

# The Burger Court Opinion Writing Database

## *Brown v. Ohio*

432 U.S. 161 (1977)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



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

CHAMBERS OF  
THE CHIEF JUSTICE

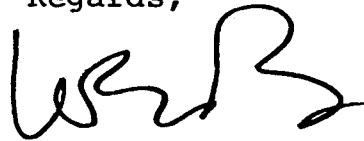
May 31, 1977

Re: 75-6933 - Brown v. Ohio

Dear Lewis:

You can register me as dissenting.

Regards,

A handwritten signature in dark ink, appearing to be 'WRB', written in a cursive, stylized script.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

June 9, 1977

Re: 75-6933 Brown v. Ohio

Dear Harry:

I join your dissent.

Regards,

WRB

Mr. Justice Blackmun

cc: The Conference

✓  
WB  
P.D. [unclear] [unclear]

To: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackman  
Mr. Justice Powell  
Mr. Justice Brennan  
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/31/77

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

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 75-6933

Nathaniel Brown, Petitioner, }  
v. } On Writ of Certiorari to the  
State of Ohio. } Supreme Court of Ohio.

[June —, 1977]

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion, but in any event would reverse on the ground, not addressed by the Court, that the State did not prosecute petitioner in a single proceeding. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of single criminal act, occurrence, episode, or transaction." *Ashe v. Swenson*, 397 U. S. 436, 453-454, and n. 7 (1970) (BRENNAN, J., concurring). See *Thompson v. Oklahoma*, — U. S. — (1977) (BRENNAN, J., dissenting), and cases collected therein. In my view the Court's statement, *ante*, at 8 n. 8, that the Ohio Legislature might be free to make joyriding a separate and distinct offense for each day a motor vehicle is operated without the owner's consent would not affect the applicability of the single transaction test. Though under some circumstances a legislature may divide a continuing course of conduct into discrete offenses, I would nevertheless hold that all charges growing out of conduct constituting a "single criminal act, occurrence, episode, or transaction" must be tried in a single proceeding.

Brown v Ohio

75-6933

Supreme Court of the United States

(Note from Potter)

3/29

1977

Lewis -

Despite the response of  
the CJ and WHR to  
your memo in Brown v.  
Ohio, I suppose there is  
still good reason to believe  
that a majority may want  
to confront and decide the  
basic question of whether

Supreme Court of the United States  
Memorandum

\_\_\_\_\_, 19\_\_\_\_

Conviction of a lesser  
included offense bars  
prosecution on the greater  
offense. This would include

Tom, John, and me; Bill  
Brennan and Thurgood on  
"same transaction" basis; and  
Byron who would disagree  
on merits of this double  
jeopardy question. P.S.

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

CHAMBERS OF  
JUSTICE POTTER STEWART

✓  
✓

May 26, 1977

Re: No. 75-6933, Brown v. Ohio

Dear Lewis,

I am glad to join your opinion  
for the Court in this case.

Sincerely yours,

PS  
✓

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 31, 1977

Re: No. 75-6933 - Brown v. Ohio

Dear Lewis:

I was the other way but toss in my hand  
and join you.

Sincerely,

A handwritten signature in dark ink, appearing to be 'Byn' or 'Byron', written in a cursive style.

Mr. Justice Powell

Copies to Conference



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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 31, 1977

Re: No. 75-6933 - Brown v. Ohio

Dear Bill:

Please join me.

Sincerely,



T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 28, 1977

Re: No. 75-6933 - Brown v. Ohio

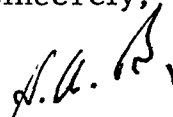
Dear Lewis:

I am afraid I cannot go along with your suggested disposition of this case. I agree generally with your comments on the double jeopardy issue as expressed at the top of the second page of your letter of March 25. This material, indeed, is that advanced by Potter at Friday's conference.

My difficulty, however, centers in the opinion or "journal entry" of the Ohio Court of Appeals. It is true that that court stated specifically, App. 23, that § 4549.04(D) is a lesser included offense of § 4549.04(A). But then it went on, in the very next sentence, to say that the two prosecutions must be premised on the "same operative act." Further down, in the same paragraph, it concluded that the two prosecutions were based on separate acts. I think we would be stretching that court's holding to give full emphasis to its comment about a lesser included offense, but at the same time to deemphasize or ignore its ultimate and critical holding that there were two offenses here committed on different dates. It may well be that the case sputters and expires accordingly, so far as the issue we hoped was there is concerned. In my view, however, we should take the case as we find it.

