The Burger Court Opinion Writing Database

Crist v. Bretz
437 U.S. 28 (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

November 8, 1977

Re: 76-1200 - Crist v. Cline

Dear John:

Your November 8 suggested formulation for the above is satisfactory.

Regards,

WEB

Mr. Justice Stevens

Copies to the Conference

6-7-77
Wm Brennan

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

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1978

Dear Potter:

Re: 76-1200 Crist v. Cline

This case is giving me more of the same trouble I expressed at Conference. It disturbs me to "constitutionalize" what is hardly more than a procedural matter. In addition, there is no genuine need for uniformity of state and federal practice, and principles of federalism are to the contrary.

I will have my position--and possible writing--by next week's conference.

Regards,

WEB
Jr

Mr. Justice Stewart

cc: The Conference

To: Mr. Justice [illegible]
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 9 1978

Recirculated: _____

Re: 76-1200 Crist v. Cline

MR. CHIEF JUSTICE BURGER, dissenting.

As a "rulemaking" matter, the result reached by the Court is a reasonable one; it is the Court's decision to constitutionalize the rule that jeopardy attaches at the point when the jury is sworn -- so as to bind the states -- that I reject. This is but another example of how constitutional guarantees are trivialized by the insistence on mechanical uniformity between state and federal practice. There is, of course, no reason why the state and federal rules must be the same. In the period between the swearing of the jury and the swearing of the first witness, the concerns underlying the constitutional guarantee against double jeopardy are simply not threatened in any meaningful sense even on the least sanguine of assumptions about prosecutorial behavior. We should be cautious about constitutionalizing every

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

From: The Chief Justice

Circulated: _____

Recirculated JUN 13 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1200

Roger Crist, as Warden of the Montana State Penitentiary, Deer Dodge, Montana, et al., Appellants, *v.* L. R. Bretz et al.

On Appeal from the United States Court of Appeals for the Ninth Circuit.

[June —, 1978]

MR. CHIEF JUSTICE BURGER, dissenting.

As a "rulemaking" matter, the result reached by the Court is a reasonable one; it is the Court's decision to constitutionalize the rule that jeopardy attaches at the point when the jury is sworn—so as to bind the States—that I reject. This is but another example of how constitutional guarantees are trivialized by the insistence on mechanical uniformity between state and federal practice. There is, of course, no reason why the state and federal rules must be the same. In the period between the swearing of the jury and the swearing of the first witness, the concerns underlying the constitutional guarantee against double jeopardy are simply not threatened in any meaningful sense even on the least sanguine of assumptions about prosecutorial behavior. We should be cautious about constitutionalizing every procedural device found useful in federal courts, thereby foreclosing the States from experimentation with different approaches which are equally compatible with constitutional principles. All things "good" or "desirable" are not mandated by the Constitution. States should remain free to have procedures attuned to the special problems of the criminal justice system at the state and local levels. Principles of federalism should not so readily be compromised for the sake of a uniformity finding sustenance per-

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 22, 1977

RE: No. 76-1200 Crist v. Cline & Bretz

Dear John:

This is just formally to affirm that I approve the questions in the above. Have you decided whether or not to precede the second question by "If not"?

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

OCT 77
Wm Brennan

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 22, 1978

RE: No. 76-1200 Crist v. Cline & Bretz

Dear Potter:

Please join me.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 8, 1977

No. 76-1200 - Crist v. Cline

Dear John,

Your proposed order seems fine to me.

Sincerely yours,

Mr. Justice Stevens

Copies to the Conference

Oct 77 Wm. Brennan

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1200

Roger Crist, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al., Appellants, *v.* Merrel Cline and L. R. Bretz.	On Appeal from the United States Court of Appeals for the Ninth Circuit.

[May —, 1978]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves an aspect of the constitutional guarantee against being twice put in jeopardy. The precise issue is whether the federal rule governing the time when jeopardy attaches in a jury trial is binding on Montana through the Fourteenth Amendment. The federal rule is that jeopardy attaches when the jury is empaneled and sworn; a Montana statute provides that jeopardy does not attach until the first witness is sworn.[1]

---

[1] Mont. Rev. Codes Ann. § 95–1711 (3) (1947) provides in pertinent part:

"[A] prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances: . . . (d) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. . . ."

