Supreme Court of the United States

NOVEMBER TERM, 1969

In the Matter of:

Docket No. 24

JOSEPH WALLER, JR.,	
Petitioner	
vs.	
THE STATE OF FLORIDA	
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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Petitioner

vs

THE STATE OF FLORIDA
Respondent

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The above-entitled matter came on for argument at 1:30 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:

LESLIE H. LEVINSON, ESQ.
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Ceunsel for Petitioner

GEORGE R. GEORGIEFF, Assistant
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State of Florida
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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 24, Waller against the State of Florida.

Mr. Levinson you may proceed whenever you are ready.

ORAL ARGUMENT BY LESLIE HAROLD LEVINSON, ESQ.

ON BEHALF OF PETITIONER

MR. LEVINSON: Thank you. Mr. Chief Justice, and may it please the Court: This case is on writ of certiorari from the Florida District Court of Appeals which affirmed a grand larceny conviction of Petitoner, Joseph Waller, Jr., whom I represent.

This Court thought that the case to be argued immediately after the case of Ashe versus Swenson, which we have just heard. Two issues of great importance in the administration of criminal justice in the states are presented by this case. Each issue, in our view, independently would provide grounds for reversing the judgments below.

One issue is a double jeopardy issue. That is to say, whether the double jeopardy rule as applies to the states through the Due Process Claus of the 14th Amendment, is violated with a separate municipal and state prosecution of the same defendant arising out of the same conduct.

The second issue in this case is whether the Due Process Clauseof the 14th Amendment is violated where the Trial Judge imposes sentence of imprisonment after reading a

presentence investigation report which he refused to make available even to the defendant or to the Appellate Court.

The facts of the case are not in material dispute and never have been. Up on the City Hall of St. Petersburg Florida there was a mural, a piece of canvas attached to the wall by glue or other adhesive.

One day in 1966 in broad daylight and during business hours and in the presence of a substantial crowd, which included police officers and other public officials, a group of people went to the City Hall and tore this mural off the hall and brought it downstairs into the street and started walking through the streets of the city carrying the mural.

The people engaged in this demonstration alleged that the mural portrayed the Negro race in an insulting caricature. And the people were expressing their disturbance by this form of demonstration.

It is undisputed that the Petitioner, Joseph Waller, Jr., was a member of the group and that he personally participated in the removal of the mural from the wall and in carrying it through the streets of town.

A very short while after and as part of the same continuous happening or conduct, the police confronted Waller and the other individuals and recovered the mural after a scuffle. By then the mural was in a slightly damaged condition. Perhaps the only conflict in the testimony in the case was just

when the damage occurred.

But at any rate, the mural was recovered by the police and Waller was immediately apprehended.

First, Waller was prosecuted in the City Court on the charge that he had violated two city ordinances during that course of conduct. One ordinance concerns construction of city property. The other ordinance: disorderly breach of the peace.

He pled not guilty to both charges; a trial was held in the Municipal Court. Waller was found guilty on both charges and was sentenced to the maximum of 90 days on each charge, the sentences to be served consecutively.

While he was serving this total of 180 days onthe city ordinance violations, an information was charged alleging the felony of grand larceny. And this grand larceny prosecution is what turns out to be the subject matter of the present case.

It is undisputed that the events/ alleged in the informations for grand larceny concern the identical sentence that is the threat to Petitioner and concern the identical course of conduct at the same place and the same time the same mural and the same general course of transactions. And this fact has been conceded by Counsel for the State of Florida. It is also established by an affidavit executed by the Petitioner and included in our Appendix, Page 15, the District Court of

Appeals also found as an undisputed fact that the same defendant in the same course of conduct were involved both in the city and in the information for grand larceny filed by the State of Florida.

Q I understand that there is no dispute about the fact that it's the same defendant and that it was the same general course of conduct. I don't quite understand how it could be actually the same action that could be disorderly conduct and what was it -- malicious destruction of property or destruction of government property?

A Destruction of city property.

Q City property. That was the subject of the first one trial under the city ordinances and then the subject of the second trial under the state law was for larceny.

A Well, Mr. Justice, in both trials --

Q Larceny generally doesn't -- I mean, a conventional larceny case doesn't generally embrace what we ordinarily think of as disorderly conduct.

A Mr. Justice, in the felony file in the circuit court -- that is the file for grand larceny a point was raised by the Defendant that larceny generally consists under Florida law as elsewhere, the stealing of the property.

However, the District Court of Appeals affirmed the Circuit Court on the theory amongst others, that larceny in Florida may also consist of the destruction of the property

rather than the stealing of it. Or even creating a reasonable risk of destruction under Florida law is sufficient to constitute larceny.

The record contains a charge to the jury of that effect and we do not include it in the appendix, but the Court may wish to refer to it.

And the Opinion of the District Court of Appeals which is -- in the appendix, actually mentions the matter which was an issue on appeal. And if I may refer to the Court -- the Court to the Opinion of the District Court of Appeals back on Page 55 of our Appendix, the District Court of Appeals copes with the problem can there be a larceny by destruction under Florida Law? And they say yes, there can be and there was.

To some extent this represents a stretching of pre-existing Florida Law on Grand Larceny and illustrates, perhaps, thatthe state was straining pretty far in order to try to pin a grand larceny label on what actually happened.

