In the

Supreme Court of the United States

SAMUEL ED ROBINSON,

Petitioner,

v. No. 71-6272

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,

Respondent.

Washington, D.C.
December 6, 1972

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SAMUEL ED ROBINSON, Petitioner	:	
v.	:	No. 71-6272
WILLIAM S. NEIL, Warden, Tennessee State Penitentiary, Respondent	:	

Washington, D. C.

Wednesday, December 6, 1972

The above-entitled matter came on for argument at 1:57 o'clock p.m.

BEFORE:

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

APPEARANCES:

JAMES D. ROBINSON, ESQ., Goins, Gammon, Baker & Robinson, 700 Hamilton National Bank Bldg. Chattanooga, Tennessee 37402, for the Petitioner.

BART C. DURHAM, III, ESQ., Assistant Attorney General, 211 Supreme Court Building Nashville, Tennessee 37219, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-6272, Robinson against Neil.

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

ORAL ARGUMENT OF JAMES D. ROBINSON, ESQ.

ON BEHALF OF THE PETITIONER

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

Mr. Jerry Summers is here with me as co-counsel on behalf of the petitioner in this case.

The sole issue involved in this case is whether the decision of Waller v. Florida decided by this Court in 1970 declaring an end to the "dual sovereignty" theory with respect to criminal prosecutions by the states, should be accorded retroactive application.

With the Court's indulgence, I would like to briefly review the history of this case.

The petitioner was tried and convicted of assault and battery in the City Court of Chattanooga, Tennessee, in three cases receiving a $50 fine on each. He was later indicted by the Grand Jury of Hamilton County, Tennessee, in three cases of assult with intent to commit murder. The occurrences giving rise to the indictments were the same as the city cases.

The petitioner in the State cases entered pleas of

guilty and received sentences of 10 years, 3 to 10 years, and 3 to 5 years running consecutively. The petitioner is now in custody of respondent Warden, pursuant to the sentences imposed in the Criminal Court of Hamilton County, Tennessee.

In 1966, the petitioner filed a petition for writ of habeas corpus in the Criminal Court of Davidson County, Tennessee, contending double jeopardy. The petition was denied, and on appeal the Supreme Court of Tennessee affirmed. Thereafter, the petitioner filed a petition for a writ of habeas corpus in the United States District Court in Chattanooga contending double jeopardy. This petition was denied in June 1967. On appeal the Sixth Circuit Court of Appeals affirmed in April of 1968.

In April 1970, following Waller v. Florida, the petitioner filed a petition for writ of habeas corpus contending again double jeopardy. This petition for writ of habeas corpus was filed in the U.S. District Court again in Chattanooga. The petition was sustained by the U.S. District Court and the respondent appealed to the Sixth Circuit Court of Appeals and the decision of the District Court was reversed.

QUESTION: Mr. Robinson, do I understand there were four years between the first conviction and his complaint of double jeopardy?

MR. ROBINSON: Yes, your Honor, that's approximately --

QUESTION: Do you know why he waited so long?

MR. ROBINSON: Your Honor, I did not represent the petitioner at that time. I am unaware of why there would be the delay between his conviction and the first petition for habeas corpus in the State of Tennessee.

QUESTION: Is that a usual, ordinary event in your courts, such a time lapse?

MR. ROBINSON: Your Honor, I don't really know how to answer that because it would vary from case to case. It would depend perhaps on the circumstances, the attorney representing the defendant. We do have, of course, access to law resources in the state penitentiary at Nashville, and it could be that the defendant himself came in contact with this source or with other people there.

QUESTION: Where was he between the time of the conviction in the municipal court for assault and battery and got a $50 fine and the time when they indicted him on the State charge?

MR. ROBINSON: He was in custody, your Honor.

QUESTION: All the time.

MR. ROBINSON: Yes, your Honor.

QUESTION: No interruption.

MR. ROBINSON: No, your Honor.

QUESTION: That might explain why there was no hurry, I suppose, or at least why someone thought there was

no hurry, because he wasn't going anywhere.

MR. ROBINSON: Well, I believe -- perhaps I misunderstood Mr. Justice' question earlier. There was not a very big time lapse between the trial in City Court and the trial in State Court, but there was a lapse of about 4 years between the conviction in State Court and his first petition for writ of habeas corpus in the State of Tennessee.

QUESTION: I see. I misunderstood your response.

