

# The Burger Court Opinion Writing Database

*Ashe v. Swenson*

397 U.S. 436 (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

March 24, 1970

MEMORANDUM TO THE CONFERENCE

Re: No. 57 - Ashe v. Swenson

Enclosed is a tentative draft of dissent in the above. It will have some changes before printing, but it is essentially what I will say. Anyone who considers joining me is welcome to offer suggestions.

W.E.B.

W. E. B.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION OF THE U.S. SUPREME COURT

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

No. 57 - Ashe v. Swenson

MR. CHIEF JUSTICE BURGER, dissenting.

From: The Chief Justice  
Circulated: 3/24/70  
Recirculated:

I cannot join in any opinion or holding which reaches a conclusion that an accused charged in a state court with robbery/ of six persons after unlawful entry into a private home can be tried for only one robbery of one of the six victims. That Ashe was tried and acquitted for robbery of Knight ~~xxxxxx~~ is totally irrelevant, on this record, to the power of the state to try him for robbery of Roberts. I therefore join with the four courts which have found no double jeopardy in this case.

Ashe was tried and convicted in the state court; he was given full review by the highest court of Missouri, which, applying Missouri law to a Missouri statute, found no double jeopardy under the Missouri or United States Constitutions. The United States District Court and the Court of Appeals for the Eighth Circuit agreed. A second trial, on this record, is a far cry from the Fifth Amendment prohibition against being "subject for the same offense to be twice put in jeopardy." Nothing in the language and none of the gloss placed on the Fifth Amendment remotely justifies the result reached today. Nothing in the purpose of the authors of the Constitution or of our prior holdings commands the Court's holding; this is truly a case of expanding a sound basic principle far beyond the bounds -- or needs -- of its legitimate objectives. It does not make good sense and it cannot make sound law.

The facts are set out in the Court's opinion but it may be worth emphasizing that the four robbers, after breaking and entering the home,

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

1

SUPREME COURT OF THE UNITED STATES

From: The Chief Justice

No. 57.—OCTOBER TERM, 1969

Circulated: \_\_\_\_\_

Recirculated: 4/3/70

Bob Fred Ashe, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
Harold R. Swenson, Warden. } of Appeals for the Eighth  
Circuit.

[April —, 1970]

MR. CHIEF JUSTICE BURGER, dissenting.

The Fifth Amendment to the Constitution of the United States provides in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." Nothing in the language and none of the gloss previously placed on this provision of the Fifth Amendment remotely justifies the treatment which the Court today accords to the collateral estoppel doctrine. Nothing in the purpose of the authors of the Constitution commands or even justifies what the Court decides today; this is truly a case of expanding a sound basic principle beyond the bounds—or needs—of its rational and legitimate objectives to preclude harassment of an accused.

I

Certain facts are not in dispute. The home of John Gladson was the scene of "a friendly game of poker" in the early hours of the morning of January 10, 1960. Six men—Gladson, Knight, Freeman, Goodman, McClendon and Roberts—were playing cards in the basement. While the game was in progress, three men, armed with a sawed-off shotgun and pistols, broke into the house and forced their way into the basement. They ordered the players to remove their trousers and tied them up, except for Gladson who had a heart condition of which the robbers seemed to be aware. Substantial amounts of currency and checks were taken from the poker table

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

CHAMBERS OF  
JUSTICE HUGO L. BLACK

January 22, 1970.

Dear Potter:

No. 57- Bob Fred Ashe v. Swenson,  
Warden.

I agree although I do not believe that  
because the Court thinks some conduct or  
procedure is "fundamentally unfair" it is  
unconstitutional as a violation of "due process  
of law". I might later want to add a few  
words.

Sincerely,

  
Hugo

Mr. Justice Stewart

cc: Members of the Conference

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

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

1

SUPREME COURT OF THE UNITED STATES

No. 57.—OCTOBER TERM, 1969

From: Black, J.

Circulated: MAR 5 1970

Recirculated: \_\_\_\_\_

Bob Fred Ashe, Petitioner, }  
                                  v. } On Writ of Certiorari to  
Harold R. Swenson, Warden. } the United States Court  
  } of Appeals for the Eighth  
  } Circuit.

