ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1330

TITLE MORRIS THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL., Petitioners v. BARRY JOE ROBERTS

PLACE Washington, D. C.

DATE April 23, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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MORRIS THIGPEN, COMMISSIONER, :
MISSISSIPPI DEPARTMENT OF :
CORRECTIONS, ET AL., :
Petitioners, :
v. : No. 82-1330
BARRY JOE ROBERTS :

- -x

Washington, D.C.
Monday, April 23, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:38 o'clock a.m.

APPEARANCES:

WILLIAM S. BOYD, III, ESQ., Special Assistant Attorney General, Jackson, Mississippi; on behalf of the petitioners.

RHESA H. BARKSDALE, ESQ., Jackson, Mississippi; as amicus curiae in support of judgment below.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Thigpen against Roberts.

Mr. Boyd, I think you may proceed when you are ready.

ORAL ARGUMENT OF WILLIAM S. BOYD, III, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BOYD: Mr. Chief Justice, and may it please the Court, the ultimate question which we are here about today is to resolve whether the respondent was denied his rights under the double jeopardy clause of the Fifth Amendment when he was indicted, tried, and convicted of manslaughter by culpable negligence.

Our discussion this morning will focus on three principal areas. The first is the appropriate federal or constitutional standard to be applied in this case. Two, that with the exception of the denial of post-conviction relief herein, which was without opinion, the Mississippi Supreme Court has never addressed the question of whether reckless driving is a lesser included offense of manslaughter by culpable negligence. And three, that both the District Court and the Fifth Circuit Court of Appeals has misconstrued the law of the state of Mississippi when they held that reckless driving was a lesser included offense.

QUESTION: Mr. Boyd, may I ask about the law of Mississippi? When did this death occur in relation to the time of the accident?

MR. BOYD: The death occurred instantaneously with the accident.

QUESTION: Instantaneously?

MR. BOYD: Yes, sir.

QUESTION: Well, in that circumstance under Mississippi law could the state have tried both the misdemeanor and the felony charges in one proceeding?

MR. BOYD: No, sir.

QUESTION: They could not?

MR. BOYD: No, sir. Let me qualify that with this. It was initially done that way or was later done that way in this case, that the justice courts of the state of Mississippi in which they were at the time of this case, five per county, one for each supervisor's beat, that the misdemeanor charges, they have primary jurisdiction of misdemeanor charges.

QUESTION: Well, was there any Mississippi statute that required the trial of those charges, the misdemeanor charges, in the justice of the peace court independently of any other court?

MR. BOYD: None that would require it. However, as I pointed out in the reply to the brief of

amicus in this matter, that in Stenson v. State, which has been recently decided by our Supreme Court, they have held that it was a -- that the conviction was reversible where the individual was indicted in a multi-count indictment.

In other words, we cannot charge more than one charge per indictment, nor can we try under Stenson more than one charge per case unless it is with the agreement of the parties, which was done so in this case on appeal from the misdemeanor.

So, unlike the federal government, or unlike the federal procedure under the Federal Rules of Criminal Procedure, we do not have a requirement that all of the charges be contained in one indictment, but instead it is just the opposite, the old common law rule that they have to be brought by separate indictment.

QUESTION: Are the misdemeanor offenses charged by indictment in Mississippi?

MR. BOYD: No, ma'am. They are charged by affidavit.

QUESTION: It is just a traffic citation? Is that it?

MR. BOYD: Yes, ma'am, that's exactly --

QUESTION: By the policeman?

MR. BOYD: Um-hm. That --

QUESTION: And how are felonies charged then in Mississippi? Only by indictment?

MR. BOYD: The constitution of the state of Mississippi requires that one be indicted for an offense. However, there is an exception where the defendant waives indictment. We have had a few cases of that nature where they have -- where the defendant has come in and waived indictment and in fact pled guilty to the offense.

QUESTION: Mississippi doesn't use a preliminary hearing type?

MR. BOYD: There are preliminary hearings once someone is arrested on an arrest warrant. There can be an arrest warrant issued by a magistrate, be it a justice of the peace, circuit judge, chancery judge, Supreme Court Justice, youth court judge, or whatever, that so long as he is a magistrate or a judicial officer, he may issue an arrest warrant. However, prosecutions are had only upon indictments.

QUESTION: And this would be at the request of the county attorney or whoever the local prosecutor is for felons?

MR. BOYD: All right. This gets into one particular question that was raised by the briefs in this case. We have in essence or had at the time that

this case came down four different types of prosecutors in the state of Mississippi. We had municipal prosecutors who were limited in jurisdiction to the municipalities in which their court sat plus they were only appointed in cities where we had a population in excess of 10,000.

There are county prosecuting attorneys, which are -- is an elected position. County prosecuting attorneys have traditionally had jurisdiction in misdemeanor cases. They have prosecuted cases involving misdemeanors in the justice courts and in county courts in those counties which have county courts. They have assisted the district attorney, who is normally elected from a multi-county district or a circuit district in the state.

Under the constitution of the state, the district attorney has primary jurisdiction of all felony cases. Now, in 1979, after this case was tried, the Mississippi legislature clarified the jurisdiction between all of these various and sundry prosecuting authorities.

The fourth prosecuting authority is the attorney general's office. Now, there is no statutory prohibition which keeps us from prosecuting in the circuit courts. However, it has been by tradition that

the district attorneys have that function --

QUESTION: Excuse me. When you say nothing to stop you, did that mean that the attorney general's office could have tried all of these offenses, misdemeanor and felony, in the circuit courts?

MR. BOYD: There is no statutory prohibition to it.

QUESTION: Well, that would suggest that yes?

MR. BOYD: Yes, sir.

QUESTION: That might have happened.

MR. BOYD: Yes.

QUESTION: But it did not happen.

MR. BOYD: It did not happen. That is what I said.

QUESTION: Yes.

MR. BOYD: Traditionally we have followed a demarcation of jurisdiction along lines of municipal attorneys trying municipal offenses, county attorneys trying misdemeanor offenses, district attorneys trying felony cases --

QUESTION: Now, in this case the misdemeanor offenses were tried in what court?

MR. BOYD: Justice Court of Beat One, Tallahachee County, Mississippi.

QUESTION: Which is -- and that would be a

county prosecutor, would it?

MR. BOYD: Yes, sir.

QUESTION: I see. The felony indictment was tried in the --

MR. BOYD: Circuit Court.

QUESTION: And who was the prosecutor there?

MR. BOYD: The primary prosecutor was the district attorney. However, the county attorney did assist.

QUESTION: The district attorney is a regional district attorney.

MR. BOYD: Yes, sir. His district -- this is, I believe, the Fifteenth Judicial District, which runs from Memphis, Tennessee, some 120 miles south into the Delta area of the state. That I think --

QUESTION: Would you clarify that a little more? It is a confusing system.

