy?

A I don't remember that it did, sir.

Q Isn't the thing about double jeopardy, that you should make amends when exposed to it a second time?

A That is the -- yes, sir, that is the contention of this Court.

Q Is there any error in this case, to admit that at the beginning of the trial, the trial should not have been held?

A Under the law today, I would have to admit that that --

Q And despite that fact, you deny harmless error?

A Yes, sir, because I submit to the Court that

that error, if in fact it was error, did not go to a substantial right of this man. He had all the substantive rights at his trial to reject --

Q The right under the law is not to be charged twice with the same crime. But once he was put to trial on them, is it not true that the Constitution was violated as of that moment?

A Yes, sir, it is true, but so were the rights of all of the defendants, for instance, that came before the Miranda decision, that came before the Gideon decision -- no, that was made retroactive -- but some of the cases that were not made retroactive, their rights also were violated, but this Court has decided that that was not such a substantial right that it should be made retroactive. And I am submitting to --

Q Based on harmless error?

A Yes, sir, and I am saying that this is not such a substantial right that he has been harmed.

Q When a man is put on trial, he has a right and is entitled to protection from and has the right not to be charged, certainly not to be tried with that same crime again.

A That is, and I have admitted, and I admit now, that would seem to be the rule were that case decided today. But I am saying there are other elements --

Q Suppose you lose this case, can you reindict

this man for manslaughter?

A I don't see any reason -- I do not know, Your Honor, I don't believe --

Q If you reindict him, there wouldn't be any double jeopardy problem?

A No, sir, this would be the standard that you may retry a man for a conviction set aside.

Q Well, what I am asking now, suppose you lose this case, can you reindict him now for manslaughter and try him again?

A I would believe so, yes, sir.

Q Is there -- that is what I asked Mr. Wallace, whether the statute of limitations runs?

A Your Honor, I have not considered that. I don't know.

Q It seems to me that that is the essence of your harmless error point.

A Well --

Q If you can try him again now, even though he has been put in jeopardy, just as Justice Marshall says, you can try him again for the manslaughter charge and give him a sentence, if he is convicted, not longer than the original sentence, isn't that your harmless error claim?

Q It would be better to defer, Mr. Wallace.

Q Isn't that your harmless error claim?

A I had not considered that but, however, that is a point that I wish I had considered and presented to the Court. That is a point well taken.

Q You can't tell me whether the --

A Statute of limitations --

Q -- statute has run?

A No, sir, I'm sorry, I --

Q Are your witnesses still available?

A I do not know that, sir. We have taken this --

Q As far as I am concerned, I wish you would let the Court know whether the statute has run on this manslaughter charge.

A Well, he was tried the second time. I do not know, Your Honor. I don't know that. I have --

Q Well, won't you let us know?

A Yes, certainly.

Q When you address yourself to that question, will you also indicate whether there are any legal barriers being tried under the existing indictment, provided the court does not submit any charge higher than voluntary manslaughter to the jury? Mr. Wallace seemed to concede that that would have satisfied his position at the time of the second trial. I do not take that as a concession that he would concede it now, necessarily. But if you will address yourself to that point also in your memorandum.

A Yes, sir.

Passing then, in my final argument on this question, I submited that because of the fact he did get a lesser sentence that there was harmless error, and I now pass to the question of the retroactivity of Benton.

Ostensibly, if this Court should decide that Benton is not applicable to the facts in this case, and of course this would not perhaps be a proper case to decide the retroactivity of Benton, but nevertheless this Court has for some time now, especially since 1965, in the case of Linkletter vs. Walker, set out certain criteria which it has tried to follow in determining whether a case should be retroactive.

It has considered the prior history of the rule. It has considered the purpose and effect of the new rule, and it has considered whether or not the application of the new rule would further or retard its operation. And throughout these cases where the prospectivity of a case has been in question, it has applied these rules.