But the District Court of Appeals did affirm the Trial Court upon the theory, among others, that larceny can exist on the basis of destruction of the property, rather than secreting it and concealing it as we would normally thinkof larceny.

Q I was suggesting on the question that it might be possible in a case where -- let's assume there was a Federal

statute that makes it an offense to steal government property and another statute that makes it an offense to destroy it -- Federal Government property.

I suppose it's conceivable that a person might steal a portrait of George Washington from the White House and then a couple weeks -- and be guilty of stealing it -- and then a couple weeks later in fear that he was going to be discovered, destroyed it.

You wouldnt contend those were necessarily one offense, were they?

A Well, certainly not, Mr. Justice. They would take place under your circumstances at different times, for one thing and they would offend different policies of the state.

What I suggest here is that the single incident would happen continuously within a very few minutes, was the sole evidence introduced both in the City Court and in the Circuit Court. And the state strained rather far in order to label it grand larceny. Presumably, wanting to, if I may use that expression, "throw the book" at this Defendant.

Q What property was destroyed? What was the claim in the first trial that was destroyed?

A Mr. Justice, there is no record of the trial in the City Court and I was not there personally, and I have to rely on the affidavits of the Petitioner, who was there. And

his affidavits, which have not been controverted, state that the same facts which were introduced in evidence in the City Court as in the felony court. That is the fact that he entered the City Hall; tore the mural off the wall; carried it out in the street and it was recovered in a damaged condition.

Q Well, I suppose that it's possible that on that stated fact that it wasn't the painting that was destroyed, but the wall.

A Yes, indeed, it is possible.

Q And that the -- what was stolen was the painting. What was destroyed was the wall.

A This is possible and we concede that it is possible that a single course of conduct may, indeed, offend a number of statutes at the same time.

Q And even maybe different, separate acts.

A Maybe. WE believe that our rule of compulsory rejoinder would require that as many complaints that the state may have against the Defendant by reason of this course of conduct, they can join it into one trial; try him once on th the multiple counts but not to keep on trying him a number of different times, so that to use Mr. Clifford's term, he should not have to "run the gauntlet" of the criminal process.

Q You would say that in the last case, in the robbery case, robbing several people atthe same time that if

a Defendant goes up to one person and lifts his wallet out of his pocket and goes up to the other person and lifts the wallet out of his pocket, but sticks a knife in him at the same time, that the state may not try the person for murder at a different time than they try him for robbery?

I think that if all the facts are known to the state ---

Q All the facts there are just --

A I believe that the state under the arguments which we have submitted on our brief and which are -- which I wish to elaborate on in a little while -- the state should join together all the charges in a single file which may contain numerous counts alleging to various criminal statutes which have been violated.

Q Now, that's critical to your case here, isn't it?

A There is a -- we have an alternative theory, the theory of the lesser included offense. We believe that either the compulsory joinder or the lesser included offense theory would be sufficient to require reversal of the double jeopardy aspects of this case.

If I may resume, may it please the Court: After the summary information was filed, alleging the crime of grand larceny, three more informations were filed by the county prosecutor, alleged the three misdemeanors of: (1) unlawful assembly; (2) malicious destruction of public property and

(3) resisting arrest without violence.

Now, Counsel was able to persuade the county prosecutor that double jeopardy had indeed been reached by filing these three misdemeanor charges and so the county prosecutor withdrew the three misdemeanors and they never came on for trial.

But the State's Attorney persisted in bringing the grand larceny charge to trial and ultimately the trial resulted in the verdict again the Defendant.

Before the matter came on for trial, appropriate motions to quash the files as the appropriate Florida means of challenging the double jeopardy aspects of the case, and a suggestionfor a written prohibition was filed in the Florida Supreme Court as an additional means of attempting to get the Florida Courts to decide that double jeopardy had been violated.

We were unsuccessful and the case came up for trial. The same evidence was introduced at this trial, according to the Petitioner's affidavits, as had been introduced at city courts; the same mural was identified by the same witnesses as the record shows. And eventually the Petitioner was found guilty and was given a sentence from six months to five years, which is the statutory maximum on the Florida law of double jeopardy.

I might briefly mention the facts of the proceedings,

as they arose concerning the presentence report, and then I would like to return to a discussion of the double jeopardy issue.

After verdict and before sentencing, Petitioner moved the Court for discovery of the presentence investigation report which had been prepared by a probation officer. The Court denied this motion. The Court referred to the presentence report; the Court pronounced sentence; after sentence again Petitioner renewed his request to see the report, asserting he should have an opportunity to rebut any errors or to parry any unfavorable contents of the report. This request was denied.

When the case was being appealed on the floor of the District Court of Appeals, Petitioner asked the Clerk of the Trial Court to include the presentence report in the record. This was denied. Appropriate motions were filed in both courts to try to get the presentence reports in the record. All motions were denied and to this very day this very Court has/no access to the presentence report which is still secreted in the desk of the trial judge in St. Petersburg, Florida.

The conviction was appealed to the Florida District Court of Appeals, Second District, which affirmed an opinion which is contained in the appendix and if I may now return to the double jeopardy issue before the District Court of Appeals -- and I quote from Page 53 of the Appendix.

