

The Burger Court Opinion Writing Database

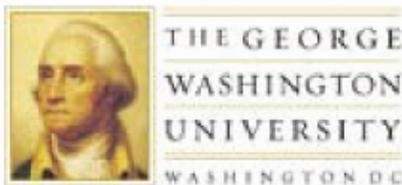
Waller v. Florida

397 U.S. 387 (1970)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 24, 1969

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

From: The Chief Justice

Circulated: **DEC 24 1969**

Recirculated:

Re: No. 24 - Waller v. Florida

MEMORANDUM FOR THE CONFERENCE

Enclosed is Xerox draft of opinion in the above case.

At Conference we all saw this as a clear case, but in developing it the possible relationship to the "retroactivity" of Benton and a relationship with Ashe (which Potter Stewart is writing) and the Price case (not yet calendared) began to emerge.

As a result, pages 4 and 5 now project a very tentative treatment of the Benton "retroactivity" problems and should be so read. It may be that this case should be put "on ice" until Ashe and Price are resolved.

W. E. B.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

No. 24 - Waller v. Florida

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to review a narrow question which can best be treated on the basis of the facts as stated by the District Court of Appeals of Florida, Second District, and the holding of that court. Petitioner was one of a number of persons who removed a canvas mural which was affixed to a wall of the City Hall in St. Petersburg, Florida. After the mural was removed, the petitioner, together with others, carried it through the streets of St. Petersburg until they were confronted by police officers. After a scuffle, the officers recovered the mural, but in a damaged condition.

The petitioner was charged by the City of St. Petersburg with the violation of two ordinances, first, destruction of city property and second, disorderly breach of the peace. He was found guilty in the municipal court on both counts, and sentence was imposed.

Thereafter an information was filed against the petitioner by the State of Florida charging him with grand larceny. It is conceded that this information was based on the same acts of

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

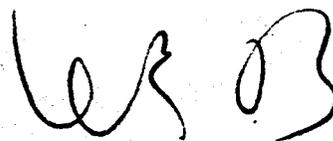
February 25, 1970

Re: No. 24 - Waller v. Florida

MEMORANDUM TO THE CONFERENCE:

Enclosed is a recirculation of the above case.

Several stylistic and punctuation matters will be cleared
up as indicated.



W. E. B.

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
~~Mr. Justice Fortas~~
Mr. Justice Marshall

From: The Chief Justice

1

Circulated: _____
Recirculated: 2/26/70

SUPREME COURT OF THE UNITED STATES

No. 24.—OCTOBER TERM, 1969

Joseph Waller, Jr., Petitioner, } On Writ of Certiorari to
v. } the District Court of
State of Florida. } Appeal of Florida, Sec-
ond District.

[March —, 1970]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to review a narrow question which can best be treated on the basis of the facts as stated by the District Court of Appeal of Florida, Second District, and the holding of that court. Petitioner was one of a number of persons who removed a canvas mural which was affixed to a wall inside the City Hall of St. Petersburg, Florida. After the mural was removed, the petitioner, together with others, carried it through the streets of St. Petersburg until they were confronted by police officers. After a scuffle, the officers recovered the mural, but in a damaged condition.

The petitioner was charged by the City of St. Petersburg with the violation of two ordinances: first, destruction of city property; and second, disorderly breach of the peace. He was found guilty in the municipal court on both counts, and a sentence of 180 days in the county jail was imposed.

Thereafter an information was filed against the petitioner by the State of Florida charging him with grand larceny. It is conceded that this information was based on the same acts of the petitioner as were involved in the violation of the two city ordinances.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

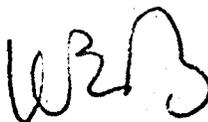
March 4, 1970

Re: No. 24 - Waller v. Florida

Dear Potter:

I hope to have my ideas on Ashe very soon.

Meanwhile I think we can hold Waller to check possible
problems you refer to.