I would submit that insofar as Benton vs. Maryland, that the prior history of the double jeopardy provision of the Fifth Amendment has shown that this Court has repeatedly held that it was not applicable to the states. And upon given a choice, since the Green case, in 1957 or 1959, whenever it was, when given a choice, this Court has on one occasion said the double jeopardy provisions of the Fifth

Amendment is not applicable to the states, and on another occasion, Chicos vs. Indiana, in a factual situation identical, I submit, to ours, this Court did not pass on the question. However, it did say in dictum that it was -- that the double jeopardy provision was not applicable to the states.

Q How about Ash vs. Swenson?

A Well, I've studied --

Q And Pierce?

A Well, in Pierce, if Your Honor please, the question that was specifically posed in Pierce, and the question which was phrase in the first paragraph of that decision, was whether or not when, at the behest of the defendant, a criminal conviction has been set aside and a new trial ordered, to what extent does the constitution limit the imposition of a harsher sentence. And, in furthering the opinion, this Court said that the double jeopardy provision is to protect three things: protection against repeated prosecutions acter an acquittal; protection after a conviction and protection against the imposition of repeated punishments.

But in Pierce, the only question posed to the Court was the question of the sentence. It was not really confronted with the question that we have here. And I would urge this Court to consider Pierce not as a blanket determination that Benton vs. Maryland should be retroactive, but that Pierce

decided only that insofar as the imposition of harsher sentences are concerned, that it should be made retroactive.

And I emphasize this position because that is a correction that can be made with a minimum of effort by the state. It need only do it administratively. It need not have subsequent trials, as would be required by a retroactive application of Benton vs. Maryland. So the footnote --

Q What were the other two cases you said we had had since Green with the double jeopardy provision, that it does not apply to the states?

A Particularly one, Your Honor, was Bartkus vs. Illinois, which was in the late fifties, 1959. The earlier one was Hoag vs. New Jersey, though that is not a holding of the Court. It is dictum. That is a 1958 decision, also dictum --

Q Where was the Bartkus case at?

A Bartkus vs. Illinois.

Q What page?

A I'm sorry, Your Honor, I don't have the citation in front of me.

Q 359 U.S. 121.

A It is a 1959 case. The other case was Chicos vs. Indiana, a very -- the last paragraph in that case. That case suggested that the double jeopardy provision was not applicable to the states.

Q How do you spell that?

A C-h-i-c-o-s.

Q 359 U.S. 121.

A So we have here, then --

Q What about Ash?

A Oh, yes, sir. The facts in Ash would seem to come within the ambit of the first of the three propositions set out in Pierce, that is whether Benton is applicable in protection to the defendant against subsequent trials after an acquittal. That would seem to be the suggestion in Ash.

However, Ash, I respectfully submit, does no more than to incorporate collateral estoppel into the double jeopardy provision, where it had not been incorporated earlier. In fact, it had been rejected in Hoag vs. New Jersey.

Q By footnote or otherwise did it not say something explicit on the question of retroactivity?

A It is quite explicit. It is --

Q How did it read?

A There can be no doubt that the retroactivity of the court decision in Benton vs. Maryland. In North Carolina vs. Pierce, decided the same day as Benton, the Court unanimously accorded full retroactive effect to the Benton doctrine. I submit to the court, however, that --

Q The word there is fully, isn't it? Fully retroactive?

A Yes, sir. Yes, sir, it says fully retroactive. But if we are going to say that it is applicable to the other elements of the three, then it is a departure from what this Court has done in earlier cases. Linkletter vs. Walker, Stovall vs. Denno, Jenkins vs. Delaware, these continuing series of cases where this Court has considered the criteria set out in Linkletter vs. Walker, prior history, purpose and effect.

Q Ash could not have been decided the way it was, the judgment couldn't have been reached, but it was reached in Ash, without holding that the doctrine of Benton vs. Maryland was fully retroactive. Isn't that correct?

A Yes, sir, that is correct.

Q So haven't we crossed that bridge, for better or for worse?

A It is a difficult bridge to cross, Your Honor.

Q Well, haven't we don it, difficult or otherwise?

