

# The Burger Court Opinion Writing Database

*United States v. DiFrancesco*

449 U.S. 117 (1980)

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

October 29, 1980

PERSONAL

RE: 79-567 - U.S. v. DiFrancesco

Dear Harry:

In Part IV, p. 21, would it help to insert at the third line after "of" the following:

"what Congress clearly contemplated  
as . . ."

I leave it to you.

Regards,



Mr. Justice Blackmun

P.S. - Since Marvin has "shed the veil," should we describe him as "Judge" on p. 25?

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

CHAMBERS OF  
THE CHIEF JUSTICE

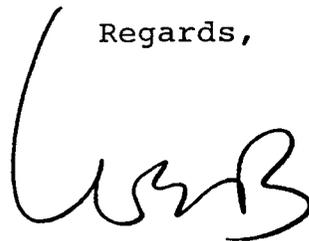
October 29, 1980

RE: 79-567 - U.S. v. DiFrancesco

Dear Harry:

I join.

Regards,

A handwritten signature in cursive script, appearing to read "WB", is written below the typed word "Regards,".

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

October 30, 1980

RE: No. 79-567, United States v. DiFrancesco

Dear Lewis:

In your memorandum today, third paragraph, final sentence, you state:

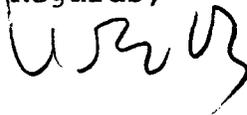
"The sentencing decision. . . is no more 'tentative' than any decision of a trial court that is subject to review. . . ."

With all deference, I suggest that you overlook the marked difference between a "decision of a trial court that is subject to review" and sentences, which until §3576, were not subject to any appellate review. This statute is a new concept and although Congress did not use the term "tentative," the sentence is final only for appeal purposes. For all other purposes, it is "interim," "tentative," "provisional," -- or whatever.

Congress, by hindsight, might have been well advised -- as it could if we declared this new program bad -- to make all sentences "recommendations" with final authority in the reviewing court. That is the situation with our magistrates -- and was true in Swisher.

In short, I do not see the problem you pose as to Part VI.

Regards,



Mr. Justice Powell

cc - Mr. Justice Stewart  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

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

CHAMBERS OF  
THE CHIEF JUSTICE

October 31, 1980

Re: 79-567 - United States v. DiFrancesco

Dear Harry:

If any substantial change is made in Part VI,  
you may find me "apostate."

I simply do not see Lewis' point - with all  
deference!

Regards,



Mr. Justice Blackmun

cc: Mr. Justice Stewart  
Mr. Justice Rehnquist

LP ?

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

CHAMBERS OF  
THE CHIEF JUSTICE

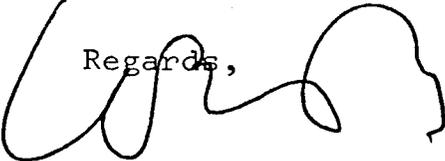
December 3, 1980

Re: 79-567 - United States v. DiFrancesco

Dear Harry:

You may treat my October 29 "join" as  
continuing.

Regards,



Justice Blackmun

Copies to the Conference

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

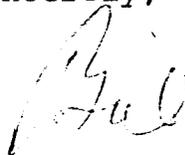
CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

Re: No. 79-567 - United States v. DiFrancesco

Dear Harry:

I will circulate a dissent in due course.

Sincerely,



Mr. Justice Blackmun

cc. The Conference

REPRODUCED FROM THE COLLECTION

MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE

213 UNITED STATES v. DIFRANCESCO

79-567

To: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Brennan  
Mr. Justice Burger  
Mr. Justice Rehnquist  
Mr. Justice Souter  
Mr. Justice Thomas

From: Mr. [unclear]

Circulated: NOV 25 1980

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

JUSTICE BRENNAN, dissenting.