MR. BOYD: Yes, ma'am, it is.

QUESTION: In 1979, when this particular respondent was charged and tried, were there different prosecutors involved in the two different courts?

MR. BOYD: Yes, ma'am.

QUESTION: And it would have been possible to have brought all of the charges in one court?

MR. BOYD: It is possible. However, they

normally, and by that I mean normally, I mean 99.9 percent of the time, misdemeanor charges always originate in Justice Court, that that is their, shall we say, bailiwick, that Justice Court judges have jurisdiction in all cases which involve fines up to $1,000 and imprisonment in the county jail for up to one year.

All other crimes, the jurisdiction is vested exclusively in the circuit courts. This is where the trial de novo question comes in. Appeal with a right to trial de novo. You do not have a right to a jury trial in Justice Court. You can have a jury trial, but you don't have a right to it.

Now, in this case, if I may summarize the facts just very briefly in order to get this matter in the proper perspective, that on August 6th, 1977, Barry Joe Roberts, the respondent in this case, was traveling along Mississippi State Highway 35 between Charleston, Mississippi, and Batesville, Mississippi. Roberts was heade in a northerly direction, and a pickup truck driven by Mary Ella Bonner was headed south.

Somewhere between these two cities, in Tallahachee County, there was a collision. Mr. Roberts first ran off the righthand side of the road, then crossed the median or center line in the road and hit

the pickup truck headon. This ten-year-old little girl was in the back end of the pickup truck. She was thrown out and killed.

Now, as a result of this, the investigating highway patrol officer issued four citations under the Uniform Citation Act of the state of Mississippi. They were for driving while -- with a revoked driver's license, Mr. Roberts having been convicted of driving while intoxicated on a previous occasion, driving under the influence of intoxicating liquor, reckless driving, and driving on the wrong side of the road.

Six days after the accident, Mr. Roberts appeared in Justice Court. The Honorable Sandra B. Johnson of Beat One, Tallahachee County, Mississippi --

QUESTION: You say Beat One, Mr. Boyd. Are there several different beats for Justice Courts in Tallahachee?

MR. BOYD: Yes, sir. It goes back -- the terminology goes back to the old police jury system that we had in days of yore, that there are in essence five supervisors' districts in each county. These districts are called beats. Each beat in 1977 had a Justice Court judge. We have since amended that statute. We have reduced the number of Justice Court judges in the state of Mississippi, there being only two counties which have

five now, that being Hines and Harrison Counties, the two largest.

QUESTION: Is there also a Circuit Court in Tallahachee County?

MR. BOYD: Yes, sir.

QUESTION: And that is the Circuit Court for what, the Fifteenth --

MR. BOYD: Fifteenth Judicial District, which encompasses DeSoto, Tate, Tallahachee, Pinola, and Yalabusha Counties.

QUESTION: And is there a resident circuit judge in Tallahachee County, or does the circuit judge just come part of the time?

MR. BOYD: The circuit judge in that district lives in Tallahachee County, or one of them does.

QUESTION: But that is a matter of coincidence?

MR. BOYD: That is a matter of coincidence. The other circuit judge lives in DeSotc County, which is a good bit north of there.

QUESTION: Mr. Boyd, at the time the offenses in the Justice Court were being prosecuted, were there any proceedings going on arising from the death of the little girl?

MR. BOYD: No, sir. The next session of the

Circuit Court -- We have terms of court.

QUESTION: Yes.

MR. BOYD: The next session was in December. That is the next time that the grand jury came into session, and at that time that was when the indictment was obtained in this case by the district attorney.

QUESTION: Well, was there any charge before the indictment?

MR. BOYD: The record does not reflect that there was.

QUESTION: I see.

QUESTION: Would it have been possible to have an earlier indictment, earlier than December?

MR. BOYD: No, ma'am, not an indictment.

QUESTION: Pardon me?

MR. BOYD: Not an indictment. No, ma'am. The grand jury is the only one that can return an indictment, and the grand jury did not go into session until the first Monday of the December term.

QUESTION: So the delay in the charge of the felony was due entirely to Mississippi's procedure for charging felonies?

MR. BOYD: That is correct.

QUESTION: Did someone have authority to convene the grand jury specially?

MR. BOYD: Not at that time, they did not, Your Honor.

QUESTION: Do they now?

MR. BOYD: They do now. In fact, we have all but abolished terms of court now, and we have permanent sitting grand juries for six-month periods, or at least they have got to call two grand juries during a given calendar year. They can be held over court terms and things of this nature. At that time they could not be held over a court term. The grand jury was called at the beginning of the court session, and things of this nature.

Now, as I said, on August 13, 1977, Mr. Roberts appeared in Justice Court of Tallahachee County. He entered a plea of guilty to the misdemeanor offenses or to the traffic offenses, immediately perfected an appeal with a right to trial de novo to the Circuit Court of Tallahachee County. On December 7, 1977, at the first grand jury which was convened after the accident, respondent was indicted for manslaughter under Section 97.347 of the Mississippi Code.

By agreement of the parties in this case, the misdemeanors were consolidated with the manslaughter charge for trial. On May 28, 1978, the matter was called for trial, but prior to the state resting, it

nolle prossed as the Fifth Circuit found all of the misdemeanor charges that had been lodged against Mr. Roberts.

Neither the double jeopardy question that is raised in this case nor the prosecutorial vindictiveness questions were raised until a petition for post-conviction relief was filed in November of 1980.

QUESTION: Is there any explanation of the nolle prossed --

MR. BOYD: No, sir. No explanation whatsoever.

QUESTION: They just nolle prossed the misdemeanor charges and went ahead with the manslaughter indictment. Is that it?

MR. BOYD: This is correct. In actuality what happened, the Fifth Circuit found that this was the equivalent of a nolle pros. We have -- as a part of our criminal practice, district attorneys will ask the court to pass something to the files, which is the functional equivalent of a nolle pros.

QUESTION: And where was the post-conviction relief sought first, in the state court?

MR. BOYD: All right. Once again we get into another particular aspect of Mississippi procedure. Under Section 99.35.145 of the Mississippi Code, we have

a procedure by which, or up until last week we had a procedure by which you file a petition or an application for leave to proceed in the court which had last jurisdiction in the case.

In other words, if you take an appeal to the Mississippi Supreme Court, then that is the court which had last jurisdiction, and you file an application for leave to proceed to file a petition for writ of error coram nobis in the lower court. The court then reviews this petition to determine whether or not probable cause has been stated for review. If probable cause has not, then the court will deny the application and there will be no remand to the lower court.

QUESTION: And that is what was filed here?

MR. BOYD: Yes, sir. That was what was filed here.