A Well, it is hard for me to see how this Court has done it, and I have tried to study the opinions. For instance, the Benton vs. Maryland case has been only mentioned one time. In Pierce there is no reference to the other elements, the three that this Court set out. There is no reference to the other two elements, and the effect of Benton. The whole case turns upon the imposition of harsher sentences

and then, all of a sudden, we have this decision in Pierce which, if it is to be determined that it is retroactive, making Benton retroactive, it is a complete departure from earlier cases where this Court has considered the effect, reliance; the Desist case, I think, is a good opion where this Court has considered what all of this will do to the --

Q Well, that involves the Fourth Amendment, where the test is whether or not there is the searching officer's act -- it is the reason.

A Yes, sir.

Q And part of the reason is relying on the existing court decisions, perhaps. But haven't we, as I say, rightly or wrongly, for better or for worse, hasn't the Court, whether you approve or not, hasn't the Court crossed that bridge, if not in Pierce then at least in Ash?

A Yes, sir.

Q How could Ash possibly have been decided the way it was without holding the doctrine of Benton vs. Maryland retroactive? Ash came up, you remember, on collateral --

A Yes, sir.

Q -- proceedings in federal habeas corpus.

A This Court has crossed that bridge. I was seeking to urge this Court --

Q To go back and cross the bridge the other way now?

A -- that you consider the perspective that it had, because of a departure from its earlier decisions in determining retroactivity. I was urging this Court that, because of past history in this Court, that Pierce is a complete departure and because of the elements set out in Linkletter vs. Walker, the states had no way of knowing that this Court would resolve Benton the way it did. In fact, the states were encouraged to believe that it would hold differently.

Q Of course, every state has a guarantee against double jeopardy, usually in the state constitution, and I think one or two or three by a statute or court decision, and while they are not exactly coincidental with the guarantees of the federal constitution, they are so close that the disruption of state procedures would be minimal, wouldn't it?

A Yes, sir, all the states do have them. About 18 or 20 of the states do in fact provide for the retrial on a higher charge.

Q Right.

A And the Georgia courts is one of those, and that is why we have this problem there.

Q But aren't there quite a few states that, either by statute or court procedure, said that where you find a guilty plea of a lesser offense, that it is actually an acquittal of the others?

A Yes, sir.

Q The majority of them.

A Yes, sir. Only 18 or 20 other states have held the view that Georgia has, that you may retry on the higher sentence.

Q Georgia could have done it in this case?

A Yes, sir, but --

Q They could?

A Yes, sir, Your Honor, but please remember that this Court, in an identical factual situation in Brantley vs. Georgia, in a 1910 case, said it didn't violate the Constitution of the United States, in an identical factual situation.

Q I understand that Benton was argued for the double jeopardy argument?

A Well, the proposition of double jeopardy --

Q Benton itself?

A No, Your Honor, the case before the Court now was before the Benton decision.

Q Well what --

A Brantley was argued --

Q Brantley.

A Brantley.

Q Brantley, that's right.

A Brantley. And so I am saying that the State of Georgia, and the other states too, have had a determination by this Court at least since 1910, and certainly since 1930,

or whenever it was, in the Polko decision, that the Firth Amendment was not applicable to states. And even more recently, since 1959, in Bartkus, and in 1966 in Chicos, and all of a sudden now the states are going to have to go back and retry these people, and this will be a terrible burden on the states, because some of these people have been in jail for quite a long time and it will be necessary to get the witnesses and revive their memories, and this will be a burden on the administration of justice.

Q As I understand it, this is a law in Georgia, that at the first trial he was not in fact acquitted of murder, is that correct?

A As a matter of fact, he was not. He was silent on --

Q And that is the law in Georgia?

A Yes, sir.

Q That he was not acquitted?

A Yes, sir.

Q Unlike the law in the District of Columbia, as construed by this Court in Green. Is that your point, so --

A Well, Green wasn't -- in Green the jury was silent on the Green case, as it was in this case.

Q I understand, yes.

A This Court has determined that that wasn't implied acquittal.

Q In the District of Columbia?

A In the District of Columbia. In the State of Georgia there was no implied acquittal because the law provided that he could be retried, which must reject the implied acquittal doctrine.