MR. ROBINSON: It's our position on behalf of the petitioner that Waller v. Florida should be accorded retroactive application. We respectfully submit that this is more than an attack on the fairness of the trial. It is our position that the second trial, that is the trial in the State Court of Tennessee, was in violation of the Fifth Amendment prohibition against double jeopardy.

Insofar as a discussion of whether a principle laid down by this Court should be applied prospectively or retroactively, there are certain guidelines set out in the case by this Court of Linkletter v. Walker in 1965.

QUESTION: Now, this question only arises on the assumption that the crime was the same in the two cases.

MR. ROBINSON: Yes, your Honor.

QUESTION: Is there any dispute about that?

MR. ROBINSON: I don't believe there is.

QUESTION: I thought you had to prove some element

in the second case you didn't in the first.

MR. ROBINSON: No, your Honor. We touched upon this in our brief, because this was a point of contention in the lower courts. But this point is conceded by the respondent that the occurrences giving rise to both the City Court --

QUESTION: Maybe it's conceded by him. What about the fact -- is there some element in the crime that was charged second, was it necessary to prove something that it wasn't necessary to have proved in the first trial?

MR. ROBINSON: Yes, your Honor, there would be. In the City Court, the charges were simple assault and battery.

QUESTION: Yes.

MR. ROBINSON: And in the State court, they were aggravated assult with intent.

QUESTION: All right. Now, is that double jeopardy?

MR. ROBINSON: Your Honor, we submit that it is because it arises out of the same transaction.

QUESTION: All right, but you have to claim double jeopardy on that basis rather than the identity of the crime.

MR. ROBINSON: Yes, your Honor.

QUESTION: Now, have five Justices in this Court ever taken the transactional approach to double jeopardy?

MR. ROBINSON: Your Honor, I am unable to answer that question.

QUESTION: Well, the answer is no. I wrote the

dissent supporting the transaction, and only two others ever concurred with me in that opinion. There were only two of my colleagues who ever joined me in that.

MR. ROBINSON: Yes, your Honor.

QUESTION: Well, let's assume that you are wrong in that, would you say if the transactional approach isn't taken, then the question is the identity of the crimes. Is it that there is double jeopardy involved if you have to prove an additional element at the second trial?

MR. ROBINSON: Your Honor, it's our position that it is since they spring from the same conduct, but not the same charges.

QUESTION: Now you are getting back to transactional again.

MR. ROBINSON: The essential elements would be at least identical insofar as the assault and battery is concerned.

QUESTION: The same evidence rule, however, calls for the application of double jeopardy doctrine only if the same evidence is required in the second as in the first trial.

MR. ROBINSON: Yes, sir. I think this case would satisfy that requirement.

QUESTION: There is a whole element in the second crime that is different from the first one -- intent. One is simple assault and one is something else.

MR. ROBINSON: We submit that the proof, though,

insofar as the two charges are concerned, assault and battery and that required in the intent would be identical.

QUESTION: When the judge instructed the jury in the second case, he was obliged presumably to instruct the jury that they had to find intent. How they found it would be another question, but that would be required, would it not, under Tennessee law?

MR. ROBINSON: Yes, your Honor. Well, in the State Court cases, there were pleas of guilty entered, so it did not reach that stage insofar as the trial is concerned.

QUESTION: But had it been tried, there would have been an instruction on the intent, I assume.

MR. ROBINSON: Yes, your Honor, that's correct.

QUESTION: The jury would have to make an affirmative finding on an element which was not involved in the $50 case.

MR. ROBINSON: Yes, sir, insofar as the intent only is concerned, it would be.

QUESTION: I suppose you could argue, Mr. Robinson, that if we are talking about the same evidence test that frequently no separate evidence is introduced on the element of intent. All it amounts to is an additional charge to the jury to find perhaps from the same evidence that was admitted in the trial that didn't involve intent there was this added element.

MR. ROBINSON: Yes, your Honor, that's exactly the case. I don't feel like there would be any need of additional proof introduced insofar as the showing of intent is concerned, because this would be a determination by the jury upon the instruction by the Court.

QUESTION: Apparently the United States District Court in this case and the Court of Appeals agreed with you because the Court of Appeals says the only question is the retroactivity of Waller.

MR. ROBINSON: Yes, your Honor.