See also *State* v. *Cunningham*, 166 Mont. 530, 535 P. 2d 186, 189. In addition to Montana, Arizona also holds that jeopardy does not attach until "proceedings commence," although this may be as early as the opening statement. *Klinefelter* v. *Maricopa County*, — Ariz. —, 502

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 22, 1978

No. 76-1200, Crist v. Cline

Dear Harry,

Thanks for your note of today. After considerable thought, I concluded that the considerations you mention all furnish valid reasons for holding that a defendant is put in jeopardy at an early stage of a criminal trial, but none of them can be said to lead to a holding that the precise point at which jeopardy attaches is when the jury is empaneled and sworn. Indeed, these considerations could argue equally for holding that jeopardy attaches even before that point is reached. (See the last sentence of note 16 on page 10.) I stressed these considerations, therefore, only in discussing why jeopardy attaches long before final verdict. (See the quotation from Green on page 7.) I was leery, however, of relying on anything other than trial by the chosen jury to pinpoint the precise stage at which jeopardy does attach.

Lewis is going to circulate a dissenting opinion in due course. I shall certainly bear your thoughts in mind in deciding whether any modifications in my opinion seem to be called for in response to his dissent.

Sincerely yours,

P.S.

Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1200

Roger Crist, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al., Appellants, *v.* L. R. Bretz et al.	On Appeal from the United States Court of Appeals for the Ninth Circuit.

[May —, 1978]

MR. JUSTICE STEWART delivered the opinion of the Court.

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[1] Mont. Rev. Codes Ann. § 95-1711 (3) (1947) provides in pertinent part:

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To: The Chief Justice
Mr. [illegible]
Mr. [illegible]
✓ Mr. [illegible]
[illegible]

3rd DRAFT

SEE PAGES: 2, 3, 5, 10

SUPREME COURT OF THE UNITED STATES

No. 76–1200

Roger Crist, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al., Appellants, *v.* L. R. Bretz et al.	On Appeal from the United States Court of Appeals for the Ninth Circuit.

[May —, 1978]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves an aspect of the constitutional guarantee against being twice put in jeopardy. The precise issue is whether the federal rule governing the time when jeopardy attaches in a jury trial is binding on Montana through the Fourteenth Amendment. The federal rule is that jeopardy attaches when the jury is empaneled and sworn; a Montana statute provides that jeopardy does not attach until the first witness is sworn.[1]

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See also *State* v. *Cunningham*, 166 Mont. 530, 535 P. 2d 186, 189. In addition to Montana, Arizona also holds that jeopardy does not attach until "proceedings commence," although this may be as early as the opening statement. *Klinefelter* v. *Maricopa County*, — Ariz. —, 502

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 19, 1978

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 76-1200, Crist v. Bretz

The one case held for Crist v. Bretz is Shaw v. Georgia, No. 77-5935. In Shaw the jury at the first trial was dismissed prior to its being empaneled and sworn. There later was another trial, which ended in a conviction. The state courts held there was no double jeopardy violation.

The only issue in Shaw is the determination of the time when jeopardy attaches in a state jury trial. Since Crist holds that jeopardy does not attach until the jury has been empaneled and sworn, it is consistent with Shaw. Accordingly, I will vote to deny the petition for certiorari.

P.S.

P.S.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 9, 1977

Re: No. 76-1200 - Crist v. Cline

Dear John:

Your suggested form of order in this case is satisfactory to me.

Sincerely,

Mr. Justice Stevens

Copies to Conference

OCT 77
Wm Brennan

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 22, 1978

Re: 76-1200 - Crist v. Cline & Bretz

Dear Potter,

Please join me.

Sincerely yours,

Byron

Mr. Justice Stewart

Copies to the Conference

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

From: Mr. Justice Marshall

Circulated: NOV 22 1977

Recirculated: _____

No. 76-1200, Crist v. Cline

MR. JUSTICE MARSHALL, dissenting.