"Assuming but not holding that violations of municipal ordinances were included offenses of the crime of grand larceny, nevertheless there is no violation of the double jeopardy rule." "Because," said the Florida Court of Appeals, "even if a person has been tried within a municipal court for the identical offense with which he is charged in a state court, this would not be a bar tothe prosecution of such person in the proper state courts. This has been the law of the state since 1894."

And the Florida District Court of Appeals cited the case of Theisen versus McDavid, which at it happens, mentioned that proposition by way of victim, but sincethen the proposition has been indeed absorbed as aprinciple of Florida Law that is at the same -- the identical offense could be prosecuted both by the municipality and the state without violation of the double jeopardy rule of the State of Florida.

First, by way of argument upon the double jeopardy matter, the case of Benson versus Maryland, decided by this Court on the last day of the last term, clearly holds that the due process clause of the 14th Amendment makes the double jeopardy rule applicable to the states.

We argue that the purposes of applying the Benson rule a prior prosecution by a municipality within the state must be treated as equivalent to a prior prosecution by the state itself. The reason being that a municipality is a part of

of the state, a creature of the state and is not an independent sovereign.

We recognize that there have been attempts to employ a dual sovereignty theory. The attempts following traditional Florida law in the Theisen case have urged that the municipality is a separate sovereign from the state and albeit has a special interest which it may vindicate.

And many of the cases of Florida and other states, use as an analogy the relationship between the state and Federal Governments. Ten years ago this Court held in the two cases of Bartkus and Abbate, this Court held that successive prosecutions by state and Federal governments are permissible within the framework of the double jeopardy rules. We do not think it is necessary to reach the Bartkus and Abbate decisions in order to dispose of the present case. We think the relationship between city and state is not the same as the relationship between the state and Federal governments.

Q Well, suppose you prevail on that point, what do you suggest be done with this case?

A This case I believe should be reversed, I think the second trial of grand larceny in the Circuit Court should never have been held.

Q I know, but what is the Florida double jeopardy rule; the same transaction or same evidence; what is it?

A The Florida --

Q As I read this opinion and they run off on the so-called two sovereignties rule and they don't tell us what the double jeopardy rule would be if they were advised that they can't apply the two sovereignty rule.

A Well, Mr. Justice, the leading case in Florida on double jeopardy obviously would be a case involving two prosecutions in the state court because no other possibility crosses the threshold. And in this connection the Florida case of Sanford versus State, cited in the brief on Pages 30 and 31, decided in 1918, I believe would still be a definitive statement of Florida law it was reiterated by the Wilcox case in 1966.

If I may read a quotation from Sanford on Page 30. Florida says: "If be first information is such that the accused might have been convicted under it on proof of the facts by which the second information is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against trial on the second."

Q Well, that would suggest, then, as I understand it, as far as you know the identical facts that established the municipal conviction were the facts on which the grand larceny conviction was made.

A That is correct.

Q And you are suggesting that -- and on that set of facts Sanford holds that there could not have been a grand

larceny prosecution.

A That's correct.

Q Now, are we to say that or should we say the wrong endeavor on the two sovereignties thing, should we send it back to them to let the state courts apply the Sanford rule in this case?

A I believe that the case is clear enough that this Court can dispose of it completely. Obviously this Court would first have to reach the question as to whether the dual sovereignty rule should apply and I think clearly this Court should hold that --

Q WEll, my questions assume the premise that we agree.

A Yes. If this Court agrees that a municipality is a part of the same sovereignty as a state, then you reach the Sanford rule. I believe the Sanford rule is clear enough and --

Q Should we apply the Sanford rule? Let the Florida courts apply it.

A Since Florida has failed to apply it because they never reached it, I feel that in the interests of justice so as to dispose of the litigation, this Court is perfectly able and certainly has jurisdiction to apply the Sanford rule under its general authority to dispose of the litigation as the interest of justice may require.

This man has been in jail for sixteen months.

Q Yes.

A And for about another 18 months he has been out on bond in the shadow of imprisonment.

Q What was his first sentence, again?

A His first sentence was two consecutive 90-day sentences, so that was six months.

Q Did he serve those terms?

A This is a question which is still, unfortunately not clear, because he was serving the six months city sentence; he was also being held for trial in the state court; and when the state sentenced him to six months to five years, the state court judge said, "allow him credit for the time he has been confined." And we are not yet clear as to whether that credit refers to the fact that the Petitioner served a city sentence, or to the fact that the Petitioner was held pending trial in the state case.

Q When he was confined on the city cases, had he been tried and convicted of the state case?

A No, sir; he was awaiting trial and we have approached the city judge in an attempt to determine whether the City believes that the man has served the city sentence or not and I sincerely hope that the judge would agree that he has served his sentence. But there is at least a possibility --

Q Well, did he serve the city sentence in one city jail and the state sentence in the state penitentiary, or what?

A He was confined in the county and it's not unusual for city prisoners to be switched around to either the county jail or even to the state penitentiary while they are awaiting trial on state offenses. And my understanding is that as a matter of Florida law, it's somewhat unclear whether he has yet served the city sentence or not.

Q Does the record show how much bond you were to make?

A Yes; and as a matter of fact, Mr. Justice, there was a problem about the bond also. WE had to appeal to the Florida District Court of Appeals and also the Florida Supreme Court before we could get him out on bond. He turned out to be a defendant who was --

Q A what?

