

# The Burger Court Opinion Writing Database

*Burks v. United States*

437 U.S. 1 (1978)

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



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: APR 11 1970

1st DRAFT

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

## SUPREME COURT OF THE UNITED STATES

No. 76-6528

David Wayne Burks, Petitioner, | On Writ of Certiorari to the  
v. | United States Court of Appeals for the Sixth Circuit.  
United States.

[April —, 1978]

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

We granted certiorari to resolve the question of whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court solely for lack of sufficient evidence to sustain the jury's verdict.

### I

Petitioner Burks was tried in the United States District Court for the crime of robbing a federally insured bank by use of a dangerous weapon, a violation of 18 U. S. C. § 2113 (d). Burks' principle defense was insanity. To prove this claim petitioner produced three expert witnesses who testified, albeit with differing diagnoses of his mental condition, that he suffered from a mental illness at the time of the robbery, which rendered him substantially incapable of conforming his conduct to the requirements of the law. In rebuttal the Government offered the testimony of two experts, one of whom testified that although petitioner possessed a character disorder, he was not mentally ill. The other prosecution witness acknowledged a character disorder in petitioner, but gave a rather ambiguous answer to the question of whether Burks had been capable of conforming his conduct to the law. Lay witnesses also testified for the Government, expressing their opinion that petitioner

4, 9, 14, 15, 16, 17

To: Mr. Justice Brennan  
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Mr. Justice Marshall  
Mr. Justice Black  
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Mr. Justice Marshall

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2nd DRAFT

Recirculated: May 23 1978

## SUPREME COURT OF THE UNITED STATES

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

CHAMBERS OF  
THE CHIEF JUSTICE

May 25, 1978

RE: 76-6528 - Burks v. United States

MEMORANDUM TO THE CONFERENCE:

Footnote 4 page 4 seemed to give several of you some mild concern. It is obviously not essential; I included it to make clear what we were not deciding, but I am content to drop it, but I categorically reject any intimation that our holding in this case "settles" the question described as reserved. It is quite open so far as I am concerned.

Regards,

A handwritten signature consisting of the letters "W" and "B" in a cursive, flowing style.

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

CHAMBERS OF  
THE CHIEF JUSTICE

June 1, 1978

Re: 76-6528 - Burks v. United States

MEMORANDUM TO THE CONFERENCE:

After I had agreed to drop Footnote 4 in the above case several others raised questions about it. I, therefore, concluded I would drop the second sentence, but not the first. I thought I had sent a memorandum to that effect, but apparently the memorandum did not go out.

Regards,

*WEB/m*

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

CHAMBERS OF  
THE CHIEF JUSTICE

June 19, 1978

Re: Cases Held for No. 76-6528 - Burks v. United States and  
No. 76-6617 - Greene v. Massey

MEMORANDUM TO THE CONFERENCE:

No. 77-1473 - McArthur v. Nouse

(I will vote to Grant,  
Vacate and Remand in  
Light of Burks & Greene)

Petitioner was convicted by a Florida jury for the murder of her husband. On direct appeal, the Florida Supreme Court reversed, finding the evidence insufficient to sustain guilt. Noting that the State's evidence was entirely circumstantial, the Supreme Court applied the following standard of review: "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." After reviewing the "totality of scientific and non-scientific evidence" at petitioner's trial, the Supreme Court concluded that

"the petitioner's proof of Mr. McArthur's intentional murder was not inconsistent with his accidental death. The jury could reasonably have concluded, and obviously did conclude, that it was more likely that [petitioner] murdered her husband than that she did not. Yet 'even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.' On this record [petitioner's] innocence has not been disproved . . . . The state simply did not carry its burden of proof. Our jurisprudence and the justice of the cause require that the conviction entered below be reversed and that appellant, if the state so elects, be afforded a new trial."

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 13, 1978

RE: No. 76-6528 Burks v. United States

Dear Chief:

I agree.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

May 30, 1978

RE: No. 76-6528 Burks v. United States

Dear Chief:

Like John, although I join your opinion, I  
strongly agree with Lewis that footnote 4 ought  
be omitted.

Sincerely,

*Bill*

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

April 12, 1978

No. 76-6528, Burks v. U. S.

Dear Chief,

I am glad to join the opinion you  
have written for the Court in this case.

Sincerely yours,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 26, 1978

No. 76-6528, Burks v. U. S.

Dear Chief,

Unlike Bill Rehnquist, I do not feel strongly either way about the elimination of footnote 4 on page 4. If the footnote is retained, however, I think its second sentence should, in the interest of accuracy, be reworded along the following lines:

"Accordingly, we need not now decide whether, upon reversal of a conviction for insufficiency of the evidence under those circumstances, a new trial would constitute double jeopardy."

Sincerely yours,

P. S.

The Chief Justice

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 14, 1978

Re: 76-6528 - Burks v. U.S.

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Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice  
Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 13, 1978

Re: No. 76-6528 - Burks v. United States

Dear Chief:

Please join me.

Sincerely,

*JM*  
T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 13, 1978

Re: No. 76-6528 - Burks v. United States

Dear Chief:

Will you please note at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

*HAB.*

The Chief Justice

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 25, 1978

No. 76-6528 Burks v. United States

Dear Chief:

Please join me in your opinion for the Court.

I do have some question about n. 4 (on p. 4). I would think that the question reserved in this note actually is answered by the combination of the rationale of your decision in this case and that of Thurgood's in Sanabria. If I am right about this, I would think the note might be confusing to courts below.

Although I would prefer to omit note 4, my join is not conditioned on your doing this.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 5, 1978

Re: No. 76-6528 - Burks v. United States

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 26, 1978

Re: No. 76-6528 Burks v. United States

Dear Chief:

I agree with you that the question reserved in your footnote 4 in this opinion is not resolved by Sanabria, and I quite strongly favor its retention in your opinion. As I understand Sanabria, it holds that an acquittal by the trial court, even though necessitated by the erroneous exclusion of evidence offered on behalf of the prosecution, precludes an appeal by the government. I do not think it follows from this that a defendant who has been found guilty and sentenced by a trial court must retain the benefit of those errors in admission of evidence when he himself successfully appeals his conviction to the appellate court and obtains a reversal on the basis of insufficiency of the evidence. My own view is that under those circumstances an appellate court would have some discretion to refuse to order an appellant acquitted and discharged where evidence which was in its opinion sufficient to establish his guilt had been wrongfully excluded at trial, but all your footnote 4 does is to leave this question open. I think that is wholly desirable; we are not trying to decide the merits of the question here, but neither should we permit an inference to arise by omission of a footnote such as this that it is being decided by implication.

Sincerely,

*W.W.*

The Chief Justice  
Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 12, 1978

Re: 76-6528 - Burks v. United States

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 25, 1978

Re: 76-6528 - Burks v. United States

Dear Chief:

Although I joined your opinion before you added the second sentence to footnote 4, I think Lewis' observation is dead right. I hope you can omit the entire footnote or, if not, at least the second sentence.

Respectfully,



The Chief Justice

Copies to the Conference