In closing, if this Court please, I ask this Court to consider the criteria set out in Linkletter, in Linkletter vs. Walker, as carried forward in many subsequent cases deciding retroactivity. I ask this Court to not apply Benton retroactively and consider the burden upon the administration of justice and the reliance upon the states, that it be on the decisions of this Court prior.

Q General Robins, the Court is not unmindful of the burdens that these things can impose on the states sometimes, but when you consider the language of the Constitution, that he shall not twice be placed in jeopardy, that must mean he shall not twice be put at the risk of this conviction. Is that not what it must mean?

A Yes, sir, it must mean that, and I say were the facts as they were in Green, where the man received a death sentence, then this case would have to fall.

Q Now, let's put ourselves back in the posture that he was at the end of the first trial and the verdict, and it was a relatively -- a much less sentence than he might have got.

A Yes, sir.

Q Now, then, he is put by the State of Georgia at risk again, and the risk is not the risk of being found guilty of an offense that would give him 10 to 15 years, but he is again put at risk of the death sentence, isn't he?

A Yes, sir.

Q He thinks so, at least, even if his lawyers may tell him about the Green case and about the Benton case and the other cases. And now isn't that kind of an apprehension, the fear, the risk, the kind of thing that is embraced in double jeopardy in the --

A Yes, sir, and at that time the Court should probably pass upon a proper motion raising double jeopardy.

Q But the court didn't, and that is why we are here.

A That's right, yes, sir, but I say all this was vitiated when the jury rejected that apprehension that he was placed under and said do not concern yourself with that, you are being convicted of voluntary manslaughter and we are sorry for the apprehension, but you have not been convicted of that murder charge.

Q But in the meantime he and -- if he has a family -- his family were subject to that apprehension, by fear, that jeopardy, was he not?

A Yes, sir. I cannot deny that.

Q We cannot turn the clock back on that.

A No, sir, we cannot do that. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Wallace?

REBUTTAL ARGUMENT OF ALLYN M. WALLACE, ESQ.,

ON BEHALF OF PETITIONER

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

First of all, I take issue with my brother about the pardoning of one in Georgia. At the time when Price was tried the second time, that was not the rule. The Pardon Board, as it now stands, the Parole Board, if they see fit, can grant a pardon the second day or the first day after he has been incarcerated, if I understand the rule correctly.

Now, I have always felt that the law had two basic purposes: One was to protect the society, and the other was to correct the wrongdoer. Now, Justice Marshall -- or I believe it was one of the other Justices that asked me what harm had been done, and I want to call the Court's attention to a dissenting opinion in the Chicos case, and it was used by Justice Marshall in the case of the Second Circuit Court of Appeals, which was a case out of the State of New York, and this is the language of the Court:

The second time gave the prosecution the advantage of offering the jury a choice, a situation which is apt to

induce a doubtful jury to the finding of the defendant guilty of the lesser serious offense rather than to continue to debate as to his innocence. This doctrine was also stated and it refers to Chief Justice Marshall's case.

Now, that is my position in this matter and that is where I say their error to the harm was committed. It is as the Court brought out. It is not that he was tried the second time. He was subjected to double jeopardy, which the Constitution says. And if it says anything at all, that is what it says, and I think it would be --

Q Could I ask you this question?

A Yes, sir.

Q Not in terms of harmless error, but let me put it to you in terms of remedy. Suppose you win, what should be the consequence? Can the State be prevented from retrying this man on a new indictment, charging only manslaughter?

A If Your Honor please, if I understand the law correctly in Georgia, the thing has never gone down from the Supreme Court of Georgia or the Court of Appeals of Georgia to the trial court, and it is still in the Supreme Court of Georgia, pending the outcome of this case here in this Honorable Court.

Q Well, what should --

A He can be reindicted.

Q He what?

A He can be reindicted.

Q And should our mandate prevent his reindictment?

A No, sir, I can't see that.

Q We shouldn't do that, should we?

A No.

Q Even if you win?

A I think it should be remanded back to the state courts, with anything to be handled, if this Court should find that he has been subjected to double jeopardy, but not inconsistent with that decision. Now, that is my position.