QUESTION: And the District Court seems to go on the assumption that it was the same evidence, the same offense. So if there remains any question about that, should we decide that the District Court was -- in your favor on the retroactivity question, I suppose we would remand it for consideration by the courts below as to whether or not the offenses were identical. It's not for us to decide that question here, is it?

MR. ROBINSON: No, your Honor. There is one matter that I overlooked mentioning. That is the matter of assault and battery would be a lesser included offense in the charge of aggravated assault with intent to commit murder so far as the State charges are concerned.

QUESTION: That may be, but they weren't acquitted.

MR. ROBINSON: No, your Honor, they were found

guilty on a plea of guilty.

QUESTION: If he had been acquitted of an included lesser offence, maybe that's a different story in the double jeopardy. But here they were found guilty of simple assault first and then aggravated assault next.

QUESTION: They pleaded guilty.

MR. ROBINSON: They pleaded guilty in the State and were found guilty.

It's our position, of course, that the entire second trial is the matter that was in violation of the petitioner's constitutional guaranty under the Fifth Amendment. Insofar as the criteria this Court has laid down with regard to applying a new principle retroactive or prospectively, the three matters have been, one, the purpose of a new rule, and, two, the reliance on the old rule by law enforcement officials, and, three, the effect on administration of justice by retroactive application of the new rule.

A 1969 case of Benton v. Maryland, the double jeopardy clause of the Fifth Amendment was held applicable to the States by this Court through the Fourteenth Amendment. This decision was recognized as being retroactive in the cases of Ashe v. Swenson and Price v. Georgia.

With respect to the first criteria as to the purpose of the new rule, we submit that the purpose is self-evident to prevent two branches, a State and a city, of the same

government from trying a person twice in violation of the Fifth Amendment for the same occurrence.

So far as the second criteria is concerned, the reliance on the old rule by law enforcement officials, we submit that the 1907 case of Grafton v. U.S. wherein there was a prosecution by a court of the U.S. was held to be a bar to subsequent prosecution by territorial court since both are arms of the same sovereign, that this case is applicable and germane to the case under discussion insofar as the city prosecution and then later the State prosecution in the present case.

It has been recognized by the courts of Tennessee from the latter part of the nineteenth century that the city is but an arm of the State, and therefore is but one sovereign involved within the State of Tennessee, the city being but merely a subordinate part of it. And we submit that the State of Tennessee should not be permitted to justify the act in the past of trying persons both in City Court and later in State Court on reliance since the city had notice by judicial determination that the city was but a part of the State and there was just one sovereign within the State of Tennessee.

In the case of Reynolds v. Sims, a legislative reapportionment case by this Court in 1964, the Court held political subdivisions of States -- counties, cities, or whatever

-- never were and never have been considered as sovereign entities. Rather they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in carrying out of State government functions. The relationship of States to the Federal Government could hardly be less analogous. We submit that this is important insofar as the second point of Linkletter v. Walker is concerned, that with the combination of the Grafton v. U.S. case, the cases within the State of Tennessee recognizing the city was but an arm of the State, and in the Reynolds v. Sims case that there was no reasonable basis for reliance of the State of Tennessee on this rule separating city charges and then State charges because they are both part of the same sovereign.

Insofar as the third criteria of Linkletter v. Walker is concerned, that is, the effect on administration of justice of a retroactive application, the respondent has submitted letters and affidavits in regard to this phase. A review of these letters from ten States expressed the view that the Waller v. Florida decision would have little or no effect on the administration of justice in their State if it was given a retroactive application. Four States had insufficient data to make an evaluation. Seven States there was no response. It is significant there were only two States, Tennessee and Washington, expressing the opinion that a retroactive application

of Waller would have a substantial effect on administration of justice.

Insofar as the reply from the State of Washington is concerned, at page 61 of the appendix, it was stated that in the State of Washington a retroactive application of Waller v. Florida quite possibly could affect the administration of justice in that State.

So we submit that it essentially boils down to one State insofar as this material that was collected by the respondent and that even insofar as the State of Tennessee is concerned, there is only one county that would be affected by a retroactive application of Waller v. Florida. In the affidavit of Attorney General of Shelby County, Memphis, Tennessee, submitted by the respondent, Appendix page 22, it is stated that a retroactive application of Waller v. Florida would have but a minimal effect on felony cases. This affidavit further states that 15 percent of the then present misdemeanor cases would be affected by a retroactive application of Waller v. Florida. We feel like it's significant this affidavit is dated October 30, 1970, and under Tennessee law the maximum punishment for misdemeanor is 11 months and 29 days. So these people would certainly have served the time by now and it would have no effect so far as the misdemeanor cases are concerned.