QUESTION: And denied?

MR. BOYD: And denied without opinion.

QUESTION: And then to the federal court?

MR. BOYD: And then into U.S. District Court. Yes, sir.

QUESTION: And the double jeopardy claim that is here was presented in the coram nobis proceeding?

MR. BOYD: Yes, sir. I have no question but what the question was raised under Rose v. Lundy to

determine whether or not exhaustion had taken place. There is no question about exhaustion in this case. I will parenthetically add that the order entered by the Mississippi Supreme Court in this case has recently been interpreted to include procedural bars, that is, under Wainwright versus Sikes as decided by this Court.

However, at the time frame in which this case came up, I must candidly admit that under Ulster County Court versus Allen, the state did not proceed under the theory of procedural bar, so consequently we do not argue it here.

The Fifth Circuit and the District Court both relied on deciding the double jeopardy question upon the test articulated by this Court in Blockburger versus the United States, the same evidence test. Our position as expounded upon by Justice White in his opinion in Vitalli v. Illinois is that the state is not precluded from prosecuting respondent notwithstanding the fact that there was a substantial overlap in proof required to prove both the crimes of reckless driving and manslaughter by culpable negligence because each offense requires proof of a statutory element the other does not.

In Albernaz versus United States, Whalen versus the United States, this Court indicated that the

test articulated in Blockburger was a rule of statutory construction. Applying that rule of statutory construction to the case at bar, we find that the application of the test should focus, one, upon the statutory elements of the offense of reckless driving, and two, upon the statutory offense or the general catch-all statute of manslaughter by culpable negligence.

Now, this distinguishes this case from the statutory situation in which we found in Vitalli. In Vitalli, the state of Illinois had a specific statute dealing with the reckless use of an automobile, of a motor vehicle. We do not have that in this case. Instead, we have a general or omnibus statute dealing with manslaughter or a catch-all statute. They specifically define various and sundry forms of manslaughter in other statutes, and then say all other homicides, including homicide by culpable negligence, shall be construed as manslaughter.

Therefore, we find that there are two separate and distinct statutory provisions.

QUESTION: Even if you are correct about that, what do we do with the language in Vitalli that talked about the substantial double jeopardy claim which would be available if the prosecution relied upon and used the

same evidence in the proof of both?

MR. BOYD: Justice O'Connor, I think this is the whole question or the whole thing that this case boils down to, is the interpretation of this Court's statement of same evidence or the same evidence rule. In reviewing Brown --

QUESTION: The evidence was the same, I suppose, except for the establishment of the death of the victim?

MR. BOYD: Yes, ma'am. Well, I say that, yes, ma'am, in tha the reckless driving requires an element that manslaughter does not require, and manslaughter requires an element that reckless driving does not require.

The problem that we run into here is tantamount to the situation of a rico prosecution and a prosecution for the substantive offense. In particular, the Fifth Circuit has found in at least two cases that these are separate and distinct offenses for which indictments can be returned, or that separate punishments may be imposed.

Unquestionably, both the same evidence was introduced, although he pled guilty at the misdemeanor case in the Justice Court. The same evidence would have been introduced in both trials, primarily because both

offenses arose out of the same res justi. You would have had to introduce everything in order to prove both of the charges.

QUESTION: But you would still have to find for one crime an element that you didn't have to from the other from those same facts.

MR. BOYD: That's correct. That's correct. And this is what the Court noted in Brown, in Iannelli, and in Vitalli. The Court spoke about despite the fact that there is a substantial overlap in proof that is actually offered, that I think the Court has envisioned the fact that you will often times have the same facts introduced. It is just what those facts go to prove, the elements that those facts go to prove which are the distinguishing point in which the state intends to rely in this case, is the fact that because in the case of reckless driving you had to prove that you were driving a vehicle on the streets and highways of the state of Mississippi, an element you are not required to prove --

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

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to resume at 1:00 o'clock p.m. of the same day.)

AFTERNOON SESSION

(12:59 P.M.)

CHIEF JUSTICE BURGER: You may continue, Mr. Boyd.

ORAL ARGUMENT OF WILLIAM S. BOYD, III, ESQ.,
ON BEHALF OF THE PETITIONERS - RESUMED

MR. BOYD: Mr. Chief Justice, and may it please the Court, I want to clarify one point that I think there was a misunderstanding on my part. I believe Justice O'Connor asked a question.

To clarify a procedural point, the state of Mississippi could have indicted Mr. Roberts at this time. The thing about it is -- and could have called a grand jury. The thing about it is, this particular judicial district was at that time the busiest judicial district in the state of Mississippi, processing over 4,000 criminal cases a year.

As a matter of actual practice, they did not call grand juries except during the terms in which the court was in session. In particular, the court was in session, I believe, 48 weeks out of 52 in every given year at that particular time. They had one judge, one district attorney, and one assistant district attorney to handle that many cases.

So, as a consequence, it simply was not done,

although it could have been done in this case.

I want to direct my attention here in the last few minutes to two points. The first is that the Fifth Circuit misconstrued the state -- or the case of Smith v. State in this situation. The Mississippi Supreme Court has never addressed the question of whether reckless driving was a lesser included or is a lesser included offense to the offense of manslaughter by culpable negligence.

The case cited by the Fifth Circuit applying this judicial veneer as they call it was not in fact a judicial veneer but was in fact addressing the particular facts of that case to the law as it applied. In particular, Smith v. State dealt with whether gross negligence was sufficient, or proof of gross neligence was sufficient to prove culpable negligence under this statute. They held that it was not.

We also note that the Court has held that DWI is not a lesser included offense to the crime of manslaughter. That was in Cutshall v. State.

Finally, we look to the legislative intent, following the Albernaz line of reasoning. We note that we have separate statutes. The manslaughter statute was enacted in 1848. The reckless driving statute was enacted in 1938.

Manslaughter is contained in Title 97 of the Mississippi Code dealing with criminal offenses. Reckless driving is in Title 63, dealing with traffic offenses. Manslaughter carries its own separate penalty of up to 20 years maximum in the state penitentiary. Reckless driving has its own separate offense or punishment of ten days in the county jail or a fine of $500 or both.

Both provisions are unambiguous. There is no legislative history behind either one of these things, so consequently following the presumption that this Court discussed in Albernaz, we should presume that the legislature of the state of Mississippi, which as pointed out by this Court about the Congress is primarily a lawyers' body. It therefore must be presumed that the legislature was familiar with this Court's doctrine in Blockburger versus the United States and that they construed reckless driving to be a separate offense for which separate punishment could be imposed other than in the manslaugher situation.