By its order restoring this case to the calendar for rebriefing and additional oral argument, the Court appears once again to be "reach[ing] out" for a vehicle to change a long line of precedent. See Pennsylvania v. Mimms, ____ U.S., _____, _____, slip op. at 3 (Stevens, J., dissenting). The Court asks the parties to discuss the rule to be applied in the federal courts with regard to attachment of jeopardy, a rule that is very well-established.[1] But the parties here are the State of Montana and state court defendants, parties who can hardly be considered knowledgeable about the federal courts. The Court attempts to surmount this difficulty by asking the Solicitor General to provide the federal prosecutor's perspective on this important issue, but it does not invite any defendants' representative to submit a brief giving the federal defendant's perspective.

In my view, the Court today does violence to two assumptions underlying Article III of the Constitution: that we will not anticipate a question before it is necessary to decide it,[2] and that both sides of an issue will be vigorously represented by involved advocates.[3] See generally Ashwander v. TVA, 297 U.S. 288, 346-48 (1938) (Brandeis, J., concurring). I dissent from the order restoring the case for reargument.

6 00 77 Wr Brennan

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 22, 1978

Re: No. 76-1200 - Crist v. Cline & Bretz

Dear Potter:

Please join me.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

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

From: Mr. Justice Marshall

Circulated: _____

Recirculated: NOV 28 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1200

Roger Crist, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al., Appellants, *v.* Merrel Cline and L. R. Bretz.	On Appeal from the United States Court of Appeals for the Ninth Circuit.

[November —, 1977]

MR. JUSTICE MARSHALL, dissenting.

By its order restoring this case to the calendar for rebriefing and additional oral argument, the Court appears once again to be "reach[ing] out" for a vehicle to change a long line of precedent. See *Pennsylvania* v. *Mimms*, — U. S., —, —, slip op., at 3 (STEVENS, J., dissenting). The Court asks the parties to discuss the rule to be applied in the federal courts with regard to attachment of jeopardy, a rule that is very well established.[1] But the parties here are Montana prison officials, represented by the Attorney General of Montana, and state court defendants; they can hardly be considered knowledgeable about the federal courts. The Court attempts to surmount this difficulty by inviting the Solicitor General to provide the federal prosecutor's perspective on this important issue, yet it does not invite the other side, federal defendants

[1] The current federal rule on attachment of jeopardy was applied in the federal courts as early as 1868. *United States* v. *Watson*, 28 Fed. Cas. 499 (SDNY 1868). Since *Downum* v. *United States*, 372 U. S. 734 (1963), it has never been questioned in this Court that jeopardy attaches when the jury is sworn. See, *e. g.*, *Illinois* v. *Somerville*, 410 U. S. 458, 467 (1973); *id.*, at 471 (WHITE, J., dissenting); *Serfass* v. *United States*, 420 U. S. 377, 388 (1975); *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 569 (1977).

SUPREME COURT OF THE UNITED STATES

ROGER CRIST, AS WARDEN OF THE MONTANA STATE PENITENTIARY, DEER LODGE, MONTANA, ET AL. *v.* MERREL CLINE AND L. R. BRETZ

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1200. Decided December 5, 1977

ORDER

This case is restored to the calendar for reargument. Counsel are requested to brief and discuss during oral argument the following questions:

1. Is the rule heretofore applied in the federal courts—that jeopardy attaches in jury trials when the jury is sworn—constitutionally mandated?

2. Should this Court hold that the Constitution does not require jeopardy to attach in any trial—state or federal, jury or nonjury—until the first witness is sworn?

The Solicitor General is invited to file a brief expressing the views of the United States on each of these questions.

MR. JUSTICE MARSHALL, dissenting.

By its order restoring this case to the calendar for rebriefing and additional oral argument, the Court appears once again to be "reach[ing] out" for a vehicle to change a long line of precedent. See *Pennsylvania* v. *Mimms*, — U. S., —, —, slip op., at 3 (STEVENS, J., dissenting). The Court asks the parties to discuss the rule to be applied in the federal courts with regard to attachment of jeopardy, a rule that is very well established.[1] But the parties here are Montana prison offi-

[1] The current federal rule on attachment of jeopardy was applied in the federal courts as early as 1868. *United States* v. *Watson*, 28 Fed. Cas. 499 (SDNY 1868). Since *Downum* v. *United States*, 372 U. S. 734 (1963), it has never been questioned in this Court that jeopardy attaches

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 11, 1977

Re: No. 76-1200 - Crist v. Cline

Dear John:

I go along.