[March —, 1970]

MR. JUSTICE BLACK, concurring.

I join in the opinion of the Court although I must reject any implication in that opinion that the so-called due process test of "fundamental fairness" might have been appropriate as a constitutional standard at some point in the past or might have a continuing relevancy today in some areas of constitutional law. In my view it is a wholly fallacious idea that a judge's sense of what is fundamentally "fair" or "unfair" should ever serve as a substitute for the explicit, written provisions of our Bill of Rights. One of these provisions is the Fifth Amendment's prohibition against putting a man twice in jeopardy. On several occasions I have stated my view that the Double Jeopardy Clause bars a State or the Federal Government or the two together from subjecting a defendant to the hazards of trial and possible conviction more than once for the same alleged offense. *Bartkus v. Illinois*, 359 U. S. 121, 150 (1959) (dissenting opinion); *Abbate v. United States*, 359 U. S. 187, 201 (1959) (dissenting opinion); *Cuicci v. Illinois*, 356 U. S. 571, 575 (1958) (dissenting opinion); *Green v. United States*, 355 U. S. 184 (1957). The opinion of the Court in the case today amply demonstrates that the doctrine of collateral estoppel is a basic and essential part of the Constitution's prohibition against double jeopardy. Accordingly, for the reasons stated in the Court's opinion I fully agree that petitioner's conviction must be reversed,

January 22, 1970

Dear Potter:

Your opinion in No. 57 --  
Ashe v. Swenson is excellent. Please  
join me.

William O. Douglas

Mr. Justice Stewart

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

February 28, 1970

Dear Bill:

In No. 57 - Ashe v. Swenson,  
would you add:

Mr. Justice Douglas, who has joined  
the opinion of the Court, also joins this  
opinion.

W. O. D.

Mr. Justice Brennan

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



March 26, 1970

Re: No. 57 - Ashe v. Swenson

Dear Potter:

While I find myself unable to join in the Chief Justice's dissent, I am still not yet completely at rest as to how I shall come out in this case. I shall therefore have to ask you to put the matter over for another week.

Sincerely,

J. M. H.

Mr. Justice Stewart

April 1, 1970

Re: No. 57 - Ashe v. Swenson

Dear Chief:

After reconvening this case, I have come to the conclusion, with regret, that I cannot join you in voting to affirm. I consider it inescapable that Hoag has been rendered obsolete by Benton, and that on the particular record in this case the Double Jeopardy clause does come into play. I am therefore joining Potter Stewart's opinion, with the attached small concurring opinion.

Sincerely,

JMH

The Chief Justice

CC: Mr. Justice Stewart

SUPREME COURT OF THE UNITED STATES

No 57.—OCTOBER TERM, 1969

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

Bob Fred Ashe, Petitioner,  
v.  
Harold R. Swenson, Warden.

On Writ of Certiorari to  
the United States Court  
of Appeals for the Eighth  
Circuit.

From: Harlan, J.

[March —, 1970]

Circulated

APR 1 1970

Recirculated: \_\_\_\_\_

MR. JUSTICE HARLAN, concurring.

If I were to judge this case under the traditional standards of Fourteenth Amendment due process, I would adhere to the decision in *Hoag v. New Jersey*, 356 U. S. 464 (1958), believing that regardless of the reach of the federal rule of collateral estoppel, it would have been open to a state court to treat the issue differently. However, having acceded in *North Carolina v. Pearce*, 395 U. S. 711, 744 (1969), to the decision in *Benton v. Maryland*, 395 U. S. 784 (1969), which, over my dissent, held that the Fourteenth Amendment imposes on the States the standards of the Double Jeopardy Clause of the Fifth Amendment, I am satisfied that on this present record Ashe's acquittal in the first trial brought double jeopardy standards into play. Hence, I join the Court's opinion. In doing so I wish to make explicit my understanding that the Court's opinion in no way intimates that the Double Jeopardy Clause embraces to any degree the "same transaction" concept reflected in the concurring opinion of my Brother BRENNAN.