QUESTION: Mr. Boyd, before you sit down, isn't another issue we have to address apart from double jeopardy, didn't both the District Court and the magistrate, at least, rely on Blackledge --

MR. BOYD: Your Honor --

QUESTION: -- and I think the Court of Appeals mentioned it but didn't address it. Don't we have to?

MR. BOYD: That issue was avoided by the Fifth Circuit, I think primarily because of this Court's decision in Goodwin.

QUESTION: No, but if we agree with you on the double jeopardy point, don't we have to address that?

MR. BOYD: As I say, Your Honor, I think the Fifth Circuit, deservedly so, avoided the issue on Blackledge v. Perry because of this Court's decision in Goodwin, and knowing what the procedural posture is in the state of Mississippi in regard to prosecutions. The magistrate's decision was decided prior to -- or entered his decision prior to this Court's decision in Goodwin in 1981, applying a per se rule, which this Court has since said in Goodwin is not a per se rule, but merely a presumption.

QUESTION: I don't see how that means we can avoid addressing it.

MR. BOYD: I agree. I don't think the Court should. I think, however, because of the procedural posture in this case, that it would be the better course of action to remand the matter back to the Fifth Circuit for reconsideration on that point.

QUESTION: Oh, ask them -- I see.

QUESTION: May I ask one question, Mr. Boyd? In your view, is the -- I am troubled about the nolle prossing of the misdemeanor charges. Was that tantamcunt tc an acquittal as a matter cf Mississippi law?

MR. BOYD: Nc, sir. Those charges could be rebrought or brought again.

QUESTION: Well, then, I don't understand how there can never be a double jeopardy question.

MR. BOYD: The statute of limitations run I suppose would be the termination of thcse offenses.

QUESTION: But that is just like a voluntary dismissal without -- they could have been reinstated as a matter of Mississippi law?

MR. BOYD: Tc my knowledge. Yes, sir.

CHIEF JUSTICE BURGER: Mr. Barksdale?

ORAL ARGUMENT OF RHESA H. BARKSDALE, ESQ.,
AS AMICUS CURIAE IN SUPPORT OF JUDGMENT BELOW

MR. BARKSDALE: Mr. Chief Justice, and may it please the Court, as the Court knows, I appear as amicus curiae cn invitaticn from the Court to present argument in support of the judgment of the Fifth Circuit. We filed a brief upon which the argument tc be presented today relies.

The single questicn presented to this Court

is, does or did the Fifth Circuit correctly apply the holding in Vitalli. As will be further discussed, and as is discussed fully in our brief, we think it is clear that the Fifth Circuit did correctly apply the language in Vitalli for a two-trial situation. That is the important criteria. Have there been two trials? This isn't an interlocutory appeal. Two trials have been held.

We think the test to be applied where two trials have been held is as follows. There is double jeopardy where the same factual elements used for the second prosecution were proved in the other or first prosecution, which simply is what I believe this Court held in Brown versus Ohio.

QUESTION: Would you need to prove death on the first charge?

MR. BARKSDALE: No, sir. At the first charge, of course --

QUESTION: Would you need to prove it on the second?

MR. BARKSDALE: At the second, of course, Your Honor, you have got to prove death in the manslaughter.

QUESTION: Pretty big difference, isn't it?

MR. BARKSDALE: No, sir, because at the second you have proved everything else that you proved at the

first, and if we allow the state, as in this instance, to try a man, and I will get to this later -- there was no guilty plea to my knowledge.

To try and convict a man in Justice Court of all of the elements and then to go to Circuit Court and retry and reprove all of those elements again and add death, which is undisputed, it is simply letting the state have two bites out of the apple and have a dress rehearsal of their case.

QUESTION: You dismissed the death factor rather swiftly.

MR. BARKSDALE: No, sir, the death factor is a given. But as I understand the underlying purpose of double jeopardy, it is to prohibit, as you yourself stated in Breed versus Jones, two trials or multiple trials, where there is the attendant physical, psychological, and financial stress, and the fact that the state is given the chance to have a dry run or a dress rehearsal.

QUESTION: And the evidence is the same.

MR. BARKSDALE: Yes, sir, where the evidence is the same.

QUESTION: The evidence is not the same here.

MR. BARKSDALE: It is the same, Your Honor, for the lesser included offense, if you want to call it

that. And then you add one given, manslaughter or death. I don't disregard the death, but I think you have proved, in order to prove manslaughter in this instance, the state, if you want to call it, had to prove the lesser included offense.

QUESTION: Of course, Brown against Ohio, Mr. Barksdale, was two separate Ohio Circuit Court prosecutions, common pleas prosecutions. Here you have a non-record court or -- you know better than I do what the Justice Court is in Mississippi, and then a Circuit Court. Don't you think that at least factually distinguishes it from Brown?

MR. BARKSDALE: Your Honor, I don't think it does, because you may have had two different -- you had the court of Kihoba County and some other -- Marion County in Ohio on those two offenses, but the JP Court is a separate court in that sense from the Justice Court.

You say I may know better than you. I am not sure anybody knows really the Justice Court system in Mississippi. I don't say that flippantly, but it is a difficult thing to fathom. But I didn't see any distinction in that instance, Your Honor, the fact that it is an appeal from the Justice Court to the Circuit Court.

As Justice Brennan has pointed out, I think if

this Court does not rest -- bottom this decision on Vitalli and double jeopardy, it must reach the due process Blackledge claim. In fact, although we don't stress this in our brief --

QUESTION: Well, we don't need to reach it, but it must be reached by somebody. We don't need to reach it, do we?

MR. BARKSDALE: That's correct. I think this Court should reach it, Your Honor, if Blackledge means what it says, and I think that it does. I disagree with my friend, Mr. Boyd. I don't believe that Goodwin has overturned Blackledge. Goodwin went off on entirely different facts. This case falls squarely under Blackledge, and I think this Court should affirm on that ground.

Now, I think some important procedural points need to be addressed here, because the Court is obviously interested in them. This accident occurred on August the 6th, 1977. Mr. Boyd has not pointed out, and I am sure it is by oversight, and it is something that doesn't jump right out and grab you out of this joint appendix, there was a preliminary hearing in this case on August the 10th, and it's in the joint appendix at Page 71. It is just an innocuous exhibit to the writ of coram nobis, but it is there.

And a preliminary hearing was held at which an affidavit was filed by the father of this young girl in which he charged Mr. Roberts with manslaughter.

QUESTION: Well, Mr. Barksdale, again, I think the procedural thing may be complicated by terminology. I would have thought a preliminary hearing, based on my own prior -- was after an information had been filed by the prosecuting attorney, and then a preliminary hearing would be seeing whether there is probable cause to hold you to answer.

MR. BARKSDALE: Yes, sir.

QUESTION: And yet I gather, what, a preliminary hearing in Mississippi is instituted by a complaining witness?

