

# The Burger Court Opinion Writing Database

## *Arizona v. Washington*

434 U.S. 497 (1978)

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

December 27, 1977

Dear John:

Re: 76-1168 Arizona v. George Washington, Jr.

I join.

Regards,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 28, 1977

RE: No. 76-1168 Arizona, Richard Boykin v. Washington

Dear Thurgood:

Would you undertake a dissent in this case?

Sincerely,

*Bul*

Mr. Justice Marshall

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 23, 1978

RE: No. 76-1168 Arizona v. Washington

Dear Thurgood:

Please join me in the dissenting opinion you  
have prepared in the above.

Sincerely,



Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

January 3, 1978

Re: No. 76-1168, Arizona v. Washington

Dear John,

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

Sincerely yours,

Mr. Justice Stevens

P.S.  
/

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 27, 1977

*Handwritten: H.R. 1168*  
Re: No. 76-1168 - Boykin v. Washington

Dear John:

I am considering a short concurrence in  
this case.

Sincerely,



Mr. Justice Stevens

Copies to Conference

✓ 40: The Chief Justice ✓  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice White

Circulated: 1-3-78

1st DRAFT

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

## SUPREME COURT OF THE UNITED STATES

No. 76-1168

Arizona, Richard Boykin, Sheriff,	} On Writ of Certiorari to
Pima County, Petitioner,	
v.	
George Washington, Jr.	} the United States Court of Appeals for the Ninth Circuit.

[January —, 1978]

MR. JUSTICE WHITE, dissenting.

I cannot agree with the Court of Appeals that the failure of a state trial judge to express the legal standard under which he has declared a mistrial is, in itself and without further examination of the record, sufficient reason to infer constitutional error foreclosing a second trial. The Court's opinion in *Townsend v. Sain*, 372 U. S. 293 (1963), is to the contrary. There, in the course of a full scale exposition of the proper approach to be followed by a federal court in determining whether a writ of habeas corpus should be issued on the petition of a state prisoner, the Court addressed the situation where the state trial judge, in making the challenged ruling, did not articulate the constitutional standard under which he acted. The Court concluded that "the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standard of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied." 372 U. S., at 314-315. A silent record is not a sufficient basis for concluding that the state judge has committed constitutional error; the mere possibility of error is not enough to warrant habeas corpus relief.

The Court of Appeals, as well as the District Court, was therefore in error in granting relief without further examina-

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 28, 1977

Re: No. 76-1168, Arizona v. Washington

Dear John:

In due course I will circulate a dissent in this  
one.

Sincerely,



T.M.

Mr. Justice Stevens

cc: The Conference



1/19/78

No. 76-1168, Arizona v. Washington

MR. JUSTICE MARSHALL, dissenting.

The Court today holds that another trial of petitioner, following a mistrial declared over his vehement objection, is not prohibited by the Double Jeopardy Clause. To reach this result, my Brethren accord a substantial degree of deference to a trial court finding that the Court simply assumes was made but that appears nowhere in the record. Because of the silence of the record on the crucial question whether there was "manifest necessity" for a mistrial, I believe that another trial of respondent would violate his constitutional right not to be twice put in jeopardy for the same offense. I therefore dissent.

My disagreement with the majority is a narrow one. I fully concur in its view that the constitutional protection of the Double Jeopardy Clause "embraces the defendant's 'valued right to have his trial completed by a particular tribunal,'" since a

23 JAN 1978

1st PRINTED DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1168

Arizona, Richard Boykin, Sheriff, Pima County, Petitioner, v. George Washington, Jr.	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
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[February —, 1978]

MR. JUSTICE MARSHALL, dissenting.

The Court today holds that another trial of petitioner, following a mistrial declared over his vehement objection, is not prohibited by the Double Jeopardy Clause. To reach this result, my Brethren accord a substantial degree of deference to a trial court finding that the Court simply assumes was made but that appears nowhere in the record. Because of the silence of the record on the crucial question whether there was "manifest necessity" for a mistrial, I believe that another trial of respondent would violate his constitutional right not to be twice put in jeopardy for the same offense. I therefore dissent.

My disagreement with the majority is a narrow one. I fully concur in its view that the constitutional protection of the Double Jeopardy Clause "embraces the defendant's 'valued right to have his trial completed by a particular tribunal,'" since a second prosecution inevitably "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Ante*, at 6-7 (footnotes omitted). For these reasons, I also agree that, where a mistrial is declared over a defendant's objections, a new trial is permissible only if the termination of the earlier trial was justified by a "manifest necessity" and that the prosecution must shoulder the "heavy" burden of demonstrating such a

Feb. 14, 1978

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1168

Arizona, Richard Boykin, Sheriff, Pima County, Petitioner, v. George Washington, Jr.	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
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[February —, 1978]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today holds that another trial of petitioner, following a mistrial declared over his vehement objection, is not prohibited by the Double Jeopardy Clause. To reach this result, my Brethren accord a substantial degree of deference to a trial court finding that the Court simply assumes was made but that appears nowhere in the record. Because of the silence of the record on the crucial question whether there was "manifest necessity" for a mistrial, I believe that another trial of respondent would violate his constitutional right not to be twice put in jeopardy for the same offense. I therefore dissent.