Section 3576 of 18 U.S.C.<sup>1</sup> authorizes the United States to appeal<sup>2</sup> from a sentence imposed by a federal district judge on the ground that the sentence is too lenient and further permits the appellate court to increase the severity of the initial sentence. The Court holds that § 3576 violates neither the prohibition against multiple punishments nor the prohibition against multiple trials embodied in the Double Jeopardy Clause of the Fifth Amendment.<sup>3</sup> Because the Court fundamentally misperceives the appropriate degree of finality to be accorded the imposition of sentence by the trial judge, it reaches the

<sup>1</sup>Section 3576 states in pertinent part:

"[A] review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals....Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing...."

<sup>2</sup>The United States may appeal decisions in a criminal case only if so authorized by statute. United States v. Scott, 437 U.S. 82, 84-85 (1978); United States v. Sanges, 144 U.S. 310 (1892).

<sup>3</sup>"...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...." U.S. Const., Amdt. 5.

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MANUSCRIPT DIVISION  
SERIALS ACQUISITION  
UNITED STATES DEPARTMENT OF JUSTICE

1, 4, 8-10

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 10-10-2001 BY 60322 UCBAW/STP

Brennan

1st PRINTED DRAFT

**SUPREME COURT OF THE UNITED STATES**

DEC 02 1980

No. 79-567

United States, Petitioner, } On Writ of Certiorari to the United  
v. } States Court of Appeals for the  
Eugene DiFrancesco. } Second Circuit.

[December —, 1980]

JUSTICE BRENNAN, with whom JUSTICE WHITE and JUSTICE STEVENS join, dissenting.

Section 3576 of 18 U. S. C.<sup>1</sup> authorizes the United States to appeal<sup>2</sup> from a sentence imposed by a federal district judge on the ground that the sentence is too lenient and further permits the appellate court to increase the severity of the initial sentence. The Court holds that § 3576 violates neither the prohibition against multiple punishments nor the prohibition against multiple trials embodied in the Double Jeopardy Clause of the Fifth Amendment.<sup>3</sup> Because the Court

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~~Ⓢ~~ Brennan PO

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pp. 1, 2, 4, 8-10

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

From: Mr. Justice Brennan

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

Recirculated: DEC 8 1980

1st PRINTED DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 79-567

United States, Petitioner, | On Writ of Certiorari to the United  
v. | States Court of Appeals for the  
Eugene DiFrancesco. | Second Circuit.

[December —, 1980]

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

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P.9

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

2nd DRAFT

From: Mr. Justice Brennan

**SUPREME COURT OF THE UNITED STATES**

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

Recirculated: **DEC 5 1980**

No. 79-567

United States, Petitioner, | On Writ of Certiorari to the United  
v. | States Court of Appeals for the  
Eugene DiFrancesco. | Second Circuit.

[December —, 1980]

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

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

CHAMBERS OF  
JUSTICE POTTER STEWART

November 3, 1980

Re: No. 79-567, United States v. DiFrancesco

Dear Harry,

The changes in emphasis that you suggested in your letter to Lewis of October 31 seem to me to represent improvements. So long as these changes satisfy the concerns expressed by Lewis, I shall be glad to join your opinion. I should perhaps add that your suggested changes do not, in my view, work a "substantial change" in Part VI.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to The Chief Justice  
Mr. Justice Powell  
Mr. Justice Rehnquist

*The Change*

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

CHAMBERS OF  
JUSTICE POTTER STEWART

November 4, 1980

Re: No. 79-567, United States v. DiFrancesco

Dear Harry,

I am glad to join your opinion for the Court,  
as recirculated on November 3.

Sincerely yours,

*P.S.*

Mr. Justice Blackmun

Copies to the Conference

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION OF THE LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

October 29, 1980

Re: 79-567 - U.S. v. DiFrancesco

---

Dear Harry:

I shall await the dissent.

Sincerely yours,



Mr. Justice Blackmun

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THE MANUSCRIPT DIVISION

U.S. LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 1, 1980

Re: 79-567 - United States v. DiFrancesco

Dear Bill,

I would prefer that the first full sentence on page 5 read somewhat as follows:

"The sentencing of a convicted criminal is sufficiently analogous to a determination of guilt or innocence that the Double Jeopardy Clause should preclude government appeals from sentencing decisions very much as it prevents appeals from judgments of acquittal."