Now, that is where I say the harm has been done.

Q Would it be appropriate, in your judgment -- I want you to consider this question before you answer it, because perhaps you wouldn't want to answer it today -- would it be appropriate to, if the Court found for you, on the basic issue of double jeopardy, to remand the case giving Georgia the alternative of reindicting him, if their law permits, or trying him under the existing indictment but with a limitation that no charge higher than voluntary manslaughter could be submitted?

A If I may go outside the record, if Your Honor please, that issue came up in the argument in the court when I argued the plea of double jeopardy, that the Solicitor said that he is indicted for murder and that is all I can try him for. Now, he said I would have to go back and get a new

indictment for manslaughter in order to do it, and that is when the judge picked up his gavel and said, "Motion overruled."

Now, I still contend that he can be retried for manslaughter under proper indictment, and the statute has not run.

Q Under the law of Georgia, can you proceed by information rather than indictment?

A Not in a felony, no, sir, you cannot. Now, in misdemeanor cases you can. Now --

Q What is the minimum sentence for manslaughter?

A One to twenty years, I believe.

Q And he got how many?

A 10 to 15.

Q The last time?

A The last time 10, sir. The first time, 10 to 15.

Q And the jury has to fix --

A The jury has to fix the sentence.

Q No longer can the jury say 10 to 15, as I understand it.

A They can come in with a recommendation. If it is without recommendation, then the court has no other alternative but to inflict the death sentence.

Q Not for manslaughter?

A Not for manslaughter.

Q No.

A They fix it, the jury fixes it.

Q And what is the jury --

A The jury is charged from blank years to blank years.

Q Right.

A But makes a minimum of a year, a maximum of ten years.

Q May the jury come in and say we find him guilty and recommend a sentence of from one to twenty years?

A Yes, sir. Yes, sir.

Q They did it in the first trial from ten to fifteen?

A Ten to fifteen, yes.

Q At the second trial they fixed it at ten years.

A Ten years.

Q I had understood, in the course of oral argument that the law was changed in the interim and that a jury must now fix a definite number of years. Perhaps I misunderstood. Did I?

A Yes, sir.

Q I misunderstood that?

A I think you did, yes, sir.

Q But in the second case, in any event, the jury did fix a definite number of years?

A They did, sir.

Q And in the first conviction they did not?

A Except within a minimum of 10 to 15 years.

Q 10 to 15 years.

A Now, to the question of retroactivity, my good friend here has called the Court's attention to the Bartkus case, and I have set this out in my brief and I feel that this honorable body has read that brief. That was a 1910 decision. The feet have been cut out from under that case, not only that case but other cases have been set aside. The Polko doctrine is gone. The Twining doctrine case is gone. The Brock case -- all of those decisions of this honorable body have been cut away.

We are living in the year 1970 and not 1910. There have been many decisions recently in this Court that have been overturned, at least, old established rules and principles that have long since been gone. And I cannot go along with my brother on this Benton case, which said if a man voluntarily seeks a new trial and attains it, then he is barred from pleading double jeopardy. That is not so now.

Now, if the Benton case means anything, it means that it would be unfair, certainly discriminatory, to give new trials for unconstitutional convictions, when others are kept in prison without any hope or any reward whatsoever, simply because it would cost the state maybe a little money or a

little effort, to retry an individual.

Life at its best is short and sweet. I don't care if it is man or beast. And to incarcerate a man in jail and not give him the privilege of what you have given someone else would certainly be, in my opinion, unjust and certainly a rape of justice, if I may use that phrase.

Now, as I said in my brief, I am not too concerned about that. I think the Benton case said to Maryland, "You have violated the law. You have gone beyond your bounds in convicting this man, of placing him in jeopardy twice. Now, correct it."

If the Green case, and the case from the Second Circuit Court of Appeals means anything at all, it means that all of the states, if you have violated a law and you haven't given a man his constitutional rights, or he has been denied that right, then I think the Benton case says retry, regardless of what the consequences are, and that is the way I feel about it.