I thus adhere to my vote to affirm. I could go along with a DIG if that is the consensus.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 30, 1977

Re: No. 75-6933 - Brown v. Ohio

Dear Lewis:

I shall write promptly, and briefly, in dissent in line with my vote at conference and with my letter to you of March 28.

I wonder, in the heading of your opinion, whether the writ should not be directed to the Court of Appeals rather than to the Supreme Court of Ohio.

Sincerely,

*H.A.B.*

Mr. Justice Powell

cc: The Conference

To: The Chief Justice

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAY 31 1977

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

No. 75-6933 - Brown v. Ohio

MR. JUSTICE BLACKMUN, dissenting.

The Court reverses the judgment of the Ohio Court of Appeals because the Court does not wish this case to slip by without taking advantage of the opportunity to pronounce some acceptable but hitherto unenunciated (at this level) double jeopardy law. I dissent because, in my view, this case does not deserve that treatment.

I, of course, have no quarrel with the Court's general double jeopardy analysis. See Jeffers v. United States, ante, p. \_\_\_\_\_. I am unable to ignore as easily as the Court does, however, the specific finding of the Ohio Court of Appeals that the two prosecutions at issue here were based on petitioner's separate and distinct acts committed, respectively, on November 29 and on December 8, 1973.

To The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Blackmun

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

Recirculated: JUN 1 1977

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 75-6933

Nathaniel Brown, Petitioner,  
                                   v.  
 State of Ohio.                    } On Writ of Certiorari to the  
   Supreme Court of Ohio.

[June —, 1977]

MR. JUSTICE BLACKMUN, dissenting.

The Court reverses the judgment of the Ohio Court of Appeals because the Court does not wish this case to slip by without taking advantage of the opportunity to pronounce some acceptable but hitherto unenunciated (at this level) double jeopardy law. I dissent because, in my view, this case does not deserve that treatment.

I, of course, have no quarrel with the Court's general double jeopardy analysis. See *Jeffers v. United States*, ante, p. —. I am unable to ignore as easily as the Court does, however, the specific finding of the Ohio Court of Appeals that the two prosecutions at issue here were based on petitioner's separate and distinct acts committed, respectively, on November 29 and on December 8, 1973.

Petitioner was convicted of operating a motor vehicle on December 8 without the owner's consent. He subsequently was convicted of taking and operating the same motor vehicle on November 29 without the owner's consent and with the intent permanently to deprive the owner of possession. It is possible, of course, that at some point the two acts would be so closely connected in time that the Double Jeopardy Clause would require treating them as one offense. This surely would be so with respect to the theft and any simultaneous unlawful operation. Furthermore, as a matter of statutory construction, the allowable unit of prosecution may be a course of conduct rather than the separate segments of such a course.

Brown v Ohio

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

Byron,

What do you think  
of the change I  
suggest on page 8?

I would prefer to  
retain the ~~the~~ sentence  
in view of Harry's  
dissent - which suggests  
that every time a  
stolen car stops &  
starts again there  
could be a separate  
offense under Ohio  
law.

Lewis - O.K.  
BFW

Lewis

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: MAY 26 1977

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

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 75-6933

Nathaniel Brown, Petitioner,  
 v,  
 State of Ohio. } On Writ of Certiorari to the  
 Supreme Court of Ohio.

[June —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the Double Jeopardy Clause of the Fifth Amendment bars prosecution and punishment for the crime of stealing an automobile following prosecution and punishment for the lesser included offense of operating the same vehicle without the owner's consent.

## I

On November 29, 1973, the petitioner, Nathaniel Brown, stole a 1965 Chevrolet from a parking lot in East Cleveland, Ohio. Nine days later, on December 8, 1973, Brown was caught driving the car in Wickliffe, Ohio. The Wickliffe police charged him with "joyriding"—taking or operating the car without the owner's consent—in violation of Ohio Rev. Code § 4549.04 (D).<sup>1</sup> The complaint charged that "on or about December 8, 1973, . . . Nathaniel H. Brown did unlawfully and purposely take, drive or operate a certain motor vehicle to wit; a 1965 Chevrolet . . . without the consent of the owner one Gloria Ingram . . . ." App. 3. Brown pled guilty to this charge and was sentenced to 30 days in jail and a \$100 fine.