Sincerely,

HAB.

Mr. Justice Stevens

cc: The Conference

Oct. 77
Wm Brennan

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Rochester, Minnesota
December 1, 1977

Re: No. 76-1200 - Crist v. Cline

Dear John:

On balance, I would also prefer the presence of the words "If not" in the second question. This, however, is not earthshaking.

Sincerely,

H. A. B.

Mr. Justice Stevens

cc: The Conference

Wm Brennan
9/77

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 22, 1978

Re: No. 76-1200 - Crist v. Cline and Bretz

Dear Potter:

Please join me.

As I read your opinion, particularly at page 8, you rely for the result on only one interest of the defendant, namely, retaining a chosen jury. I believe our earlier cases explain that there are other interests that deserve protection, vis., the avoidance of repetitive stress, continuing embarrassment, and prosecutorial overreaching before the first witness is sworn. I think I would have preferred having some mention made of these other interests, for they are implemented in the swearing of the jury. I do not feel strongly enough about this, however, to write separately, and I shall be content with your ultimate decision in the matter.

Sincerely,

HAB

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 2, 1978

Re: No. 76-1200 - Crist v. Bretz

Dear Potter:

Now that Lewis has written his dissent, I have indulged in a few paragraphs by way of separate concurrence. This is out of line with the last sentence of my letter to you of May 22, but on reconsideration I felt I should write.

Sincerely,

Harry

Mr. Justice Stewart

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: JUN 2 1978

Recirculated: _____

No. 76-1200 - Crist v. Bretz

MR. JUSTICE BLACKMUN, concurring.

Although I join the Court's opinion, I write to emphasize the fact that I am not content to rest the result, as the Court seems to be, ante, p. 8, solely on the defendant's "valued right to have his trial completed by a particular tribunal," a factor mentioned by Mr. Justice Black, speaking for the Court, in Wade v. Hunter, 336 U.S. 684, 689(1949). That approach would also support a conclusion that jeopardy attaches at the very beginning of the jury selection process. See Schulhofer, Jeopardy and Mistrials, 125 U. Pa. L. Rev. 449, 512-514 (1977).

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

1st PRINTED DRAFT

From: Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

No. 76-1200

Circulated: JUN 5 1978

Recirculated: _____

Roger Crist, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al., Appellants, *v.* L. R. Bretz et al.

On Appeal from the United States Court of Appeals for the Ninth Circuit.

[June —, 1978]

MR. JUSTICE BLACKMUN, concurring.

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Other interests are involved here as well: repetitive stress and anxiety upon the defendant; continuing embarrassment for him; and the possibility of prosecutorial overreaching in the opening statement.

It is perhaps true that each of these interests could be used, too, to support an argument that jeopardy attaches at some point before the jury is sworn. I would bring all these interests into focus, however, at the point where the jury is sworn because it is then and there that the defendant's interest in the jury reaches its highest plateau, because the opportunity for prosecutorial overreaching thereafter increases substantially, and because stress and possible embarrassment for the defendant from then on is sustained.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 9, 1977

No. 76-1200 Crist v. Cline

Dear John:

I agree with your order in the above case.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

lfp/ss

OC 77
Wm Brennan

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 22, 1978

No. 76-1200 Crist v. Cline

Dear Potter:

In due time I will circulate a dissent.

Sincerely,

L. Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

lfp/ss 6/1/78

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: 1 JUN 1978

Recirculated: _____

No. 76-1200 CRIST v. CLINE

MR. JUSTICE POWELL, dissenting.

The rule that jeopardy attaches in a jury trial at the moment the jury is sworn is not mandated by the Constitution. It is the product of historical accident, embodied in a Court decision without the slightest consideration of the policies it purports to serve. Because these policies would be served equally well by a rule fixing the attachment of jeopardy at the swearing of the first witness, I would uphold the Montana statute. Even if one assumed that the Fifth Amendment now requires the attachment of jeopardy at the swearing of the jury, I would view that rule as incidental to the purpose of the Double Jeopary Clause and hence not incorporated through the Due Process Clause of the Fourteenth Amendment and not applicable to the States. I therefore dissent.