We respectfully submit that a review of this data

submitted by the respondent would appear to limit any effect on the administration of justice to Chattanooga, Hamilton County, Tennessee, and there is some speculation contained insofar as this effect is concerned in the affidavits and other materials submitted in this regard.

Nonetheless, it would appear even other counties in Tennessee were not engaging in the unconstitutional act of trying a person in City Court and then in State Court, and that it would seem to boil down to a proposition of the City of Chattanooga using their ordinances and prosecutions in City Court as a revenue-raising device. We respectfully submit on behalf of the petitioner that Waller v. Florida should be afforded retroactive application and the judgment of the District Court should be reinstated and the judgment of the Court of Appeals be vacated and the petitioner be discharged from custody.

May it please the Court, we would like to reserve a few minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Durham.

ORAL ARGUMENT OF BART C. DURHAM, III, ESQ.

ON BEHALF OF RESPONDENT

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

With regard to the issue of transactional approach, the same evidence approach, of course, we didn't ask for

certiorari in this case. We were satisfied with the judgment of the Sixth Circuit, which only reached the retroactivity question.

QUESTION: Well, that's the only question brought in the Court of Appeals. That's the only question you brought to them, isn't it? That's what they say in their opinion.

MR. DURHAM: I think that is the only one they considered, your Honor.

QUESTION: That's the only one you brought to them. Am I wrong about that?

MR. DURHAM: I think you are perhaps correct. I wasn't counsel then.

QUESTION: That is what Judge Peck says in the opinion of the Court of Appeals.

MR. DURHAM: Yes.

QUESTION: I suppose you are free to support the judgment in this Court on any precisive ground, aren't you. whether it was raised in the court below or whether even if it was rejected in the court below.

MR. DURHAM: Yes, we are, your Honor.

QUESTION: What about this issue of double jeopardy?

MR. DURHAM: Well, I think it's a very profound question and I would have hardly expected the Court when it granted certiorari on retroactivity --

QUESTION: Well, nobody forces you to rely on that

ground if you don't want to.

MR. DURHAM: -- to have gone beyond that. I did in doing research trying to find out how other States have been affected by the Waller rule find that this happens quite frequently. I will give you two examples. A young man is brought in the juvenile court and some adjudication is made. Then he is tried as an adult. The burden of proof is different and so forth.

The most frequent example, however, are in your DWI cases. A person is arrested and charged in City Court with that. Perhaps he has hit someone --

QUESTION: Driving while intoxicated.

MR. DURHAM: -- and perhaps he has struck another vehicle, and then the victim dies and there are a number of cases that the Supreme Court of Florida, I believe, and other States have decided since this Court's opinion in Waller which say that even though you bring a man in the City Court and convict him of driving while intoxicated, you are not thereafter barred to a trial of murder or homicide if the person he hit while he was drunk later dies.

So it is a very profound argument, and frankly I wasn't prepared to really stress that. But if the Court wants to adopt that --

QUESTION: I don't know anything about what proof it takes for these two offenses in your State. No one gives

us any authority. How can we do other than if it's still an open issue, send it back for a 3-judge court to look into it? Certainly we aren't competent here to do it, are we?

MR. DURHAM: No, sir. The two offenses are assault and battery. We all know where assault and battery is. The other offense is assault and battery with intent to commit first-degree murder. And first degree murder is lying in wait, committing the act by poison. And the reason they have the intent on there, of course, is that the victim didn't die.

QUESTION: Your State Court should look at them.

MR. DURHAM: Well, I am sure your Honors know --

QUESTION: No, I don't know what your Tennessee courts would do with them.

MR. DURHAM: Well, your Honors should take judicial notice of Tennessee law, and I know your Honors know that pure and simple assault does not include as an essential ingredient of the offense premeditation with intent to commit first degree murder.

QUESTION: Are these the same crimes then or not?

MR. DURHAM: Under the rationale as an alternate, no. Assault and battery is pushing someone, slapping him in the face. Assault with intent to commit first degree murder is where you commit first degree murder except your victim doesn't die.