A He turned out to be a defendant who was not given the maximum leniency by the trial court.

Q So what -- at what was the bond fixed?

A $2,500.

Q And he couldn't make it?

A Yes, he did make it. Originally a higher bond was set. Originally the court refused any bond; then a high bond was set and it took appellate court proceedings --

Q Denied bond entirely?

A Yes, sir; and there is a recorded opinion in the Southern Reporter in which athey cite that the Appellate Court reversed the trial judge on that matter, which suggests amongst other things that the presentence investigation report may have had a prejudicial effect on the mind of the trial judge which perhaps will be discussed when I reach the other point of the argument.

Q What was there about it -- was it a sensational case? What was it about?

A Well, Mr. Justice --

Q What was it he took?

A He took a mural from a wall of the city hall.

Q What kind of a mural?

A A canvas painting depicting a group of Negro musicians.

Q A what?

A A group of Negro musicians were depicted on this painting and he and the other members of this group alleged that this was an insulting caricature of their race.

Now, he was punished for his conduct by 180 days in the city jail. We're not appealing that. We are protesting that he should not have been tried twice in the basis of this same -

Q Same transaction.

A Same transaction or same course of conduct, or in current language, a "happening," if I may use the word.

Now, I indicated before, if it please the Court, that the relationship between municipalities and states is not analogous between the stated and the federal government. I believe a more appropriate analogy is that between a territory of the United States and the Federal Government and this Court has held as long ago as 1907 in the Grafton case, that a formal prosecution by a territory clearly bars a subsequent prosecution by a tribunal of the United States. And I believe the Grafton case is adequate precedent for the proposition that two arms of the same sovereignty should not be permitted separately to try a defendant.

If we may assume that a municipality is an arm of the sovereign state, I believe we have two alternative approaches, either of which would lead to the conclusion that the double jeopardy bars the state prosecution.

One theory is the theory of compulsory joinder and another theory is the theory of the lesser included offense.

Now, Mr. Chief Justice I see that the white light is flashing and I wish to reserve the remaining five minutes for rebuttal, if I may.

MR. CHIEF JUSTICE BURGER: Mr. Georgieff.

ORAL ARGUMENT BY GEORGE R. GEORGIEFF, ESQ.

ASSISTANT ATTORNEY GENERAL OF FLORIDA

MR. GEORGIEFF: Mr. Chief Justice and may it please the Court: Let me add here as a wish to extend something that is hastily stated in both documents, whether in Florida or in the United States Constitution -- the question of what constitutes double jeopardy.

Counsel tells you that he's talking about the same conduct. I tell you that both documents are the same offense; not the same conduct; not the same happening; not the same event, but the same offense.

Here we had two courts: the Municipal Court and the Court of Record in Pinellas County, Florida. Now, the one charge was of grand larceny, which is here before you to decide whether it constituted a second attempt to do this man in for whathe had been prosecuted for in the city court; to wit:

Q Where was the mural that he took?

A Beg your pardon?

Q Where was the mural that he took?

A City Hall.

Q Where?

A St. Petersburg.

Q St. Petersburg.

A St. Petersburg and he was charged there under municipal ordinances for the disturbing of the peace and I

don't know the exact wording of the charge on the second one, but it was damaging city property.

Now, obviously we couldn't prosecute him in the state for damaging city property because it isn't state property. We couldn't prosecute him for disturbing the peace because we don't have such an animal.

Q You mean at the state level?

A At the state level. So, the prosecution had to be in two separate courts if it was going to be at all.

Now, somebody decided to prosecute him in the city court for these two violations; I assume the City Prosecutor. The County Prosecutor decided for one or another reason, that he did not want to move against this man on the misdemeanor charges in the County Court or the County Judges Court. Now, that was his option and he exercised that; and that's not here, except to demonstrate that somebody decided they didn't want to move against him.

Now, I don't know what lesser included has to do with it. I don't see that disturbing the peace or destroying this city property was a lesser included offense of grand larceny. And I don't understand that the law in Florida says that you can commit grand larceny by destroying property. Now, it may; I may stand corrected; but I don't believe that that's the law in Florida, no matter what the SEcond District Court says.

Now, when this painting was taken off the wall, either because it was offensive or for any other reason, he then violated for the first time, the state law. Now, we're told that this can't be so because the separate sovereign theory that may have been the predicate for what you said in Bartkus and Abbate, can't prevail here, since the cities can't exist without the express provision of the state legislature which creates them.

Q What point in time do you say the state offense began?

A I would say the minute they ripped it off the wall and carried it away and meant to keep it from the property of the --

Q Had any other offense been committed against any sovereign, in your view, before they began to tear it off from the wall?

A Certainly breach of the peace; that seems to be the first one.

Q What was the breach; what were the facts constituting the breach of peace before they began to tear it off from the wall?

A Would you believe it, Mr. Justice, I can't tell you because there is no record here of it. What went on in the city court was not made a matterof record. I was not there; I had no hand in it; I don't function at that level

and Mr. Levinson did not either. I think the affidavit simply says that the same or similar evidence was adduced at both hearings.

Now, I cannot tell you and it's simply because I do not know what physical events took place. The gathering and don't let me amplify -- but the storming of the city hall to get this mural off the wall. I would assume that constituted the breach of the peace. That would have been number one.