W. E. B.

Mr. Justice Stewart

cc: The Conference

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Changes as marked

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Fortas~~
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: The Chief Justice

Circulated: _____

No. 24.—OCTOBER TERM, 1969

Recirculated: 4/2/70

Joseph Waller, Jr., Petitioner, } On Writ of Certiorari to
v. } the District Court of
State of Florida. } Appeal of Florida, Sec-
ond District.

[April —, 1970]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to review a narrow question which can best be treated on the basis of the facts as stated by the District Court of Appeal of Florida, Second District, and the holding of that court. Petitioner was one of a number of persons who removed a canvas mural which was affixed to a wall inside the City Hall of St. Petersburg, Florida. After the mural was removed, the petitioner, together with others, carried it through the streets of St. Petersburg until they were confronted by police officers. After a scuffle, the officers recovered the mural, but in a damaged condition.

The petitioner was charged by the City of St. Petersburg with the violation of two ordinances: first, destruction of city property; and second, disorderly breach of the peace. He was found guilty in the municipal court on both counts, and a sentence of 180 days in the county jail was imposed.

Thereafter an information was filed against the petitioner by the State of Florida charging him with grand larceny. It is conceded that this information was based on the same acts of the petitioner as were involved in the violation of the two city ordinances.

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December 29, 1969

Dear Chief:

In re No. 24 -- Waller v.
Florida

I agree with Potter Stewart
and his memo to you on this case dated
December 24, 1969. Subject to those
modifications, I join your opinion.

William O. Douglas

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

January 6, 1970

Re: No. 24 - Waller v. Florida

Dear Chief:

Your opinion in this case was forwarded to me in Connecticut during the Christmas recess, and this is the first opportunity I have had to make my return to you.

I am in entire agreement with the holding and reasoning of your opinion respecting the underlying issue. As to the retroactivity problem, I should think that the retroactivity of Benton should be decided in this case, rather than holding the case for either Ashe or Price -- a question which you raise in your covering note.

On the merits of the retroactivity issue, I would have to vote to make Benton fully retroactive in cases on direct review, which this one is, for reasons given in my dissent in Desist v. United States, 394 U. S. 244, 256.

Whether Benton should be made retroactive on cases coming here on collateral review is a more difficult question for me. While I am inclined to think that I would hold Benton retroactive even in such cases, I would prefer not to reach that issue here, since it is not directly presented.

Sincerely,

J. M. H.

The Chief Justice

CC: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

February 27, 1970

Re: No. 24 - Waller v. Florida

Dear Chief:

I am glad to join your opinion as re-circulated on February 26.

Sincerely,

J.M.H.

COMMUNICATIONS SECTION
FEB 27 1970

WALLER V. FLORIDA

The Chief Justice

CC: The Justices



SUPREME COURT OF THE UNITED STATES

No. 24 - October Term 1969

Joseph Waller, Jr., Petitioner

v.

State of Florida

(
(On Writ of Certiorari to the
(District Court of Appeal of
(Florida, Second District.
(

[March __, 1970]

MR. JUSTICE BRENNAN, concurring.

I join the holding of the Court that, because the municipal and state courts of a state are part of one sovereign judicial system, successive prosecutions in the municipal and state courts are not prosecutions by separate sovereign entities. Moreover, for the reasons stated in my concurring opinion in Ashe v. Swenson, ante, I believe that, unless Florida law properly precluded joinder of the several charges, the Double Jeopardy Clause barred a second trial since all the charges grew out of the same criminal episode.

SUPREME COURT OF THE UNITED STATES

No. 24.—OCTOBER TERM, 1969

Joseph Waller, Jr., Petitioner, }
v. } On Writ of Certiorari to
State of Florida. } the District Court of
Appeal of Florida, Sec-
ond District.

[March —, 1970]

MR. JUSTICE BRENNAN, concurring.

I join the holding of the Court that, because the municipal and state courts of a State are part of one sovereign judicial system, successive prosecutions in the municipal and state courts are not prosecutions by separate sovereign entities. Moreover, for the reasons stated in my concurring opinion in *Ashe v. Swenson*, *ante*, I believe that, unless Florida law properly precluded joinder of the several charges at one trial, the Double Jeopardy Clause barred a second trial since all the charges grew out of the same criminal episode.