MR. BARKSDALE: Yes, sir. It would have to be instituted, I assume, by the complaining witness, and Mr. Boyd can possibly fill in the gaps here, but the complaining witness at Page 71 states that -- this is the same Justice judge, by the way, that tried and convicted Mr. Roberts on the four offenses -- that the father made affidavit that "Mr. Roberts did unlawfully and feloniously commit manslaughter," and then there is a notation, "A preliminary hearing was held in my court for Barry Joe Roberts on this charge of manslaughter."

Now, I don't know that there is anything else

in the joint appendix before this Court or the transcript of record before this Court about this preliminary hearing, but some sort of hearing was held.

QUESTION: What do you make of that? You kind of criticize your opponent for making nothing of it. What do you make of it?

MR. BARKSDALE: Oh, I don't criticize Mr. Boyd, Your Honor. I am just pointing out that a preliminary hearing was held and he -- Justice O'Connor asked him was anything going on on the manslaughter while this misdemeanors. Yes, a preliminary hearing had been held, a manslaughter charge filed. To me, what I make of it is that the state certainly was aware that it was going to probably seek a manslaughter indictment of Roberts, and therefore should have proceeded extremely cautiously on trying him on these misdemeanor charges.

QUESTION: Does the preliminary hearing of the kind that you reported or show was held in August, is that prosecuted by a prosecuting attorney?

MR. BARKSDALE: Your Honor, I think under the general statutes it states, and we cite in our brief at Footnote 8 at Page 58 through 60 talking about the general powers a county attorney had back in 1977. They are even broader now. That the county attorney is charged with being responsible for the matters tried in

his county, and certainly he should have been present at that preliminary hearing.

QUESTION: How about Mississippi practice? I mean, would it be customary for a prosecuting attorney to be present at a preliminary hearing?

MR. BARKSDALE: Your Honor, I do not know.

Now, the preliminary hearing was held on August the 10th. The Justice Court system in Mississippi which Mr. Boyd has stated, the justice judges are not required to have any legal training. They are simply elected officials, and at the trial on August the 13th, it is my understanding of this record that Roberts was tried and found guilty. Mr. Boyd for the first time in his reply brief states that Mr. Roberts pled guilty, and that may be in some part of the record that I don't have, but I don't see it in the joint appendix, I don't see it in the transcript of the record. In fact, in the error coram nobis, the man says he was tried and convicted in Justice Court. The magistrate says he was tried and convicted, and --

QUESTION: What difference would it make whether he pled guilty or was tried?

MR. BARKSDALE: Your Honor, I don't think it makes any difference. Possibly the state thinks it makes some difference under Coulton, that he could have

avoided the hazards of double jeopardy by simply pleading guilty and then moving on. To me it is irrelevant whether he pled guilty in Justice Court or whether he was tried in Justice Court. Jeopardy attached.

QUESTION: May I ask right there about the dismissal, the nolle pros of the charges later on? Do you agree that was without prejudice?

MR. BARKSDALE: I don't agree it was without prejudice, Your Honor. To me it is an acquittal, where they remanded to the file. To me it is the equivalent of an acquittal. I would think that by now the statute of limitations surely had run.

QUESTION: I always thought that was a voluntary dismissal, and you could always reinstate charges that had been nolle prossed, but that is not your understanding?

MR. BARKSDALE: I don't have that understanding, Your Honor.

Mr. Roberts at the Justice Court trial --

QUESTION: Well, there must be Mississippi law on that, Mr. Barksdale, whether a charge that has been nolle prossed can be filed again.

QUESTION: Usually they can be filed again if they have been nolle prossed. You suggest Mississippi

law is to the contrary?

MR. BARKSDALE: I don't know, Your Honor. My understanding was that to remand it to the file, to my way of thinking, is like an acquittal in this kind of charge. I don't know, Your Honor.

QUESTION: But that is the judgment that constitutes the bar to the second trial. That is the key to your whole case, as I understand it.

MR. BARKSDALE: No, sir. To me the judgment that constitutes the bar to the second trial is the judgment in Justice Court back in August of 1977, where he was tried and convicted of the four misdemeanors.

QUESTION: And then as a matter of -- in your two-stage trial proceeding, he had the right to have that judgment just set aside as though it had never occurred.

MR. BARKSDALE: The judgment is set aside. He is given trial de novo in Circuit Court.

QUESTION: And then they dismiss the trial de novo, and then the judgment that has been set aside is what bars a new prosecution. I just -- I have trouble grasping this whole case.

MR. BARKSDALE: Your Honor, he was awaiting his trial de novo, new trial. While he was awaiting new trial, he was indicted for manslaughter in December of

'77. In May of '78, they are consolidated. They come on for trial. At some point during the proceeding, the state elected to remand to the file those misdemeanor charges.

QUESTION: You say the state's only option at that point was to try him again for the misdemeanors.

MR. BARKSDALE: I believe they could have, Your Honor, if they had done so --

QUESTION: Well, they could have, yes, but you say that was their only option. They couldn't go ahead and try him for manslaughter.

MR. BARKSDALE: They couldn't try him for manslaughter. No, sir. They remanded those cases to the file. They proceeded with the manslaughter, and he was convicted of manslaughther based on the jury instructions which the Fifth Circuit looked to. The court said to the jury, if you find that he was culpably negligent in, one, driving on the wrong side of the road, two, driving recklessly, three, driving under the influence of alcohol, and driving without a license -- it was in the conjunctive -- then you find him guilty of manslaughter.

QUESTION: But he could have been guilty of manslaughter on any one of those, wouldn't you agree?

MR. BARKSDALE: He certainly could have, Your

Honor.

QUESTION: But he could not have been found guilty in the second stage unless there was a demonstration that someone had been killed as a result of that.

MR. BARKSDALE: That's correct, Your Honor.

QUESTION: But the -- I take it your submission is that under our cases, that if in proving him guilty of the larger offense they again proved the misdemeanors that he had already been convicted of, that was double jeopardy.

MR. BARKSDALE: That is our thinking, Your Honor. That is precisely our point, as the Court did in --

QUESTION: Brown and Harris.

MR. BARKSDALE: -- Brown and Harris. And as this Court said in Vitalli. If when you go back to the state of Illinois in Vitalli, if the state in order to prove manslaughter finds it necessary to prove failure to reduce speed, then they have used the same elements, and he would have a substantial double jeopardy claim. We think that's precisely why this case falls under that.

QUESTION: What do you think the Court meant by that language, that he would have a substantial

double jeopardy claim? Do you think that meant that he would have a patently sustainable claim, or a colorable claim?

MR. BARKSDALE: Your Honor, I wish you would ask Justice White and tell me.

(General laughter.)

QUESTION: Well, you work for him.