My disagreement with the majority is a narrow one. I fully concur in its view that the constitutional protection of the Double Jeopardy Clause "embraces the defendant's 'valued right to have his trial completed by a particular tribunal,' " since a second prosecution inevitably "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Ante*, at 6-7 (footnotes omitted). For these reasons, I also agree that, where a mistrial is declared over a defendant's objections, a new trial is permissible only if the termination of the earlier trial was justified by a "manifest necessity" and that the prosecution must shoulder the "heavy" burden of demonstrating such a

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 3, 1978

Re: No. 76-1168 - Arizona v. Washington

Dear John:

I shall await Byron's separate concurrence in this  
case.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF  
VICE HARRY A. BLACKMUN

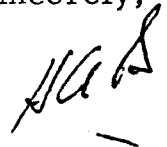
January 4, 1978

Re: No. 76-1168 - Arizona v. Washington

Dear John:

At the end of your opinion will you please add a notation that I concur in the result.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 28, 1977

No. 76-1168 Arizona v. Washington

Dear John:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Stevens

Copies to the Conference

LFP/lab

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 22, 1977

Re: No. 76-1168 - Arizona v. Washington

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

Copies to the Conference

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

From: Mr. Justice Stevens

Circulated: DEC 21 1977

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

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 76-1168

Arizona, Richard Boykin, Sheriff, On Writ of Certiorari to  
 Pima County, Petitioner, the United States Court  
 v. of Appeals for the Ninth  
 George Washington, Jr. Circuit.

[January —, 1978]

MR. JUSTICE STEVENS delivered the opinion of the Court.

An Arizona trial judge granted the prosecutor's motion for a mistrial predicated on improper and prejudicial comment during defense counsel's opening statement. In a subsequent habeas corpus proceeding, a federal district court held that the defendant could not be placed in further jeopardy by another trial. The Court of Appeals for the Ninth Circuit affirmed.<sup>1</sup> The questions presented are whether the record reflects the kind of "necessity" for the mistrial ruling that will avoid a valid plea of double jeopardy, and if so, whether the plea must nevertheless be allowed because the Arizona trial judge did not fully explain the reasons for his mistrial ruling.

## I

In 1971 respondent was found guilty of murdering a hotel night clerk. In 1973, the Superior Court of Pima County, Ariz., ordered a new trial because the prosecutor had withheld exculpatory evidence from the defense. The Arizona Supreme Court affirmed the new trial order in an unpublished opinion.

Respondent's second trial began in January 1975. During the *voir dire* examination of prospective jurors, the prosecutor

<sup>1</sup> 546 F. 2d 829 (1977). The order discharging respondent from custody has been stayed pending completion of appellate review.

*Dissent!!*

*IPS*  
*In the Court*  
*1/24/78*



pp. 1, 4, 16-17

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

From: Mr. Justice Stevens

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

Recirculated: JAN 4 1978

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 76-1168

Arizona, Richard Boykin, Sheriff,	} On Writ of Certiorari to
Pima County, Petitioner,	
v.	
George Washington, Jr.	the United States Court of Appeals for the Ninth Circuit.

[January —, 1978]

MR. JUSTICE STEVENS delivered the opinion of the Court.

An Arizona trial judge granted the prosecutor's motion for a mistrial predicated on improper and prejudicial comment during defense counsel's opening statement. In a subsequent habeas corpus proceeding, a federal district court held that the Double Jeopardy Clause protected the defendant from another trial. The Court of Appeals for the Ninth Circuit affirmed.<sup>1</sup> The questions presented are whether the record reflects the kind of "necessity" for the mistrial ruling that will avoid a valid plea of double jeopardy, and if so, whether the plea must nevertheless be allowed because the Arizona trial judge did not fully explain the reasons for his mistrial ruling.

## I

In 1971 respondent was found guilty of murdering a hotel night clerk. In 1973, the Superior Court of Pima County, Ariz., ordered a new trial because the prosecutor had withheld exculpatory evidence from the defense. The Arizona Supreme Court affirmed the new trial order in an unpublished opinion.

Respondent's second trial began in January 1975. During the *voir dire* examination of prospective jurors, the prosecutor

<sup>1</sup> 546 F. 2d 829 (1977). The order discharging respondent from custody has been stayed pending completion of appellate review.

P.20

To: The Chief Justice

Mr. Justice Brennan

Mr. Justice Stewart

Mr. Justice White

Mr. Justice Marshall

Mr. Justice Blackmun

Mr. Justice Powell

Mr. Justice Rehnquist

From: Mr. Justice Stevens

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

Recirculated: 1/6/78

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1168

Arizona, Richard Boykin, Sheriff,	On Writ of Certiorari to	the United States Court
Pima County, Petitioner,		of Appeals for the Ninth
v.		Circuit.
George Washington, Jr.		

[January —, 1978]

MR. JUSTICE STEVENS delivered the opinion of the Court.

An Arizona trial judge granted the prosecutor's motion for a mistrial predicated on improper and prejudicial comment during defense counsel's opening statement. In a subsequent habeas corpus proceeding, a federal district court held that the Double Jeopardy Clause protected the defendant from another trial. The Court of Appeals for the Ninth Circuit affirmed.<sup>1</sup> The questions presented are whether the record reflects the kind of "necessity" for the mistrial ruling that will avoid a valid plea of double jeopardy, and if so, whether the plea must nevertheless be allowed because the Arizona trial judge did not fully explain the reasons for his mistrial ruling.

## I

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Respondent's second trial began in January 1975. During the *voir dire* examination of prospective jurors, the prosecutor

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