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: _____

Recirculated: 6 JUN

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1200

Roger Crist, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al., Appellants, *v.* L. R. Bretz et al. | On Appeal from the United States Court of Appeals for the Ninth Circuit.

[June —, 1978]

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I

As the Court correctly observes, *ante*, at 5–6, it is clear that in the early years of our national history the constitutional guarantee against double jeopardy was restricted to cases in which there had been a complete trial—culminating in acquittal or conviction. The limited debate on the Double Jeopardy Clause in the House of Representatives confirms this proposi-

Stylistic Changes Throughout.

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: _____

Recirculated: 7 JUN 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1200

Roger Crist, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al., Appellants, *v.* L. R. Bretz et al. | On Appeal from the United States Court of Appeals for the Ninth Circuit.

[June —, 1978]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The rule that jeopardy attaches in a jury trial at the moment the jury is sworn is not mandated by the Constitution. It is the product of historical accident, embodied in a Court decision without the slightest consideration of the policies it purports to serve. Because these policies would be served equally well by a rule fixing the attachment of jeopardy at the swearing of the first witness, I would uphold the Montana statute. Even if one assumed that the Fifth Amendment now requires the attachment of jeopardy at the swearing of the jury, I would view that rule as incidental to the purpose of the Double Jeopardy Clause and hence not incorporated through the Due Process Clause of the Fourteenth Amendment and not applicable to the States. I therefore dissent.

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1200

Roger Crist, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al., Appellants, *v.* L. R. Bretz et al.

On Appeal from the United States Court of Appeals for the Ninth Circuit.

[June —, 1978]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 8, 1977

Re: No. 76-1200 - Crist v. Cline

Dear John:

Your proposed order seems fine to me.

Sincerely,

Mr. Justice Stevens

Copies to the Conference

Oct 77
Wm Brennan

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 1, 1978

Re: No. 76-1200 Crist v. Cline

Dear Lewis:

Please join me in your dissent.

Sincerely,

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 8, 1977

MEMORANDUM TO THE CONFERENCE

Re: 76-1200 - Crist v. Cline

Here is a possible form of order setting the case for reargument:

"This case is restored to the calendar for reargument. Counsel are requested to brief and discuss during oral argument the following questions:

1. Is the rule heretofore applied in the federal courts--that jeopardy attaches in jury trials when the jury is sworn--constitutionally mandated?

2. Should this Court hold that the Constitution does not require jeopardy to attach in any trial--state or federal, jury or non-jury--until the first witness is sworn?

The Solicitor General is invited to file a brief expressing the views of the United States on each of these questions."

Respectfully,

6c&77

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 22, 1977

Re: 76-1200 - Christ v. Cline

Dear Bill:

My slight preference for not prefacing the second question with "If not", is based on my concern that a party may decline to address the second question if he concludes that the proper answer to the first is in the affirmative.

Respectfully,

Mr. Justice Brennan

Copies to the Conference

OC 77
Mr Brennan

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

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

ROGER CRIST, AS WARDEN OF THE MONTANA STATE PENITENTIARY, DEER LODGE, MONTANA, ET AL. *v.* MERREL CLINE AND L. R. BRETZ

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1200. Decided December —, 1977

ORDER

This case is restored to the calendar for reargument. Counsel are requested to brief and discuss during oral argument the following questions:

1. Is the rule heretofore applied in the federal courts—that jeopardy attaches in jury trials when the jury is sworn—constitutionally mandated?

2. Should this Court hold that the Constitution does not require jeopardy to attach in any trial—state or federal, jury or nonjury—until the first witness is sworn?

The Solicitor General is invited to file a brief expressing the views of the United States on each of these questions.

OCT 77
Wm Brennan

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 22, 1978

Re: 76-1200 - Crist v. Cline

Dear Potter:

Please join me.

Respectfully,

John

Mr. Justice Stewart

Copies to the Conference