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SUPREME COURT OF THE UNITED STATES

No. 57.—OCTOBER TERM, 1969

Bob Fred Ashe, Petitioner, } On Writ of Certiorari to  
                                  v. } the United States Court  
Harold R. Swenson, Warden. } of Appeals for the Eighth  
  } Circuit.

[March —, 1970]

MR. JUSTICE BRENNAN, concurring.

I agree that the Double Jeopardy Clause incorporates collateral estoppel as a constitutional requirement and therefore join the Court's opinion. However, even if the rule of collateral estoppel had been inapplicable to the facts of this case, it is my view that the Double Jeopardy Clause nevertheless should be construed to bar the prosecution of petitioner a second time for armed robbery.

The two prosecutions, the first for the robbery of Knight and the second for the robbery of Roberts, grew out of one criminal episode. It was possible to try petitioner for each robbery at one trial, and I think it clear on the facts of this case that the Double Jeopardy Clause prohibited Missouri from prosecuting him for each robbery at a different trial. *Abbate v. United States*, 359 U. S. 187, 196-201 (1959) (separate opinion).

My conclusion is not precluded by the Court's decision in *Hoag v. New Jersey*, 356 U. S. 464 (1958), although the basic fact situation there was identical to that in this case. Three armed men entered a tavern and robbed five customers. Hoag was tried and acquitted under indictments for robbing three of the customers. He was then brought to trial under a fourth indictment, the same as the first three in all respects except that it named a fourth customer as the victim. This time

## SUPREME COURT OF THE UNITED STATES

No. 57.—OCTOBER TERM, 1969

Bob Fred Ashe, Petitioner,	} On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.
v. Harold R. Swenson, Warden.	

[March —, 1970]

MR. JUSTICE BRENNAN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring.

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SUPREME COURT OF THE UNITED STATES

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To: The Chief  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan ✓  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Fortas  
Mr. Justice Marshall

1

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

JAN 21 1970

Circulated: \_\_\_\_\_

No. 57.—OCTOBER TERM, 1969.

Recirculated: \_\_\_\_\_

Bob Fred Ashe, Petitioner, }  
                                  v. } On Writ of Certiorari to  
Harold R. Swenson, Warden. } the United States Court  
  } of Appeals for the Eighth  
  } Circuit.

[January —, 1970]

MR. JUSTICE STEWART delivered the opinion of the Court.

In *Benton v. Maryland*, 395 U. S. 784, the Court held that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. The question in this case is whether the State of Missouri violated that guarantee when it prosecuted the petitioner a second time for armed robbery in the circumstances here presented.<sup>1</sup>

Sometime in the early hours of the morning of January 10, 1960, six men were engaged in a poker game in the basement of the home of John Gladson at Lee's Summit, Missouri. Suddenly three or four masked men, armed with a shotgun and pistols, broke into the basement and robbed each of the poker players of money and various articles of personal property. The robbers—and it has never been clear whether there were three or four of them—then fled in a car belonging to one of the victims of the robbery. Shortly thereafter the stolen car was discovered in a field, and later that

<sup>1</sup>There can be no doubt of the "retroactivity" of the Court's decision in *Benton v. Maryland*. In *North Carolina v. Pearce*, 395 U. S. 711, decided the same day as *Benton*, the Court unanimously accorded fully "retroactive" effect to the *Benton* doctrine.



Minor change  
p/s.

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

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

ated: \_\_\_\_\_

No. 57.—OCTOBER TERM, 1969.

Recirculated: JAN 28 1970

Bob Fred Ashe, Petitioner, }  
v. }  
Harold R. Swenson, Warden. } On Writ of Certiorari to  
the United States Court  
of Appeals for the Eighth  
Circuit.

[February —, 1970]

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March 27, 1970

No. 57 - Ashe v. Swenson

Dear Potter:

I join your opinion in this

case.

Sincerely,

E.R.W.

Mr. Justice Stewart

cc: The Conference

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MARCH 27 1970  
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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 27, 1970

Re: No. 57 - Ashe v. Swenson

Dear Potter:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 4, 1970

No. 57 - Bob Fred Ashe v. Harold R. Swenson

Dear Bill:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Brennan

cc: The Conference

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