QUESTION: The simple assault would be a lesser included offense in the other one, wouldn't it?

MR. DURHAM: I am not so sure.

QUESTION: I see. But even if it was -- if it was and there was an acquittal, there might be a real argument about double jeopardy there.

MR. DURHAM: Yes, sir.

QUESTION: But there was a conviction.

MR. DURHAM: Yes, sir, and guilty pleas in both cases. And that's not being challenged here.

I believe your Honors have a case, somebody against the United States, involving the less included offenses on the calendar this week or next week, and that's a very profound question.

There have been other people in Tennessee prosecuted to answer some of my adversary's points. The Douglas case, Douglas v. Nixon, is a Sixth Circuit case. That's a reported case which arose after Waller, and they followed Judge Peck's opinion. The District Attorney of Shelby County, Tennessee, where Memphis is located estimated that approximately 40 serious felonies in that county would be affected by this. That's on page 25 of the appendix. On page 21 of the appendix, Mr. Clyde Sanders who is the Clerk there in Chattanooga, says that 95 percent of all their cases they handle by bringing them first in the City Court and then take them over into

State Court.

QUESTION: Well, after Waller, that sort of a policy has got to be examined pretty carefully, don't you think?

MR. DURHAM: That policy stopped on April 6, 1970.

QUESTION: Is that the date of Waller?

MR. DURHAM: Yes, sir.

QUESTION: What problem would stem in that situation from the retroactive application of Waller that ought not to stem from it? I mean, like he did. You wouldn't say it had a serious impact on the administration of justice that people could no longer be tried once in the county court or once in the city court and then once in the state court since that is what Waller was designed to eliminate.

MR. DURHAM: Yes, sir.

QUESTION: What is the disadvantage to the administration of justice that would result from applying it retroactive?

MR. DURHAM: In terms of the number of people who would be affected, if this Court heard argument in December of this year and decided the case normally sometime in 1973, there wouldn't be a great deal of people probably affected. I said 40 from Shelby County. That's one county in Tennessee. And Judge Peck in the Sixth Circuit said possibly 9 of 23 States had some.

But the important thing is the continuing argument that keeps arising about the retroactivity of decisions of

this court. And it's a philosophical question of is this the proper category case to deny retroactivity? And we believe it is.

QUESTION: Well, at this late date, isn't it rather difficult to generalize about that problem? Don't you have to deal with that on a case-by-case basis, depending on the subject matter?

MR. DURHAM: Yes, sir. In fact, we can do that here. We are always aware, of course, that it affects hundreds of people other than the litigant. But in the instance here, for example, this particular man Robinson, he entered a plea of guilty in City Court in 1962, he entered a plea of guilty in State Court in 1962. In 1966 he filed a State habeas proceeding which was unsuccessful. In 1967 he filed a Federal habeas proceeding which was unsuccessful, based on the double jeopardy, trying to anticipate the Waller rule. The Sixth Circuit affirmed him in 1968. Then Benton was decided in 1969 and Waller in 1970.

So he has to go back and, of course, take advantage of Waller. Our job is to try to convince your Honors that the tests you gave for determining retroactivity are good ones and that they should be applied here.

QUESTION: Why should this one not be retroactive -- why should Waller not be retroactive if Benton was held retroactive?

MR. DURHAM: Very simple, your Honor, the fact-finding process. Benton was a case in which a man was found not guilty of burglary, tried again and found guilty. There is a serious doubt about whether he is guilty. Ashe v. Swenson, another case where you call into play the guilt or innocense of the man. But here you have got all the criteria for not --

QUESTION: But the difference is whether or not the trial should have taken place at all or not. Now, how can you call the integrity of the process into more question than to say the trial should never have taken place at all?

MR. DURHAM: Well, in Benton, of course, we know by this Court's law that the second Benton trial should never have taken place.

QUESTION: And Benton was held retroactive.

MR. DURHAM: Yes, sir. Benton's retroactive. I suppose that the first trial of Mrs. Mapp should never have taken place. We know that all those cases that this Court has held not to be retroactive should never have taken place. So it seems to me that would be begging the question.

QUESTION: But I don't think that necessarily is a good answer on Mapp and on the other procedural type issues. They shouldn't have been tried in the manner that they were, but presumably the State was entitled to try them had it just conformed with the procedural constitutional requirements that were enunciated in these later decisions. I think the

point Justice White is making is that here there never even should have been a second trial at all.

