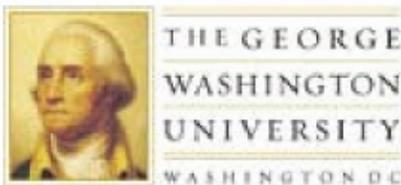


# The Burger Court Opinion Writing Database

## *Greene v. Massey*

437 U.S. 19 (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

May 26, 1978

Re: No. 76-6617 Greene v. Massey

Dear Lewis:

Your note reached me just as I am about to "take off" for a dedication affair.

I do not have time to analyze the measures but I have a feeling your concerns can possibly be met. It is worth the time because the Court got this general subject snarled up over the years, induced no doubt by poor briefs, etc. It is worth a little more time to iron out any remaining "wrinkles".

I'll discuss it with you Monday or Tuesday.

Regards,



Mr. Justice Powell

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

CHAMBERS OF  
THE CHIEF JUSTICE

June 7, 1978

Dear Lewis:

Re: 76-6617 Greene v. Massey

Now that I have pondered your memorandum of May 25, I confess I do not understand your problems. (Probably it is the June Syndrome at work.)

I will await your concurring or dissenting opinion.

Regards,

WEB.  
jk

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 22, 1978

RE: No. 76-6617 Greene v. Massey

Dear Chief:

I agree.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 22, 1978

Re: No. 76-6617, Greene v. Massey

Dear Chief,

I am glad to join your opinion for  
the Court.

Sincerely yours,

The Chief Justice

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 22, 1978

Re: 76-6617 - Greene v. Massey

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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

May 22, 1978

Re: No. 76-6617 - Greene v. Massey

Dear Chief:

Please join me.

Sincerely,



T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 19, 1978

Re: No. 76-6617 - Greene v. Massey

Dear Chief:

At the end of your opinion would you please add the usual recital that I took no part in the consideration or decision of this case.

Sincerely,



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. 76-6617 Greene v. Massey

Dear Chief:

I am having some difficulty with this case.

First, I cannot join the statement on page 5 of the opinion that the "double jeopardy [clause] is fully applicable to state criminal proceedings". I do think the Clause is applicable to this particular case as the issue is fundamental to the protection against double jeopardy. But as I will write in 76-1200 Crist v. Cline, I doubt that any of us really thinks that whether jeopardy attaches before or after the first witness is sworn is fundamental. Certainly, I do not so view it.

I could reserve my position as to this statement in a one sentence concurrence, but this is not my only concern with your draft.

The case was presented to us on the belief by all concerned, including the State itself, that the Supreme Court of Florida decision was based on a holding of insufficiency of evidence. Your opinion, if I understand it correctly, explores the possibility of an additional theory: that since certain evidence unfavorable to the defense was erroneously admitted, there was "trial error" and that this puts the case in a different posture - requiring a remand to determine more specifically the basis of the Florida Court's decision.

I would agree that the posture could indeed be different where there was trial error in some situations. But here the error was the admission of evidence unfavorable to the defendant, and apparently the three concurring Justices of the Florida court concluded either

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(1) that the totality of the evidence was insufficient, or  
(2) that with the inadmissible evidence excluded the remaining (or legally competent) evidence was insufficient to convict. Under either set of these circumstances, I see no reason for further consideration of the case by the courts below.

If, however, your opinion had focused on the point mentioned in notes 2 and 10 (pages 3 and 7), I could join a remand. Apparently the Second District Court of Appeals considered the evidence weak, though legally sufficient to sustain the verdict. And, as you point out in note 10, that court may have interpreted the Florida Supreme Court's action as granting a new trial "in the interests of justice," even though the evidence was technically sufficient to support the verdict of guilty. I would agree that this interpretation casts enough doubt on the situation to justify a remand for the purpose, and subject to the reservations, stated in your note 10. But I find it difficult to join the opinion as presently written with its primary emphasis on a finding of "trial error" that - in my view - is irrelevant in this particular case.

I also have reservations as to your n. 7, which seems to be inconsistent with Brown v. Ohio, 432 U.S. 161, and precedents discussed in that case.

Subject to further enlightenment, I may circulate a brief concurring and dissenting opinion along these lines.

Sincerely,



The Chief Justice

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 9, 1978

No. 76-6617 Greene v. Massey

Dear Chief:

In view of the season, I have decided not to write a concurring opinion.

I therefore am happy to join you.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

✓

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 12, 1978

No. 76-6617 Greene v. Massey

Dear Chief:

I am adding the attached concurring opinion to make sure there is no tension between my joining you and my dissent in Crist.

I have delivered this to the printer early this afternoon.

As both Bill Rehnquist and I cite Crist, I assume all of the double jeopardy cases - including Crist - will come down on the same day.

Sincerely,



The Chief Justice

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LFP/lab

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✓

No. 76-6617 Greene v. Massey

MR. JUSTICE POWELL, concurring.

I concur in the opinion of the Court, but do so without agreeing that the constitutional prohibition against double jeopardy is fully applicable to state criminal proceedings. See Crist v. Bretz, No. 76-1200 (POWELL, J., dissenting). I believe, however, that under our decision today in Burks v. United States, ante, a fundamental component of the prohibition against double jeopardy is the right not to be retried once an appellate court has found the evidence insufficient as a matter of law to support the jury's guilty verdict.

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 12, 1978

Re: No. 76-6617 Greene v. Massey

Dear Chief:

I have no desire to postpone "DJ" day, for which we have all waited so long. I will have a one paragraph opinion concurring only in the judgment in this case, which I hope to circulate later today. I sincerely hope it does not delay the coming down of any of these cases.

Sincerely,



The Chief Justice

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 Stevens

No. 76-6617 Greene v. Massey

From: Mr. Justice Rehnquist

Circulated: JUN 13 1976

MR. JUSTICE REHNQUIST, concurring in the result Recirculated: \_\_\_\_\_

For the reasons stated by Mr. Justice Powell in his dissenting opinion in Crist v. Bretz, No. 76-1200, I do not agree with the Court's premise, ante, page 5, that "the constitutional prohibition against double jeopardy is fully applicable to state criminal proceedings". Even if I did agree with that view, I would want to emphasize more than the Court does in its opinion the varying practices with respect to motions for new trial and other challenges to the sufficiency of the evidence both at the trial level and on appeal in the fifty different states in the Union. Thus to the extent that Florida practice in this regard differs from practice in the federal system,

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

From: Mr. Justice Rehnquist

Circulated: JUN 12 1978

Re-circulated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-6617

Richard Austin Greene, Petitioner,  
v.  
Raymond D. Massey, Superintendent,  
Union Correctional  
Institution.

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

[June —, 1978]

MR. JUSTICE REHNQUIST, concurring in the judgment.

For the reasons stated by MR. JUSTICE POWELL in his dissenting opinion in *Crist v. Bretz*, No. 76-1200, I do not agree with the Court's premise, *ante*, p. 5, that "the constitutional prohibition against double jeopardy is fully applicable to state criminal proceedings." Even if I did agree with that view, I would want to emphasize more than the Court does in its opinion the varying practices with respect to motions for new trial and other challenges to the sufficiency of the evidence both at the trial level and on appeal in the 50 different States in the Union. Thus, to the extent that Florida practice in this regard differs from practice in the federal system, the impact of the Double Jeopardy Clause may likewise differ with respect to a particular proceeding. I therefore concur only in the Court's judgment.

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

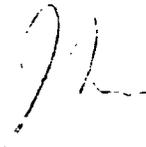
May 23, 1978

76-6617 - Greene v. Massey

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

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