I also suggest that the very next sentence read as follows:

"The sentencing proceeding involves the examination and evaluation of facts about the defendant, which may entail the taking of evidence, and the pronouncement of a sentence."

I do not insist on the foregoing and have circulated an agreement with your dissent.

Sincerely,



Mr. Justice Brennan

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 1, 1980

Re: 79-567 - U.S. v. DiFrancesco

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Brennan

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REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION OF THE LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

October 29, 1980

Re: No. 79-567 - U.S. v. DiFrancesco

Dear Harry:

I await the dissent.

Sincerely,

*J.M.*

T.M.

Mr. Justice Blackmun

cc: The Conference

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NATIONAL MANUSCRIPT DIVISION

U.S. LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 2, 1980

Re: No. 79-567 - U.S. v. DiFrancesco

Dear Bill:

Please join me in your dissent.

Sincerely,

*J.M.*

T.M.

Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTION

OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT RECORDS

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



CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 28, 1980

Re: No. 79-567 - United States v. DiFrancesco

Dear Chief, Potter, Lewis, and Bill:

The Chief Justice assigned this case to me, I suppose, on the theory that I was the "least persuaded."

The double jeopardy area surely is one that has plagued the Court in the decade I have been here, and with varying results. As a consequence, in this opinion I have endeavored to outline the recent cases and some of the older ones and to extract from them what I think are governing principles. This lengthens the opinion, but I concluded that it was time we attempted to summarize the many recent cases. I believe it is helpful. At least it has helped me. You may not agree.

From all this, I have attempted to apply material that was pertinent to the case. I come out to reverse. I shall be interested in your reaction to this type of approach.

Sincerely,

The Chief Justice  
Mr. Justice Stewart  
Mr. Justice Powell ✓  
Mr. Justice Rehnquist

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE

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: OCT 28 1980

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

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 79-567

*Record 11*

United States, Petitioner, | On Writ of Certiorari to the United  
v. | States Court of Appeals for the  
Eugene DiFrancesco. | Second Circuit.

[November —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, contains, among other things, a definition of "dangerous special offender," 18 U. S. C. §§ 3575 (e) and (f);<sup>1</sup> authorizes the imposition of an increased sentence upon

<sup>1</sup>Section 3575 provides so far as pertinent for this case:

"(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury. . . .

"(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. . . . In connection with the hearing, the defendant and the United

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 30, 1980

Re: <sup>567</sup> No. 79-589 - United States v. DiFrancesco

Dear Lewis:

I would not be adverse to eliminating a good portion of Part VI of the proposed opinion if those on the "reverse" side of the controversy so wish. I suggest, however, that the portion omitted be the material at the bottom of page 21 and all of pages 22 and 23. What follows thereafter are general comments without specific relation to Swisher v. Brady. I would like to retain those comments. What do you think?

Sincerely,



Mr. Justice Powell

The Chief Justice

Mr. Justice Stewart

Mr. Justice Rehnquist

pp. 1, 7, 18, 21, 23

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

From: Mr. Justice Blackmun

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

Recirculated: SGT. C. E. [unclear]

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 79-567

United States, Petitioner, | On Writ of Certiorari to the United  
v. | States Court of Appeals for the  
Eugene DiFrancesco. | Second Circuit.

[November —, 1980]

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 31, 1980

Dear Lewis:

Re: No. 79-567 - United States v. DiFrancesco

I have given further consideration to the comment in your letter of October 30. I had thought that the proposed Part VI was not concerned with a new question but set forth examples of other two-tier systems that the Court has approved. It suggests that if they are constitutional, § 3576 is necessarily constitutional. The point, I think, is a valid one, and I believe the opinion would be weaker without it.