Number two: the destruction of the city property would have been: (1) pulling it off the wall, destroying the adhesive which was on there and the attendant plaster that may have fallen off and destruction to the wall on which it was attached. Then when they carried it off; the larceny.

So, I would assume now that that ran it 1, 2, 3 in approximately that order.

Q What was the offense of damaging the wall? Let's assume that the breakingof the bond and the adhesion, substantial damage to the wall, for the moment.

A Chipped the plaster off of the wall.

Q Was that --

A And damaged the painting.

Q Was that, in your view, the damage to the well, an offense against the municipality or an offense against the State of Florida?

A That would have had to have been against the municipality; it was their property.

Q Could the State of Florida prosecute it?

A No, sir.

Q So that we rule that out. That falls, if it falls anywhere, under the local offense.

A Yes, sir; of course, that's not here before you. That's the two that they are not complaining about.

Q I'm trying to find the two separate offenses.

A Yes. Now, on the breach of thepeace there isn't any such animal.

Q That's the state?

A That's right. Or disturbing the peace, I think they call it. I'm not sure what the exact nomenclature is.

Q Do you have a state statute against malicious destruction of property?

A Not city property.

Q Do you have a state statute which makes it a crime to maliciously destroy property?

A I am sure there are several, Mr. Justice. I can't recall them offhand, but I am sure there are several involving both private and public.

Q So that when they damaged that wall there was a violation of state law?

A No, sir; the state has no ownership or interest in the city hall in St. Petersburg; it belongs to the city.

Q Well, if you maliciously destroy a person's private property isn't that a violation of state law?

A Yes, sir; in Florida.

Q And it would be the same with the city; wouldn't it?

A No, I don't think so, because --

Q Or it's because you accept the sovereignty bit -- is that your reason?

A Yes, sir.

Q I see.

A Now, see --

Q Mr. Georgieff, may I ask: The affidavit to whih you referred, is this Mr. Waller's affidavit at Pages 15 and 16?

A I take it it's the only one in the --

Q I gather this was executed before the trail on grand larceny; was it not?

A I think so.

Q And is the paragraph to which you refer, Paragraph 6: "To the best of my knowledge and belief, the direct information of grand larceny is based solely upon allegations that I engaged in the identical conduct alleged in the prosecution in this court."

We don't know, do we -- or is there not an affidavit anywhere that -- I guess we have a record of the trial proceedings in the grand larceny trial.

A That's on the state charge; you do have that, But you have no record whatsoever --

Q No, but do we have any representation that what we have here as having been offered as evidence on the grand larceny charge is the same evidence that was offered on the -- in the municipal court.

A We haven't.

Q You do not have that evidence?

A No, sir.

Q Suppose he had been tried in the city hall -- in the city for larceny, for taking that away. Then could he have been tried in the state for thesame offense?

A Under the separate sovereign theory; yes, he could, Your Honor.

Q So, that's the really the basis --

A That's one of them. I'd prefer that you didn't make me hang it on just that one. But if I have to; yes, it is.

Q Of course, the city is subordinate to the state.

A Just as the states are to the Federal in my view.

Q No, not "just as".

A Similarly.

Q You are not suggesting, Mr. Georgieff, are you, that the rationale of Abbate and particularly Abbate -- not so much Bartkus, that the rationale of Abbate applies the relationship of a municipality to a state?

A Well, I'm not sure I quite understand your question.

Q Well, I gather what we got within Abbate was a question of the relationship between the Federal Government and a state government and in prosecutions for the same conduct. Do you think that Abbate is any support for your two sovereignties theory?

A Yes, sir; and I'll tell you why. In Florida -- I don't know whehter it's true in any other state, but I can tell you affirmatively that in Florida that when a city is structured -- now, some of them come into being from time to time. Most of them are already there. But, periodically they exercise the option of drafting their own ordinances or adopting by one ordinance all of he laws of the state as their own in ordinance form, you see.

Now, if they do the latter they are required to don one thing in addition thereto. They may not adopt the sentencing; they must adopt their own sentences for violations of criminal laws that they adopt as their own one ordinance. Whereas, if they take a separate position and adopt individual

ordinances by adopting a code of their own and they set whatever they like up. So, there is a difference when they take this or that course.

Now, obviously, if they adopt and there are just a handful of them that have --

Q But I still don't understand how all this suggests that the rationale of Abbate applies to that ratio.

A Well, I don't see why it doesn't. They are creatures -- they are not an arm of the state. They don't function as we tell them to; they simply exist because we allowed them to have --

Q And then the state could take that away from them.

A Oh, yes; tomorrow.

Q Could the Congress take away the sovereignty of a state?

A No, but I would imagine that before the Congress would allow Puerto Rico in, a certain number of things would have to follow.

Q Well, no. Abbate dealt with whether or not a state and the Federal Government could prosecute the same conduct with offenses against each.

A I think that's meaningless in this argument today because he's told you that if you got all three of these in one part he wouldn't be here complaining about it.

And that is what he said.

Q Yes, I know.

A He says under compulsory joinder if you were to move against Mr. Waller on all three of these in one court then there wouldn't be any question of jeopardy and we wouldn't even be here.

So, you cannot have the best of both worlds; you've got to have it one way or the other. To Mr. Waller, I would imagine it makes no difference whatsoever that he sits in jail under one theory or the other. If it's jeopardy it is; and if it isn't; it isn't.