<sup>1</sup> Section 4549.04 (D) provided at the time: "No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner." A violation was punishable as a misdemeanor. Section 4549.04 was repealed effective January 1, 1974.

May 31, 1977

No. 75-6933 Brown v. Ohio

Dear Harry:

I agree that the writ should be directed to the Ohio Court of Appeals, as was done in Moore v. City of East Cleveland, No. 75-6289. Although this apparently represents a departure from our former practice in Ohio cases, see Tumey v. Ohio, 273 U.S. 510, 515 (1927), I understand that it reflects the current understanding of the Ohio Supreme Court that dismissals by that court for want of a substantial constitutional question do not express a view on the merits.

Thank you for your interest and assistance.

Sincerely,

Mr. Justice Blackmun

lfp/ss



1, 4-6, 8-9

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

2nd DRAFT

From: Mr. Justice Powell

# SUPREME COURT OF THE UNITED STATES

dated: \_\_\_\_\_

No. 75-6933

Recirculated JUN 6 1977

Nathaniel Brown, Petitioner, } On Writ of Certiorari to the  
v. } Court of Appeals of Ohio,  
State of Ohio. } Cuyahoga County. }

[June —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the Double Jeopardy Clause of the Fifth Amendment bars prosecution and punishment for the crime of stealing an automobile following prosecution and punishment for the lesser included offense of operating the same vehicle without the owner's consent.

## I

On November 29, 1973, the petitioner, Nathaniel Brown, stole a 1965 Chevrolet from a parking lot in East Cleveland, Ohio. Nine days later, on December 8, 1973, Brown was caught driving the car in Wickliffe, Ohio. The Wickliffe police charged him with "joyriding"—taking or operating the car without the owner's consent—in violation of Ohio Rev. Code § 4549.04 (D).<sup>1</sup> The complaint charged that "on or about December 8, 1973, . . . Nathaniel H. Brown did unlawfully and purposely take, drive or operate a certain motor vehicle to wit; a 1965 Chevrolet . . . without the consent of the owner one Gloria Ingram . . . ." App. 3. Brown pled guilty to this charge and was sentenced to 30 days in jail and a \$100 fine.

<sup>1</sup> Section 4549.04 (D) provided at the time: "No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner." A violation was punishable as a misdemeanor. Section 4549.04 was repealed effective January 1, 1974.

O.T. 76

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 21, 1977

MEMORANDUM TO THE CONFERENCE:

Re: Cases heretofore held for Brown v. Ohio, 75-6933

(1) No. 76-1498, Davis v. Kentucky

Petitioner picked up a 16-year old girl in Jefferson County, Kentucky, and transported her into Bullit County, where they had sexual intercourse. He was charged with various crimes by both counties. Among the charges in Jefferson County was that of "detaining a woman against her will with intent to have carnal knowledge." Petitioner was acquitted on that charge in his Jefferson County trial. Petitioner subsequently was tried on the same charge, and on the additional charges of carnal knowledge and rape, in Bullit County. He was acquitted of "detaining" (for the second time) and also of rape, but convicted of carnal knowledge.

The Kentucky Supreme Court held that petitioner's initial "detaining" acquittal did not bar his subsequent prosecution for carnal knowledge, since each crime had separate elements under Kentucky law. The court then assumed arguendo that the initial "detaining" acquittal in Jefferson County was a bar to subsequent prosecution on the charges of "detaining" and rape (a greater offense that includes the elements of both carnal knowledge and "detaining"). It nonetheless held that any violation of the Double Jeopardy Clause was harmless since petitioner had been convicted only of carnal knowledge.

Petitioner contends that the harmless error holding conflicts with Price v. Georgia, 398 U.S. 320 (1970), where the Court held that retrial on a greater charge (murder) in violation of the Double Jeopardy Clause could not be viewed as harmless beyond a reasonable doubt although the retrial resulted only in conviction of a lesser included offense (manslaughter). The State does not dwell on the harmless error issue, but contends that there was no double jeopardy violation because the crimes charged by the two counties occurred in different jurisdictions and involved separate acts.

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 1, 1977

Re: No. 75-6933 - Brown v. Ohio

Dear Harry:

Please join me in your dissent in this case.

Sincerely,

*WHR*  
*LC*

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 27, 1977

Re: 75-6933 - Brown v. Ohio

Dear Lewis:

Please join me.

Respectfully,

/s/

Mr. Justice Powell

Copies to the Conference