It seems to me that your concerns will be alleviated if I change the emphasis of the section somewhat. What I suggest is the following:

Part VI would begin with:

"The conclusion that § 3576 violates neither the guarantee against multiple punishment nor the guarantee against multiple trials is consistent with those opinions in which the Court has upheld the constitutionality of two-stage criminal proceedings. See Ludwig v. Massachusetts, 427 U.S. 618, 630-632 (1976). See also Colten v. Kentucky, 407 U.S. 104, 119-120 (1972).

Swisher v. Brady, 438 U.S. 204 (1978), affords particular support and, indeed, precedent for the decision we reach. That case . . ." etc., as in the second complete paragraph on 22.

I would keep page 23 as it is and append a footnote following the third sentence in the last paragraph on that page; that footnote would include the material that is now the second paragraph of Part VI.

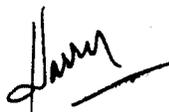
Would this not meet your concern?

Of course, Potter is yet to be heard from, and we may be spinning our wheels anyway.

Sincerely,

Mr. Justice Powell

cc: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice Rehnquist



pp. 21-23

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: \_\_\_\_\_

Recirculated: NOV 3 1980

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 79-567

United States, Petitioner, | On Writ of Certiorari to the United  
v. | States Court of Appeals for the  
Eugene DiFrancesco. | Second Circuit.

[November —, 1980]

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<sup>1</sup> Section 3575 provides, so far as pertinent for this case:

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REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION OF THE FEDERAL BUREAU OF INVESTIGATION

pp. 18, 20, 22

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 Blackmun

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

Recirculated: NOV 28 1980

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 79-567

United States, Petitioner, | On Writ of Certiorari to the United  
v. | States Court of Appeals for the  
Eugene DiFrancesco. | Second Circuit.

[November —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, contains, among other things, a definition of "dangerous special offender," 18 U. S. C. §§ 3575 (e) and (f);<sup>1</sup> authorizes the imposition of an increased sentence upon

<sup>1</sup> Section 3575 provides, so far as pertinent for this case:

"(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, [or] be disclosed to the jury. . . .

"(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. . . . In connection with the hearing, the defendant and the United

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 4, 1980

MEMORANDUM TO THE CONFERENCE:

Re: No. 79-567 - United States v. DiFrancesco

The changes in Bill Brennan's printed draft of the dissent obviously require the revision of my footnote 14 on page 18 of the recirculation of November 28. I shall change that note now to read as follows:

"14/ The dissent fails to recognize the import of Pearce. According to the dissent, the "analytic similarity of a verdict of acquittal and the imposition of sentence" requires the conclusion that sentences may not be increased after imposition without violating the Double Jeopardy Clause. Post, at 4. Thus, the imposition of a 10 year sentence where a 25 year sentence is permissible is, in the dissent's view, an implicit acquittal of the greater sentence. Ibid. But precisely this argument was unsuccessfully advanced by Justices Douglas and Harlan in Pearce. See 395 U.S., at 726-728, and n. 1. (Douglas, J., concurring): id., at 744-746 (Harlan, J., concurring in part and dissenting in part). The majority in Pearce thus rejected the notion that the imposition of a sentence less than the maximum operates as an implied acquittal of any greater sentence: See id., at 20, and n. 16.

"Further, the dissent's attempt to distinguish Pearce on the grounds that there the imposition of the sentence followed a retrial, rather than an appeal, is unconvincing. In Green v. United States, 355 U.S. 184 (1957), the Court held that a defendant who had been convicted of the lesser included offense of second degree murder at his first trial could not be convicted of the greater offense of first degree murder on retrial; thus, the conviction of the lesser included offense operated as an implicit acquittal of the greater. Since the defendant sought and obtained a retrial in each case, the difference in result reached in Green and Pearce can be explained only on the grounds that the imposition of sentence does not operate as an implied acquittal of any greater sentence."

*H.A.B.*

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION OF THE SUPREME COURT OF THE UNITED STATES

4-18

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: \_\_\_\_\_

Recirculated: DEC 4 1980

5th DRAFT

**SUPREME COURT OF THE UNITED STATES**

**No. 79-567**

United States, Petitioner, | On Writ of Certiorari to the United  
v. | States Court of Appeals for the  
Eugene DiFrancesco. | Second Circuit.