MR. DURHAM: Well, all we can say is that one United States District Judge two years later told us that's fine, three Sixth Circuit judges told us that's fine. And I'm presuming this Court had been denying certiorari since Grafton in 1907 on the same question until finally the rule was changed in Waller.

To me I see a very big difference and it's important. on questions which affect the truth-finding function. Nobody wants to see Benton tried and acquitted by a jury of 12 people in the State of Maryland and then tried again and found guilty. But who wants to let a man loose who pleads guilty to assault and battery on three counts, three people, and gets a $50 fine and a 25-year sentence, 9 to 25 years, and then get immunity back, when the sovereign states (inaudible) good constitutional law? I can see a profound difference, if your Honor please, between the fact-finding function and other purposes.

QUESTION: Well, you say the harm to the administration of justice here is that the man is tried perhaps substantially for the same offense but gets widely differing sentences, serves the smaller of the two, and then as you say claims immunity from the greater.

MR. DURHAM: Yes, sir. It's just as wrong, I

suppose, to the body politic to allow him pay a $50 fine in three instances of lying in wait with intent to kill as it would be to punish him any other way.

In Linkletter v. Walker and the other cases on retroactivity, this Court said we are going to talk about the purpose of the rule, the reliance by the States on the rule, and the effect on the administration of justice of the rule.

Now, the purpose of this rule wasn't to give a windfall, and Desist said the purpose was the most important thing. Now, the purpose of your Honors' opinion in Waller v. Florida wasn't to give a windfall to the people who had been brought in the municipal court, the purpose was to conform, to get the sovereign states to conform their practices to Federal constitutional law. And we all know that our laws are evolving. We all know that we must have nonretroactivity. Else there would be this tremendous pressure on this Court not to come out with decisions that are in keeping with the evolving law.

I want to make one other observation. Judge Peck of the Sixth Circuit pointed out that the retroactivity of a case in no way turns on the value of the constitutional guaranty. The Fifth Amendment is like our jury trial, it's a sacred, hallowed right. But the Benton situation is so different from the Waller situation that, as this Court said in the Johnson case, we don't look at what number the amendment

is, we look at how the amendment is being applied in the facts of that case.

Judge Peck wrote in the Michigan Law Review some of the rationale for the successive municipal-state prosecutions. He said municipal offenses have historically been considered to be too petty to bring into panoply the full constitutional play. And that's true. You read the opinions of this Court in the writ.

And then the second thing he mentioned was that the State interests are different from the municipal interests. The city of Chattanooga really didn't have -- counsel has suggested that they use this as a revenue-raising measure. But they don't have a District Attorney for the city of Chattanooga. I don't know many cities that do in a county system. It's a State prosecutor. And he's the law enforcement official of the county. Speeding tickets and municipal offenses are held in an entirely different atmosphere and in a different context.

Now, I have found other instances, going back -- the first thing was the purpose. The first criteria was the purpose, the reliance, and the effect on the administration of justice. This Court has said the purpose is the big thing. And I have talked about the purpose was to get the States in compliance. It wasn't to punish the States, if you want to use that term, for past mistakes. It's to get the States

into conformity with what we think are now proper constitutional procedures.

Secondly, the reliance issue. I don't know how much stronger it could be, because just by coincidence, as I pointed out earlier, the Robinson case had gone up on the same double jeopardy question in the District Court and the Sixth Circuit just two years before and had been affirmed.

And the third aspect is the effect on the administration of justice. I don't think we take a head count of the number of people who would be released or not released. I think we go into the broader area of does this fit within the standard accepted criteria that we have used in other nonretroactivity cases. If it does, we deny retroactivity, because we want to be uniform and consistent. If it doesn't, of course, we do grant retroactivity. Of course, we submit that it does.

Thank you.

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

Mr. Robinson, you have a few minutes left.

REBUTTAL ARGUMENT OF JAMES D. ROBINSON, ESQ.

ON BEHALF OF THE PETITIONER

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

My adversary made reference to the first petition for habeas corpus that went to the Federal District Court

and then the Sixth Circuit Court of Appeals being affirmed. I would submit at that time as the law existed, the double jeopardy provision of the Fifth Amendment had not been made applicable by this Court to the States by reason of the Fourteenth Amendment, and I feel like that was the basis that the petition for habeas corpus was denied at that time.