Q Makes quite a difference to him as to whether he sits there once in jail or twice in jail for the same offense.

A I am sure of that. But I don't quarrel about the idea that if it is jeopardy it ought to be put aside. I say if it isn't jeopardy, it isn't made jeopardy by the fact that it was done in a different court.

Now, we were told that the fact that this is a part of the same transaction, it is one open situation with nobody hiding or stealthily doing this, that or the other.

Well, it seems to me that if that's the rule, then what we wind up with is: if you hold an audience -- call an audience before you commit your crime, then that's a defense to the crime of larceny. But I don't understand it that way.

And Counsel tell us about compulsory joinder. Whose compulsory joinder? I don't know what that is. There is no such creature; not in existence in Florida today. Now, he may have asked for it, although the record doesn't even reflect that he did that.

The point is: how can we complain about they should have been brought in the same court? The point is he didn't ask whether they were not and structually, Florida couldn't have moved against him in one court for these three offenses.

Now, the question of Benton. We're told about Benton doing this, that and the other thing. I don't pretend to tell you, Mr. Justice Marshall, what you meant in Benton. All I'll tell you is that it gives a complaining citizen another reason to complain about jeopardy; that's all it does. Very much the same as Mapp did on search and seizure and Gideon did as to Counsel.

Now, Benton didn't change anything. It simply says that hereafter it will be a Federally-assured right under which people can complain when they think they have been placed in jeopardy twice, for the same offense; not for the same course of conduct.

Now, if you want to restructure the word "offense" to make it mean same course of conduct, that's one thing. But if you are going to stick to offense that's what has to be done and it is simply not the same offense. It is a series of

acts, each one of which constituted a separate offense: two against one sovereign; one against another. It doesn't complain about the 180 day sentence which was imposed on the city complaint, but only complains about the grand larceny charge which didn't include the other two.

And as far as I am concerned, the question of double jeopardy does not come up, period.

The question of collateral estoppel doesn't become collateral estoppel simply because we decide we're going to make it something other than offense. Well, in collateral estoppel you have to have an acquittal in order to have some adjudication of some question that's going to be involved in the other situation. And that they didn't have here. So, I submit that collateral estoppel can't apply.

Now, I'll give you a good hypothetical. How about the man who kills two people in let's say, a span of four or five minutes in an automobile. He pleads insanity when he's charged with the killing of the first one and the jury acquits him. Then the state seeks to try him on the second one and he moves to prohibit them by saying: "Well, look here, you acquitted me and it must have been obvious that you did so because you found me insane and therefore, considering this minute span of time it's absurd to say, well I could have been insane at this time; wasn't with the second one,"but the question is: suppose the jury had found him guilty? Is it

just possible that somebody would suggest that he's precluded from raising the defense of insanity on the second go-round because the verdict of guilty precluded that.

No, it does not. And we don't have mutuality here. Weren't the same issues; weren't the same sovereigns; weren't the same victims.

City the victim in the first; state the victim in the second. Same defendant, admittedly; covered a short span of time, admittedly.

But not the same facts; no mutuality; no collateral estoppel.

The question of whether the presentence investigation report should have been made public, I don't know how much of a role that plays in this. I suspect probably not a great deal. But if you recall, under the Federal rules, Federal District Judges are free to make them available to counsel or not, as it happens to suit them.

Now, I think it's clear that if they decide not to give this information to defense counsel, and so exercise their discretion that it's not reversible, ever. I submit that in Florida, though some courts have been heard to do this, it is the rule in Florida that they are secret and are not to be made available to counsel, but only available to the Court for such information as they may take from it.

IF it isn't a violation of law for the Federal Courts

not to make these availble on a discretionary basis, then how can it be for the state court to give it to counsel in this instance. It's the same PSI report; it's very much the same as what we do with a confidential informant. We don't allow the man to be bedeviled by people who may want to challenge him; what the informants may say about/the neighbors and one thing and another.

Counsel says to you, "We want to have the opportunity to check this to see if heresay comes up; to see if inaccuracies are there." The only way he can do that is to go to the people whose names appear in the PSI and tell them: "Look, why did you say this?" And, "your're wrong," this, that and the other. "You must come in and you must correct it," and will harrass them and you dry up the wellspring.

But beyond that, this doesn't go to the man's guilt or innocence. In Florida the PSI has no function whatsoever unless and until a guilty verdict is found. When it is found there is an adjudication; then the judge orders a presentence report and he usually uses this as a predicate for whatever sentence he invokes. And if the sentence is one that is well within the limits prescribed by law and this one is -- six months to five years -- then the sentence inFlorida is not reviewable. That is the law in Florida. They will not review a sentence if it's within the limits prescribed by law. And this one was six months to five years; well within it. The

PSI couldn't have made any difference whether --

Q How much did you say this one was?

A Six months to five years, sir. All sentences now in Florida for anything less than capital, must be predicated on a six months minimum and that is to say, believe it or not, that in six months and one day conceivably a man could be turned loose on parole, but not before six months.

All sentences that can be given a year's sentence, must have a six months minimum and the maximum can go to any number of years less than life.

Now, life and of course, a terminal sentence isn't subject to that.

Q Was that sentence appealed, this larceny sentence?

A I didn't hear you, sir.

