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

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: MAY 19 1978

Recirculated: _____

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.

[May —, 1978]

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

We granted certiorari to decide whether a State may retry a defendant after conviction has been reversed by an appellate court on the ground that the evidence introduced at the prior trial was insufficient, as a matter of law, to sustain the jury's verdict.

I

On September 7, 1965, petitioner Greene and José Manuel Sosa were indicted by a Florida grand jury for the murder of Nicanor Martinez. The indictment charged that Sosa "did hire, procure, aid, abet and counsel" Greene to murder Martinez and that petitioner had carried out the premeditated plan, shooting the victim to death with a pistol. A state court jury subsequently found the defendants guilty of first-degree murder, without a recommendation of mercy. Pursuant to Florida law, the trial court sentenced both defendants to death.

On appeal to the Florida Supreme Court, the convictions of Greene and Sosa were reversed and new trials ordered. The reviewing court were sharply divided, however, with a majority ~~reviewing court was sharply divided, however, with a majority~~

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,

WEB

Mr. Justice Powell

Copies to the Conference

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.
fr

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

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,

P.S.

The Chief Justice

Copies to the Conference

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

Dear Chief,

Please join me.

Sincerely yours,

The Chief Justice

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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

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,

H.A.B.

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

(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,

Lewis

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

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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,

Lewis

The Chief Justice

Copies to the Conference

LFP/lab

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 th coming down of any of these cases.

Sincerely,

WHR

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 12 [illegible]

Recirculated: _____

MR. JUSTICE REHNQUIST, concurring in the result.

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 mostions 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,

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

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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.

/

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,

JPS

The Chief Justice

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