[November —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, contains, among other things, a definition of "dangerous special offender," 18 U. S. C. §§ 3575 (e) and (f);<sup>1</sup> authorizes the imposition of an increased sentence upon

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 4, 1980

MEMORANDUM TO THE CONFERENCE:

Re: No. 79-567 - United States v. DiFrancesco

John's separate dissent, which has just arrived, necessitates yet another change in footnote 14 of the Court's opinion. This change is threefold:

- 1) The first line of the footnote will be changed to read "The principal dissent fails to recognize the import of Pearce. According to that . . . ."
- 2) The beginning words of the second paragraph will be changed to read "Further, the principal dissent's attempt . . . ."
- 3) The following final paragraph will be added to the footnote:

"Justice Stevens' dissent, with its reliance on Justice Harlan's separate opinion in Pearce, concurring in part and dissenting in part, 395 U.S., at 744, in effect argues nothing more than that Pearce was wrongly decided. We are not inclined to overrule Pearce."

I assume these changes are clear enough so that still another printed run need not be circulated.

HAB.

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 11, 1980

MEMORANDUM TO THE CONFERENCE

RE: Case Held for No. 79-567, United States v. DiFrancesco

The only held case is No. 80-5057, Hall v. United States. In that case, CA2 ruled that the DC's (Judge Weinfeld's) alteration of a sentence from a concurrent to a consecutive term two days after pronouncing sentence did not violate the Double Jeopardy Clause. The CA reasoned that where, as in Hall, the original sentence was mistakenly imposed, the DC has the power to correct the mistake if it acts within a reasonable time; in addition, the court pointed out that petitioner had not actually commenced service of the sentence imposed by the DC, but, instead, merely had been returned to a correctional center to await transfer to the penitentiary where he was already serving another sentence.

In DiFrancesco, the Court noted that it is an "established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least (and we venture no comment on this limitation) so long as he has not yet begun to serve that sentence." Slip Op. at 16-17. Further, the Court confined the dictum in United States v. Benz, 282 U.S. 304 (1931), which suggested that this limitation on resentencing was constitutionally based, to the specific context of Ex parte Lange, 18 Wall. 163 (1874). Slip Op. at 20-21.

Since petitioner here arguably had not commenced service of the sentence orally imposed by the DC, this case does not squarely present the question whether a DC may increase a sentence after the defendant has begun to serve that sentence. In any event, as in Bozza v. United States, 330 U.S. 160 (1947), the trial judge simply corrected a sentence inadvertently imposed; as the Court recognized again in DiFrancesco, "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." Slip Op. at 17 (quoting Bozza, 330 U.S., at 166-167). Accordingly, I shall vote to deny certiorari.

HAB.

October 30, 1980

No. 79-587<sup>6</sup> U. S. v. DiFrancesco

Dear Harry:

First, my congratulations on preparing and circulating a Court opinion in this important case so promptly. You also have written an excellent opinion.

I will join the first five Parts, and the judgment. I also may go along with Part VI although I do have reservations about it. It seems unnecessary to move into your "two-stage sentencing procedure" analysis, drawing on Swisher v. Brady as a relevant analogy. Perhaps my reservation in this respect is carried forward from my joining the dissent in Swisher. Yet, I really am not persuaded by the analogy.

In Swisher, there was de novo review of a master's proposals by a judge. The Court viewed this as a single adjudication with two parts. I have not, however, thought of the federal statute before us as involving a two-step sentencing procedure. The district court imposed a sentence, and an appeal is available only for the correction of "legal" errors - i.e. abuses of discretion, etc. The sentencing decision of the trial court, as I view it, is no more "tentative" than any decision of a trial court that is subject to review on the record.

I think your opinion would be sound and wholly convincing, at least for me, without Part VI. I appreciate that you have thought about this far more than I have, and already you have two joins. I therefore am sending this letter only to those of us who voted to reverse for the purpose of surfacing my one reservation. I would like to think about this further before deciding whether to limit my join to the first five Parts.