MR. BARKSDALE: To me, as we say in our brief --

QUESTION: You ought to ask the Court. That was a Court opinion.

MR. BARKSDALE: To me, as we said in our brief, we thought that Justice White was using that dictum so that he wouldn't prejudge the case on remand to Illinois, and as the dissent said, they didn't know why it was called substantial double jeopardy. To them it was double jeopardy. But I don't know what is meant by substantial other than the fact that this Court was not prejudging what was going to happen in Illinois.

A couple of other procedural points that perhaps would assist the Court. There is a close association between the county and district attorneys. The county attorney was at the arraignment. In fact, the county attorney is charged under the statute with bringing matters before the grand jury. The county

attorney was at the trial. So this isn't as if the two gentlemen were operating in a vacuum.

All of these offenses could have been tried in the Circuit Court. They could have waited. They could have indicted for manslaughter. Then they could have tried the misdemeanors and manslaughter in Circuit Court, apparently all without having to go to Justice Court under the fact that the Circuit Court is a court of general jurisdiction.

As Mr. Boyd has clarified this afternoon, the state could have called a special grand jury. Now, it elected not to do so, but in effect it is irrelevant. They could have simply waited until December. If they were going to indict him for manslaughter, they could have done so. Then they could have brought on all the charges.

QUESTION: What about the case of someone who might have been injured in the traffic accident in August and who dies in November? That obviously isn't this case, but how would your reasoning affect that? Could they have tried him for the misdemeanors in August, there at that time being no manslaughter charge available because the person was still alive, and then come back and indict them as they did here for manslaughter in December?

MR. BARKSDALE: Your Honor, of course, that is what some of the cases have addressed, where the Court has said you cannot try the lesser included offense and then try the greater unless at the original onset you couldn't have tried the lesser included. It would seem to me that again that's a balancing factor under the Constitution where if the state didn't have a pretty good reason to know that there was going to be a death, they could have gone ahead.

But I think realistically speaking, every time there is an injury in an accident, the state ought to see that as a red flag, as a buzzer to wait and decide whether or not they are going to indicte him. There is no need to rush to judgment on this.

QUESTION: Well, under your same evidence theory, even on the example posed by Justice Rehnquist, you would say double jeopardy attaches.

MR. BARKSDALE: Yes, ma'am, I would, but I would like to point out, Justice O'Connor, I am not urging the same evidence test that is referred to in Blockburger. I am urging a horse of an entirely different color.

QUESTION: Well, you are talking about the language in Vitalli.

MR. BARKSDALE: Yes, ma'am.

QUESTION: That is unclear.

MR. BARKSDALE: Well, it is clear to me. It may be unclear to others.

(General laughter.)

MR. BARKSDALE: And I think it said that if the state goes back to Illinois and convicts him of manslaughter based upon the lesser included offense, they just bought double jeopardy.

QUESTION: Well, now, the Fifth Circuit didn't decide the same crime test, did they, the lesser included offense?

MR. BARKSDALE: I think they did, Your Honor. The Fifth Circuit, when -- it said there are two prongs under Vitalli. The first prong is Blockburger, and they said, well, we think this meets Blockburger, but that means we have got to apply judicial veneer. We are not going to do that. We are going to look to the second prong. Under the language in Vitalli, they said --

QUESTION: Well, I thought the Fifth Circuit was uncertain about the first part of the Vitalli test, and therefore went on to look at the same evidence question.

MR. BARKSDALE: Yes, ma'am.

QUESTION: Isn't that right?

MR. BARKSDALE: The Fifth Circuit said it was

uncertain whether they could apply this to the judicial veneer, but I don't know why they are uncertain. I believe the Court did that in Vitalli. The Court did that in Brown. It looks at how the states have interpreted it, and the state of Mississippi has interpreted manslaughter when an automobile is involved to mean wanton and reckless conduct, which is the same language you find for reckless driving.

The petitioner here urges the Court to utilize Blockburger for a two-trial action, and that is where we differ. While Blockburger may be appropriate in some instances on an interlocutory appeal, it is not appropriate where there have been two trials and all the evidence is before the Court.

I don't think that the petitioner has ever really addressed Vitalli and the clear language there where the Court said if it is necessary when you go back to Illinois, if you have to prove failure to slow with a misdemeanor in order to prove your manslaughter, then you have got a substantial double jeopardy claim.

The Court said that twice, and I think it is clear, and I think other courts have had no problem in utilizing that point, as did the Fifth Circuit in the Roberts case, which is before the Court. Yet that is the question before this Court, was Vitalli correctly

applied. Here, I think it is important to note that of the four misdemeanors for which again it is my understanding based on this record he was tried and convicted. He was given a sentence of eleven months for driving under the influence of alcohol.

QUESTION: Well, of course, whatever -- that language in Vitalli couldn't have been any more than just a dictum. After all, the holding was, there wasn't any double jeopardy in Vitalli.

MR. BARKSDALE: The holding was that this Court said to the Illinois Supreme Court to take another look at it under Brown and Harris.

QUESTION: Well, Illinois said there was double jeopardy, and we reversed them and said at that point there wasn't.

MR. BARKSDALE: You reversed and remanded, Your Honor, to have them look at it again. There wasn't any final --

QUESTION: Nevertheless, we reversed them. We reversed their holding that at that time there had been a showing of double jeopardy.

MR. BARKSDALE: Yes, sir, but you sent it back for them to decide.

QUESTION: So whatever miscellaneous advice we might have given them later in the opinion wasn't a

holding, was it?

MR. BARKSDALE: Your Honor, that wasn't miscellaneous advice. That was the standard to be applied by the court in Illinois when you sent it back and said take another look at it.

QUESTION: I know, but you couldn't have just reversed them citing that line in Vitalli, that there was a substantial claim. It went back, they decided, well, however substantial it was, it was wrong.

MR. BARKSDALE: You could have reversed them under Blockburger, and that would have been the end of it.

QUESTION: Well, we couldn't just reverse them citing that page in Vitalli.

QUESTION: Do you know whether they reversed or vacated? Did you vacate or reverse?

QUESTION: Well, we set aside their judgment --

(General laughter.)

MR. BARKSDALE: The state here concedes, and I think it is extremely important, at Page 19 of its brief that the evidence necessary to prove the charge of reckless driving was introduced to establish manslaughter. There is no dispute about that. And as I have earlier stated, the instruction to the jury, a very cryptic instruction, says, if you find that he did in

fact commit the four offenses, and they made the jury find all four, then he is guilty of manslaughter.

I think all of this boils down to, what is the purpose of the double jeopardy clause in this instance, which is to allow the state only one trial of the same offense to prevent a dress rehearsal. Certainly they didn't need a dress rehearsal in this case, but the prophylatic rule under the double jeopardy clause obviously goes beyond this case.