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3/5/70

SUPREME COURT OF THE UNITED STATES

No. 24.—OCTOBER TERM, 1969

Joseph Waller, Jr., Petitioner, } On Writ of Certiorari to
v. } the District Court of
State of Florida. } Appeal of Florida, Sec-
ond District.

[March —, 1970]

MR. JUSTICE BRENNAN, concurring.

I join the holding of the Court that, because the municipal and state courts of a State are part of one sovereign judicial system, successive prosecutions in the municipal and state courts are not prosecutions by separate sovereign entities. Moreover, for the reasons stated in my concurring opinion in *Ashe v. Swenson*, ante, I believe that, unless Florida law properly precluded joinder of the several charges at one trial, the Double Jeopardy Clause barred a second trial since all the charges grew out of the same criminal episode.*

*I share Mr. JUSTICE STEWART's view that our decision in *Benton v. Maryland*, holding that the Double Jeopardy Clause of the Fifth Amendment is applicable to the States, is fully retroactive. See *Ashe v. Swenson*, ante, at 1, n. 1; *North Carolina v. Pearce*, 395 U. S. 711 (1969).

SUPREME COURT OF THE UNITED STATES

No. 24.—OCTOBER TERM, 1969

Joseph Waller, Jr., Petitioner, } On Writ of Certiorari to
v. } the District Court of
State of Florida. } Appeal of Florida, Sec-
ond District.

[April 6, 1970]

MR. JUSTICE BRENNAN, concurring.

I join the holding of the Court that, because the municipal and state courts of a State are part of one sovereign judicial system, successive prosecutions in the municipal and state courts are not prosecutions by separate sovereign entities. Moreover, for the reasons stated in my concurring opinion in *Ashe v. Swenson, post*, I believe that, unless this case fell within one of the exceptions to the "same transaction" rule, see, *id.*, nn. 7, 11, the Double Jeopardy Clause barred a second trial since all the charges grew out of the same criminal episode.*

*I adhere to the Court's holding in *Ashe v. Swenson, post*, at 1, n. 1, that our decision in *Benton v. Maryland*, 395 U. S. 784 (1969), holding the Double Jeopardy Clause of the Fifth Amendment applicable to the States, is "fully 'retroactive.'" See also *North Carolina v. Pearce*, 395 U. S. 711 (1969).

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 29, 1969

MEMORANDUM TO THE CONFERENCE

Re: Retroactivity of Benton v. Maryland
395 U.S. 784

On further thought, it has occurred to me that we resolved the question of Benton's retroactivity last Term in North Carolina v. Pearce, 395 U.S. 711. In the Pearce case the Court gave fully retroactive effect to Benton's holding "that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment." 395 U.S., at 717. I think we were unanimous in that view. (See separate opinions in Pearce.)

P.S.

Supreme Court of the United States
Memorandum

....., 19.....

Here we're waiting for another opinion from Burger dealing with the retroactivity point.

Perhaps ~~you~~ ^{you} could indicate agreement & join Stewart's statement that the retroactivity issue was decided last Term in Pearce.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 3, 1970

No. 24 - Waller v. Florida

Dear Chief,

I am glad to join your opinion for the Court in this case, subject only to some lingering doubt as to whether there may not be continuing tension between what you say about Benton's retroactivity in the text and note 2 on page 4, and what is said in the Ashe opinion on that subject.

Sincerely yours,

P.S.
/

The Chief Justice

Copies to the Conference

February 28, 1970

Re: No. 24 - Waller v. Florida

Dear Chief:

Please join me in your opinion
in this case.

Sincerely,

B. B. W.

The Chief Justice

U. S. Supreme Court

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 8, 1970

Re: No. 24 - Waller v. Florida

Dear Chief:

I am in agreement with the merits of your opinion. I am also in agreement with John Harlan's suggestion on the Benton point.

Sincerely,



T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 27, 1970

Re: No. 24 - Waller v. Florida

Dear Chief:

I agree with your opinion as circulated
on February 26.

Sincerely,



T.M.

The Chief Justice

cc: The Conference