Now, I would like to --

Q Would you state again --

A Sir?

Q Would you state again the harm, what you consider to be the harm that he has suffered in being tried on this indictment, instead of one simply for manslaughter?

A Mr. Justice Black, I feel that had he not been

tried for murder the second time, as it was I believe you who wrote a dissenting opinion in the Cichos case, and this is your language, sir: "By trying petitioner the second time for murder" -- now, Mr. Justice Marshall adopted that as his decision -- "By trying petitioner the second time for murder, it gave the prosecution, the state, an unfair advantage of offering the jury a choice, a situation that was apt to induce a doubtful jury to find petitioner guilty of a lesser offense rather than find him not guilty or acquittal or even continue their deliberations or debate as to his innocence."

Now, my position is, if this man had not been tried for murder, I feel that this jury, this is a small county, with a population of about 15,000 --

Q What county is it?

A Effingham County, Springfield, Georgia. And I feel that --

Q Where is it, below Savannah?

A It is about thirty miles out of Savannah, on Highway 21. And I feel that had this man been tried for manslaughter, the jury would have been more inclined and probably considered longer his innocence rather than to find him guilty of some lesser offense than murder, when he was tried for murder the second time. And I --

Q In substance, you are saying that where there is a top amount to which a person can be sentenced, and goes

on down, that a jury might have some inclination to compromise?

A Yes, or might even have acquitted, and this case -- well, I can't go outside the record, but --

Q The record doesn't show us much about what kind of case it was.

A Well, that is true and, as I mentioned a moment ago, I personally paid for that record. I am without purse. I have put a lot of time and effort in this case. I am thoroughly convinced that this man is entitled to another trial on voluntary manslaughter, and, as I said a moment ago, the trial judge is now deceased, who tried both cases. The Solicitor General has retired from office, and I have some doubt in my mind that this case, even though you refer it back, as I suggested, will ever be tried again. Now, that is the way I feel about it.

Now, I would like to, for the last closing moments, refer to the Ash vs. Swenson case, and also the Waller vs. Florida case. And the court said, and that was on April of this year that these two decisions came down, this is not last year or five years ago or back in 1910, and this was very plain -- there can be no doubt of the retroactivity of the court's decision in Benton vs. Maryland -- that is a headnote -- in North Carolina vs. Pearce, 395 U.S. 711, decided the same day as Benton, the court unanimously accorded fully retroactivity in parenthesis, the Benton doctrine.

And they went on and said that any case, as I interpret in the Waller case, that any case might come before this Honorable Court that might rise or fall in the ambit of the Ash case and the Waller case, that is within the bounds or within the limits of this one issue, then these two cases would have suffered.

Headnote one again in the Waller case -- and this was Justice Brennan, I believe -- I am not supposed to refer specifically to Justices, but I hope Justice Brennan will pardon me -- I add to the Court's ruling in Ash vs. Swanson that our decision in Benton vs. Maryland, holding the double jeopardy clause of the Firth Amendment applicable to the state "fully retroactive," nd there again referring to North Carolina vs. Pearce, 395. I think that is the crux of my case.

I think the Benton case is retroactive, in any case it might fall within its bounds and within the ambit of that case, and I say that this Price case is one of those cases. And I am asking this Court, in all fairness, to give this man the opportunity and, as I said, I doubt -- and I have very serious doubts -- that this man will ever be tried again. I think this will wind it up, because, as I said, I can't bring out anything outside the record. It is unfortunate that I couldn't bring the whole record up here, because it was expensive, and I have spent enough time and effort -- this is

my second day in Washington on this case, without purse. That is how interested I am in this case and this man getting what I think is justice. I never case for the lack of purse, and that is why I am here. And I am asking this Honorable Court to please consider my brief and what I have said here today and grant this man another opportunity, because he is entitled to it. And I thank you all so much for listening to me, and it has been a privilege to have been here. This has been my first time.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace. We thank you for your submissions. Thank you, Mr. Robins, for your submission. The case is submitted.

(Whereupon, at 11:35 o'clock a.m., argument in the above-entitled case was concluded.)

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