Q Was the larceny sentence appealed?

A Oh, yes.

Q And in the State Supreme Court of Florida?

A It did not go to the Supreme Court. It went to the District Court and the certiorari was brought here to that District Court, the Intermediate Appellate Court.

Q And they affirmed?

A Yes, sir.

Now, as I say, now, they affirm the judgment. They don't affirm sentences, Your Honor. I guess what I want to make clear is that they don't review convictions and judgments,

but they won't review sentences unless the sentence is patently in excess of that provided by law. All they will look to is to see whether it's within the limits prescribed and if it is they won't disturb it as being excessive or otherwise.

Q Now, was this question of the making available tothe defendant the presentence investigation report, an error that was -- a claimed error that was brought to the attention of the District Court?

A Yes, it was, sir.

Q Because I don't believe there is any mention of it in their opinion, is there?

A Well, there often are not.

Q Well, understand that. There is a catchall in the next to last paragraph that we determined the other --

A I submit it's included in that, but quite often even when they -- I would assume when they don't want to particularly say anything about it, then they include it in a phrase such as that, but it was brought to their attention, and made a part of their complaint. As a matter of fact, I think there were some eight points involved in the appeal to the District Court.

But in any case, it's our position very simply: whether you view it under Bartkus or Abbate, with or without Benton it doesn't make any difference. You can't have

jeopardy here because you have the same offense; not because the sovereigns are different but because the act is different. One constitutes an offense against the municipality; the other one is a separate felony; not an offense against a municipality. I would say the same if it had been in the county court where we don't have the question about the sovereignty. It doesn't make any difference.

I say that you have to have the same offense unless you mean to restructure double jeopardy, to make it the same course of conduct. And if you are not going to do that, if you mean to have double jeopardy stand as the Florida constitution and the Federal Constitution proscribe it, then we're talking about the same offense, or as it used to be said, "crime."

Q Did I understand you earlier to day that the state crime occurred when they ripped this mural off the wall?

A And carried it off.

Q When did the city crime of destroying city property start?

A Damages, I think it was.

Q Well, when did that start?

A When they started to ear it off; the plaster came off, the adhesive and --

Q So, they both started -- both crimes started at

the exact same time involving the exact same instance.

A For a point; yes, they did.

Q And did they end at the same time?

A No, sir.

Q Well, when did the city crime end?

A After it came off the wall. Then they carted it off.

Q That's when the city crime ended.

A Yes, I would assume so; oh, yes.

Q And then they carted it off; how far did they take it?

A Hmm. I'm hard put to be accurate about that. Not too far. A few minutes.

Q A few minutes?

A Perhaps five or ten minutes.

Q Well, five or ten minutes.

A I'm not that --

Q So,that's the only difference between the facts of the two crimes?

A I'm afraid if I say yes tothat I'll agree that it's so minute that it isn't worth any discussion. I will agree that there is that difference, but the difference is vast when we steal that which we damage. Now, you can damage it without stealing it.

Q Well, I understood that your District Court

said that the crime is in the damaging. That's what made it larceny.

A Well, it was also inthe carrying away, if Your Honor please.

Q Do you emphasis on the damages; am I right?

A That they did.

Q So, we've got two damages?

A Now, the mural was damaged and was recovered in a damaged condition, aside from the fact that it was carried off. But the damage that the city complained about and was made actionable against Waller wasthe damage to the structure from which it was taken; a different kind. Perhaps minute, but nevertheless different.

Q Does the record show whether they put it back?

A Do you mean did the city ever put the mural back? That I do not know, sir. I have not been down there and I don't know and I have not heard.

Perhaps Mr. Levinson can tell you; I don't know. In any case, I say very simply: I don't care whether we view it with or without Benton. I'm not relying on the separate sovereign to the exclusion of everything else. I said that separate acts occurred. I prefer to call them crimes but the word used is "offense."

Now, if you can show acquit or convict, he's in business and we all know it; there's no use kidding ourselves.

But you can't do that. He's saying, "Because I did three things in a short interval what you should do is now extend the protection of double jeopardy to me." And I say, unless you want to redo it you ought not to and you ought to affirm the action of the District Court.

Q My problem with your argument, Mr. Georgeiff, is that the District Court of Appeals did seem, as I read their Opinion, beginning on Page 52-A of the Appendix, did seem to rely exclusively upon this so-called two sovereignty theory. Because they said, among other things: "This information was based on the same acts of the Appellant as were involved in the violation of the two city ordinances."

And then they say: "Assuming but not holding that the violation to the municipal ordinances were included offense of the crime of grand larceny. The Appellant, nevertheless, is not placed and put in jeopardy because" -- and they then go along and talk about your so-called two sovereignty rule. And they base their decision, as I read this, exclusively upon that ground.

Am I mistaken in reading that?

A Well, no, your're not and that's a painful reminder. I don't know whether _____ is preferable or _____; I can't tell you where to go to. However, that outcome was correct, even though their reason was wrong. And I don't know how much of this will get back to them, but in any

case, that's my problem. I don't care what they said. My sins are enough for me to pay for. The point is if they reached the proper result I don't care that they gave the wrong reasons.

My contention is that the acts or offenses or crimes, if you want to call them that, were separate and distinct; and that they gave a wrong reason, is to me, relatively unimportant. You're not bound by what they say. You never have been in the past and I don't suspect you will in the future.