This was changed in this particular instance, of course, in Benton and then later in this particular matter that we have, of course, here today in the Waller case.

We would submit that insofar as the purpose is concerned which is the first criteria mentioned by the Court in Linkletter v. Walker that the purpose really that would appear to be in Waller was to prevent a person from being subjected to trial in a City Court within a State and then a later trial by State Court within the same State on the basis that this is one sovereign, and it's not two sovereigns.

QUESTION: Well, let's check this in a practical context. Suppose a man is charged with reckless driving, speeding, in connection with a contact accident, and he is found guilty, and pleads guilty, in the City Court. And then it develops that someone in the car that he struck dies as a result of injuries. In your view would that bar prosecution by the State for manslaughter?

MR. ROBINSON: No, your Honor, it would not, because of the transactional approach. The reckless driving would be

a separate offense from the offense of murder or what the charge might be insofar as death is concerned.

QUESTION: Now, you have at least something of that here. Perhaps the issue isn't before us, as Justice Stewart pointed out. Only retroactivity of Waller was decided. But on the merits, when you have the very serious factor, the element of intent to kill, you have a very substantially different crime, do you not?

MR. ROBINSON: Your Honor, you do. But I still must get back to the premise that in Tennessee, aggravated assault with intent to commit murder includes assault and battery as a lesser included offense, and therefore under the transactional theory then these would be one --

QUESTION: Yes, the transactional theory is not the doctrine of this Court as of now.

MR. ROBINSON: But we submit that the two charges of assault and battery, assault with intent to commit murder are of the same nature, one is greater in degree perhaps because of the intent, but they all stem from the same basic charge. Proof is practically essential, there being only the element of intent in the latter. And this is often left to the jury to draw a conclusion from the evidence whether the intent is there.

QUESTION: I think someone asked your friend Durham, and I will put the same question to you: If the Court

concluded -- if this Court now should conclude that the Sixth Circuit was in error in holding Waller not retroactive, would the correct procedural solution be to send this case back and give the State an opportunity to deal with the case on the double jeopardy level?

MR. ROBINSON: Your Honor, we would ask the Court to vacate the holding of the Circuit Court of Appeals and grant release of this man on the basis of retroactive application of Waller v. Florida.

QUESTION: Would that court not have to consider whether Waller controls this case after it was determined that it was retroactive?

MR. ROBINSON: Your Honor, this didn't appear to be considered by the court below, and I didn't understand it to be a question. Perhaps my adversary and I both were in error on this particular point. I understood our appeal here to be only on the issue of retroactivity of Waller v. Florida.

QUESTION: Well, Justice White pointed out the State of Tennessee can undertake to support this judgment on any ground.

MR. ROBINSON: Yes, your Honor.

QUESTION: Even one not reached. But you wouldn't think we should reach the merits of any possible double jeopardy, then, would you?

MR. ROBINSON: No, your Honor. I would just hope

this Court would find Waller v. Florida retroactively applied and therefore release the petitioner from custody, or his release.

QUESTION: In Waller itself,in announcing the rule of Waller -- I just read it, there is a footnote as I now read it, that left the State of Florida free in that case to find that the two offenses in fact were not identical or at least some of them were not. It's just that Waller decided the legal principle.

MR. ROBINSON: Yes, your Honor.

QUESTION: And remanded the case to the courts of Florida where I suppose they were free in further proceedings to determine that in fact at least some of the offenses were not identical.

MR. ROBINSON: Yes, your Honor, that would have to be made by the lower courts, the determination on that.

QUESTION: Did the State in its return to the petition or anywhere up until now even question whether or not there was double jeopardy?

MR. ROBINSON: Your Honor, this was mentioned in the course of at least oral argument. I just cannot state whether it was in any of the written --

QUESTION: But you really can't say then that the State really waived the question.

MR. ROBINSON: Your Honor, I would say the question

has been discussed, but I couldn't say whether it has been waived or not. As I say, I was under the impression that we are here only on the sole question of retroactivity of Waller v. Florida, and I would suggest that if this Court saw fit to hold Waller v. Florida retroactive, then it could be sent back to a lower court for determination there in line with the Court's determination on that question.

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

Thank you, Mr. Durham.

The case is submitted.

[Whereupon, at 2:37 o'clock p.m., the case in the above-entitled matter was submitted.]