It is our contention that Vitalli did not change double jeopardy law, as is being urged here. It is our contention that the Fith Circuit didn't change the well established double jeopardy law, as seems to be urged here. It is our contention that both simply applied the law that this Court has applied for years, going all the way back to In re Neilson.

QUESTION: Is it your position, Mr. Barksdale, that even though there is a different element in each statutory offense with which one is charged, if the same evidence is used to prove both, it is a violation of double jeopardy?

MR. BARKSDALE: Your Honor, if the same evidence is used to prove the factual elements of the lesser offense in order to prove the greater offense, then it is our contention that that is a violation of

double jeopardy, notwithstanding additional elements will have to be proved, such as death.

QUESTION: Well, supposing one is tried for, say, reckless driving, and found guilty by a jury of that on the grounds of recklessness, and then the same evidence is produced on the charge of intentional homicide, that the person actually intended to run the person over. Now, the state doesn't introduce any more evidence than it did at the first trial, but it simply asks the jury to infer instead of reckless disregard deliberate intent. Now, if it wouldn't be in violation of double jeopardy otherwise, would it be because there is no new evidence introduced?

MR. BARKSDALE: Yes, sir, because they are again proving the same offense, and it is trying the man twice on the same evidence, and they have been allowed at the first trial to work on their case and sharpen up their case to use it again and to simply say to the jury if you find A, B, C, D, and E plus F, then you can convict him a second time. Why is that necessary? Why can't the state wait and do it all at one time?

QUESTION: Well, it is not a question necessarily of what is necessary, but what the Constitution forbids.

MR. BARKSDALE: Yes, sir. Well, I think the

Constitution forbids it, and I think it is easy for the state to operate within those constitutional restraints.

QUESTION: In the cases where the key to it is whether additional evidence or different evidence must be used, what do you think the Court was driving at? When you say it is -- there is just one more element that needs to be proved, that is, death.

MR. BARKSDALE: Your Honor, under the Blockburger test, which talks of, if two offenses can be proved out of the same transaction, you look, does each offense require proof of a fact that the other does not, I think that is simply the court without the evidence before it on an interlocutory appeal or before trial is ever held saying, now, this is our best way to try to make sure there is no double jeopardy.

QUESTION: Could they convict in the second case without showing that someone had been killed?

MR. BARKSDALE: Oh, certainly not, Your Honor.

QUESTION: Could they make the first case without proving someone had been killed?

MR. BARKSDALE: Yes, sir.

QUESTION: Well, then, isn't that quite a bit of different evidence?

MR. BARKSDALE: In the severity, it certainly is, Your Honor. In the double jeopardy basis, I don't think so, because I think he has been tried twice for the same offense. And they have simply upped the ante the second time around.

QUESTION: What was the offense? What was the same offense?

MR. BARKSDALE: Your Honor, the same offense the Fifth Circuit looked to and just simply went off reckless driving.

QUESTION: I am asking you what was the same offense?

MR. BARKSDALE: To me the same offense were all four misdemeanors, Your Honor, reckless driving, driving without a license, driving under the influence, and driving --

QUESTION: That is manslaughter?

MR. BARKSDALE: Because they used that and nothing else to prove manslaughter, that is double jeopardy, Your Honor.

QUESTION: They had to prove death. Was death important in both cases?

MR. BARKSDALE: Excuse me, Your Honor?

QUESTION: Was death, d-e-a-t-h, important in both?

MR. BARKSDALE: No, sir, it was not -- it is certainly important in both cases. It was not relevant in the first case.

QUESTION: They didn't even need it in the first one.

MR. BARKSDALE: No, sir.

QUESTION: So there is a difference.

MR. BARKSDALE: There is a difference of one additional element, Your Honor, but for the fact of what he was tried for in the first case, he was tried again in the second.

QUESTION: Without that element, you couldn't have gotten the conviction.

MR. BARKSDALE: No, sir. That's stipulated, that there was manslaughter, or at least death. In any event, we feel that the test this Court utilized, for example, in Brown, in Harris, and stated to the Illinois court to utilize well serves the purposes of double jeopardy.

QUESTION: Now, has Mr. Roberts ever even paid the fine that was levied at the first misdemeanor trial?

MR. BARKSDALE: Your Honor, I do not know.

QUESTION: Presumably that was set aside --

MR. BARKSDALE: That was set aside.

QUESTION: -- in his de novo appeal, so right

now there is nothing, no penalty has been attached.

MR. BARKSDALE: Your Honor, all I know is what is in the record I was given, is that those were nolle prossed. Apparently nothing else has been done on them. He was let out of jail in 1982, and I doubt he has paid them. I don't know the --

QUESTION: Is he out of jail now, ever since '82?

MR. BARKSDALE: It is my understanding that he is, Your Honor, but I haven't confirmed that. I haven't checked to see if he is out of jail.

QUESTION: Was he ever in jail?

MR. BARKSDALE: Yes, sir.

QUESTION: For what period of time?

MR. BARKSDALE: I don't know whether he was out of jail on appeal, Your Honor, from the Mississippi Supreme Court, but he was certainly in jail for at least two years. That is why in our brief we stated it appears he was possibly incarcerated as long as four years, from the spring of '78 to the spring of '82.

QUESTION: From the time of affirmance by the Supreme Court of Mississippi until, what, the Fifth Circuit's ruling in this case?

MR. BARKSDALE: Your Honor, we look to the finding of a manslaughter conviction before the Circuit

Court as the possible parameter, outside limit of four years in jail, which now in Mississippi if you manslaughter while intoxicated, the maximum sentence is five years, based upon the new statute that we refer to in our brief and that Mr. Roberts' attorney refers to in his brief.

The point is raised that the trial de novo barred the double jeopardy claim. As stated in the discussion with the Court, we don't think there was a trial de novo. There was a trial in Justice Court on misdemeanors. There was a trial in Circuit Court on manslaughter. And we certainly don't think that bars his right to raise his double jeopardy claim.

QUESTION: So if you are wrong and the other side wins, what will happen to the gentleman on whose behalf you are speaking?

MR. BARKSDALE: Your Honor, I am not speaking on behalf of Mr. Roberts. I am speaking in support of the judgment below.

QUESTION: Yes. That means that you are supporting him to some extent.

MR. BARKSDALE: Yes, sir. What happens to Mr. Roberts is, if the petitioner is right and I am wrong and the Fifth Circuit is wrong, then the case would go back to the Fifth Circuit possibly under some standard,

or if reversed, Mr. Roberts would go back to jail, and --

QUESTION: What about the Blackledge point?