Q Well, the offense against the State of Florida could not begin until that mural was off of the wall.

A That is correct.

Q Because it was the carrying away.

A That is correct.

Q The damage began as soon as the tearing commenced, so that they did not commence at the same time.

A WEll, as I said to Mr. Justice Harlan, Mr. Chief Justice, I don't like to concede to something when it's so minute that I may go in the tank without knowing about it. It's a little difficult to find when one stopped and the other began. They couldn't carry itaway until they got it off the wall, so there is a difference. I don't know how much and nobody seemed to remember those particulars, since we don't have the record in the municipal prosecution.

Q That's a real problem that we don't have that record.

A That's right, sir. And I wish as much as Mr. Levinson and the Court that it was here, but it is not and I don't know how to restructure that.

It's our position in the face of the matter put to you today that the action of the District Court below, even if for the wrong reasons, should be affirmed today.

MR. CHIEF JUSTICE BURGER: Mr. Levinson, you have five minutes.

REBUTTAL ARGUMENT BY LESLIE HAROLD LEVINSON, ESQ.

ON BEHALF OF PETITIONER

MR. LEVINSON: Mr. Chief Justice, just a word about this question of larceny by destruction. In order to establish the crime of larceny the state has to prove, amongst other things, there is intent.

Now, as I understand Florida law, felonious intent can include either by an act of taking away to conceal the property, or in Florida, felonious intent can be established either by destruction or by exposing the property to an unreasonable risk of destruction.

Since the taking took place in broad daylight in the presence of public officials and police officers, we contend that there is no evidence before the jury which suggested a finding of felonious intent based on an intent to conceal.

That was impossible under the circumstances.

And so, since the jury found him guilty, the only possible basis of a finding of guilt must have been on the other branch of felonious intent, that is to say, under the structure of creating the unreasonable risk of destruction of the property

Q How about tearing it off?

A Tearing it off can only be the ingredients of larceny if it's carried off with felonious intent and the presence of police officers negates the possibility of felonious intent on the evidence presented by the state.

Q You are making it diffficult to prove a bank robbery where you have a lot of armed guards around.

A Well, the circumstances of a bank robbery make it obvious the robbers intend if they can, to get away with the haul. But circumstances of this case make it obvious that the Petitioner had no intention of keeping the mural. He wanted to --

Q I have a little difficulty with that.

Q Well, you said that had some intention to take it away; didn't they?

A They had an intention to take it away for the purpose of carrying it in a demonstration.

Q Did they demonstrate with it?

A They walked a few city blocks with it in the

presence of a long line of people.

Q Did they put it back up?

A The police recovered it and I believe the city authorities still have it in custody, possibly --

Q Did they put it back up on the wall?

A No, sir; they're holding it without --

Q You mean they have been without that all this time?

A Yes.

Q How long has that been?

A Three years. But the mural was in the custody of the city, even though not on the wall of the city hall.

Now, we believe it is possible for this Court to resolve the issues of the identity of the proofs without the necessity of a remand to the Florida Courts. Obviously, if this Court finds itself unable to resolve the will be a tough one to send back to Florida.

I would take the liberty of correcting the Attorney General, his comment that the state is unable to prosecute for the destruction of city property. Our Appendix on Pages 6 and 12 presents certain state statutes which do make it a misdemeanor and one of the three misdemeanors which was filed and dropped, specifically referred to the destruction or damaging of city property. And this is set forth on Pages 6 and 12 of the Appendix. In fact, the state has an ample arsenal of

statutes for whatever comes up that violates the city ordinance can pretty well be assured of having a counterpart in the state statutes. The state has shown itself resourceful, indeed in finding statutes even to the point of violating the constitution and having their vagrancy law reversed by a Federal Court recently.

So, I believe that if we require the state to have a single trial of all the complaints against an individual prosecutors can't find in their discretion, adequate statutory basis for bringing whatever charges are appropriate.

And Mr. Georgieff states that we would be quite prepared to have our Petitioner tried and sentenced for all of his offenses in one trial. This is not quite so. We certainly want only one trial. In that trial the state could bring whatever complaints it might want to. We might then argue that it would be unnecessary overlapping between the complaints. While under the rule of the Heflin case, which holds that the legislation willnot be presumed to intend multiple punishments arising of the single act, unless the language of the statute clearly states multiple punishments are called for.

Just to summarize the double jeopardy argument so that I can spend about one minute on the important issue of pre-sentence reports.

We believe there are two bases, either one of which

will support our argument on the double jeopardy claim. One is compulsory joinder. We assert as a rule of constitutional dimensions that the state should have only one trial of a defendant on the basis of a single act or course of conduct.

There may be exceptions tothis rule. For example, if a victim of assault dies after trial we could say that this will give rise to exception to the compulsory joinder rule.

Or if the first trial was a sham.

But, in order to clarify the law of double jeopardy, those who include within it the common-law tradition, we submit that compulsory joinder should be the presumption and that any exception to these should be justified by the state.

MR. CHIEF JUSTICE BURGER: Your time is up, Mr. Levinson. We'll take care of the points on the proofs. Thank you for your submissions. The case is submitted.

(Whereupon, at 2:30 o'clock p.m. the argument in the above-entitled matter was concluded)