Sincerely,

Mr. Justice Blackmun

cc: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice Rehnquist

LFP/lab

79-567

Re: Di Francesco  
Supreme Court of the United States

Memorandum

31600  
-----, 1960  
All my staff of the court

Harry - The  
changes you  
suggest (subject to  
approval of those  
who have joined  
you) will allay  
my concern entirely.  
My thanks,

Lewis

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 3, 1980

No. 79-567 United States v. DiFrancesco

Dear Harry:

Please join me in the third draft of your opinion  
for the Court.

Sincerely,

*Lewis*

Mr. Justice Blackmun

LFP/lab

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U.S. LIBRARY OF CONGRESS

November 3, 1980

No. 79-567 United States v. DiFrancesco

Dear Harry:

Please join me in the third draft of your opinion for the Court.

Sincerely,

Mr. Justice Blackmun

LFP/lab

Copies to the Conference

P.S. The changes suggested in your letter of October 31, although they do not go quite as far as I would have preferred, are acceptable to me.

I appreciate your making them.

Mr. Justice Blackmun

LFP/lab

cc: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice Rehnquist

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

October 30, 1980

Re: No. 79-567 United States v. DiFrancesco

Dear Harry:

Assuming that the minor change on page 23 that we discussed on the telephone is made, I join your opinion.

Sincerely,



Mr. Justice Blackmun

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

October 29, 1980

Re: 79-567 - United States v. DiFrancesco

Dear Harry:

I shall await the dissent.

Respectfully,



Mr. Justice Blackmun

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 25, 1980

Re: 79-567 - United States v. DiFrancesco

Dear Bill:

Please join me in your dissent.

Respectfully,



Mr. Justice Brennan

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OF THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF COMMERCE

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

79-567 - United States v. DiFrancesco

From: Mr. Justice Stevens

Circulated: DEC 4 '80

JUSTICE STEVENS, dissenting.

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

While I join JUSTICE BRENNAN'S dissent, I also note that neither today nor in its opinion in North Carolina v. Pearce, 395 U.S. 711 (1969), has the Court adequately responded to Justice Harlan's powerful analysis of the double jeopardy issue in that case. Id., at 744-751. Its purported response in Pearce--that although the rationale for allowing a more severe punishment after a retrial "has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified," id., at 720-721--clearly has no application to the question whether a more severe sentence may be imposed at the prosecutor's behest when the original conviction has not been nullified.

The straightforward analysis by Justice Harlan is worthy of emphasis:

"Every consideration enunciated by the Court in support of the decision in Green [v. United States], 355 U.S. 184 (1957) applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. See id., at 190. And the concept or fiction of an 'implicit acquittal' of the greater

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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 Rehnquist

From: Mr. Justice Stevens

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

Recirculated: DEC 5 '80

*Printed*  
1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 79-567

United States, Petitioner, } On Writ of Certiorari to the United  
v. } States Court of Appeals for the  
Eugene DiFrancesco. } Second Circuit.

[December —, 1980]

JUSTICE STEVENS, dissenting.

While I join JUSTICE BRENNAN's dissent, I also note that neither today nor in its opinion in *North Carolina v. Pearce*, 395 U. S. 711 (1969), has the Court adequately responded to Justice Harlan's powerful analysis of the double jeopardy issue in that case. *Id.*, at 744-751. Its purported response in *Pearce*—that although the rationale for allowing a more severe punishment after a retrial "has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified," *id.*, at 720-721—clearly has no application to the question whether a more severe sentence may be imposed at the *prosecutor's* behest when the original conviction has *not* been nullified.

The straightforward analysis by Justice Harlan is worthy of emphasis:

"Every consideration enunciated by the Court in support of the decision in *Green* [v. *United States*, 355 U. S. 184 (1957)] applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. See *id.*, at 190. And the concept or fiction of an 'implicit acquittal' of the greater offense, *ibid.*, applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of