MR. BARKSDALE: I think the Blackledge issue this Court should address. I think in fact it is an easier, cleaner constitutional issue than the double jeopardy issue before the Court, because by analogy this Court seeking to avoid ruling on constitutional issues --

QUESTION: That is a constitutional issue.

MR. BARKSDALE: Yes, sir, but it is a more difficult constitutional issue it appears than the Blackledge decision. I don't see any distinction or distinguishment between Blackledge and this case, except possibly the fact that there were two different attorneys involved, as we discuss in our brief, although it appears that the same attorney, the county attorney, was involved throughout, but --

QUESTION: Well, but why should the prophylactic rule set forth in Blackledge apply when you have two different prosecuting attorneys and presumably two different charging procedures and the timing is different on the charges? It just -- you don't have the circumstances that would lead you to need a prophylactic rule, would you?

MR. BARKSDALE: Your Honor, the main reason is because the county prosecuting attorney who would be in

charge of the Justice Court case is also the attorney that presents the charges to the grand jury, and so he is the one that makes that decision, will we indict, and that would be the prosecutorial vindictiveness that this Court --

QUESTION: Well, as I understood the responses to the questions earlier by Mr. Boyd, I thought that a district attorney was involved in the Circuit Court charging of felonies.

MR. BARKSDALE: A district attorney --

QUESTION: Maybe I misunderstood.

MR. BARKSDALE: A district attorney is involved, but the county attorney is also involved. He is responsible for trying cases in his county, so you have both the district attorney and the county attorney involved in the manslaughter Circuit Court case, but you have the county attorney involved in Justice Court, you have the county attorney involved in the arraignment, you have the county attorney involved in the grand jury proceedings and at the trial in Circuit Court.

QUESTION: Who decides whether to present this case to the grand jury? It is the district attorney, isn't it?

MR. BARKSDALE: The district attorney would have that ultimate decision, Your Honor, in consultation

obviously with the county attorney, who would obviously have a lot of influence with the district attorney because it is his county.

QUESTION: But that is enough reason not to apply the prophylactic rule in Blackledge, isn't it?

MR. BARKSDALE: I don't see a distinction, because as stated it is the county attorney's county. He obviously has a great deal of influence with the district attorney, and it is the institutional bias that this Court is looking to. It is the power of the state, not of these individuals to indict someone for a greater offense after they seek trial de novo from a case of this type.

QUESTION: Wouldn't you be making the same argument even if the county attorney were not involved?

MR. BARKSDALE: I would be making the same argument, Your Honor, but I don't think it would be as persuasive. I think it is extremely persuasive because the county attorney is involved up and down the ladder, and so is the district attorney. I think it is interesting -- I see my time has expired.

Thank you, Your Honors.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Boyd? You have two minutes remaining.

ORAL ARGUMENT OF WILLIAM S. BOYD, III, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. BOYD: Yes, sir, I have just a couple of comments. In answer to Justice O'Connor's question, yes, the district attorney is the one who has the ultimate say-so as to whether or not someone is indicted or whether someone is not indicted by the grand jury.

QUESTION: Except it is really the grand jury.

MR. BOYD: Yes, sir, except for really it is the grand jury. To follow the invitation of the amicus in this case to the same evidence test that he extrapolated upon in argument would limit the state of Mississippi to one prosecution and one prosecution only. Our Supreme Court has held as recently as Stenson v. State, there is currently a case that is pending on rehearing before that court on the same question, styled Young v. State, to the effect that the state is limited to a one count charge, that we cannot indict by multi-count indictment. Consequently, to follow the same evidence argument as advanced by amicus would limit the state to one prosecution, which under the common law was unheard of, and we submit under the laws of -- under the Constitution is not required. The state is entitled to indict on several counts.

QUESTION: Well, suppose a defendant is

convicted of robbery and then the state indictes him for felony murder, and the proof offered is that the underlying felony is robbery, and it is the same robbery that they just convicted him of, but they prove the robbery, and then they prove death. What -- was it Brown or Harris that said that was double jeopardy?

MR. BOYD: I believe it was Hicks, Your Honor. Harris versus Oklahoma.

QUESTION: Harris.

MR. BOYD: Yes, sir.

QUESTION: Harris.

MR. BOYD: That was also in, I believe, Whalen.

QUESTION: And the rationale is that they have convicted him of the underlying felony, and if that is what they prove in proving felony murder, they have violated his double jeopardy rights?

MR. BOYD: Yes, sir.

QUESTION: Isn't that what we have held?

MR. BOYD: That is what this Court has held, but I think that case is distinguishable from this case --

QUESTION: That is what I am interested in.

MR. BOYD: -- because, one, you do not have to prove in manslaughter by culpable negligence that a

vehicle was recklessly driven.

QUESTION: I know, but you are going to.

MR. BOYD: But you can.

QUESTION: But you did.

MR. BOYD: Yes, sir, I understand that, but that's not what this Court has in my opinion articulated as the test. The Court has said in Vitalli that it does not -- where you do not necessarily have to prove that element.

QUESTION: Well, in Harris, you didn't need to prove a robbery to prove felony murder. You could have proved some other felony, as far as the statute was concerned. But the fact is, the state proved the very robbery.

MR. BOYD: Robbery was a part of felony murder at that time by definition, I believe.

QUESTION: Well, not really. It was just -- That was just one of the kinds of felony murder.

MR. BOYD: I see my time is up.

QUESTION: I would like to ask a question before you sit down, please, about the preliminary hearing that was held in Justice Court --

MR. BOYD: Yes, ma'am.

QUESTION: -- in August on the manslaughter charge.

MR. BOYD: We don't know that it was held in August. That was when the affidavit was filed by the father of the child. There is no date as to when the preliminary hearing was held.

QUESTION: Why would a preliminary hearing have been held on the manslaughter charge? I don't understand.

MR. BOYD: I don't know, Your Honor. As I say, we don't know when it was held. It could have been held in conjunction with the indictment some time in November.

QUESTION: Well, you know why it was held. I thought they would have a hearing to see if they would bind him over for the grand jury.

MR. BOYD: I do not know when Mr. Roberts was --

QUESTION: Well, I know. It isn't a question of when, but wouldn't you normally have a preliminary hearing to see if you would hold him for a grand jury?

MR. BOYD: Your Honor, there is no requirement -- there is a requirement that the defendant be taken before a commiting magistrate, but there is no requirement that a preliminary hearing be given such as in Coleman. Our preliminary hearing is merely -- is not a -- is a non-binding stage. The one who has his

charges dismissed against him at a preliminary hearing the grand jury can later indict for the same offense.

QUESTION: But he would have been out of jail meanwhile.

MR. BOYD: Yes, sir.

QUESTION: Yes.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:38 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1330 - MORRIS THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL., Petitioners v. BARRY JOE ROBERTS

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

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(REPORTER)