

The Burger Court Opinion Writing Database

Bullington v. Missouri

451 U.S. 430 (1981)

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

March 10, 1981

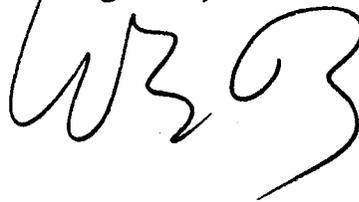
PERSONAL

Re: 79-6740 - Bullington v. Missouri

Dear Lewis:

Are you interested in doing a dissent in this case?

Regards,

A handwritten signature in black ink, appearing to be 'WJP', written in a cursive style.

Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

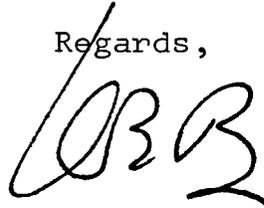
April 30, 1981

Re: 79-6740 - Bullington v. Missouri

Dear Lewis:

Please join me in your dissent.

Regards,

A handwritten signature in dark ink, appearing to be 'LBP', written over the typed word 'Regards,'.

Justice Powell

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

Dear Lewis

I have already
joined your
dissent - but
see "thoughts while
thawing on
attached pages"
Regards
WBOB

BULLINGTON v. MISSOURI

thought that there is a fundamental difference between the two. *Stroud v. United States, supra; North Carolina v. Pearce, supra; Chaffin v. Stynchcombe, supra; United States v. DiFrancesco, supra.* I would adhere to these precedents, and think they control this case.

Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. From the time an accused is first suspected to the time the decision on guilt or innocence is made, our criminal-justice system is designed to enable the trier of fact to discover that truth according to law. But triers of fact can err, and an innocent person can be pronounced guilty. In contrast, the law provides only limited standards for assessing the validity of a sentencing decision. The sentencer's function is not to discover ~~the facts~~, but to mete out just deserts ~~as he sees them~~. Absent a mandatory sentence, there is no objective measure by which the sentencer's decision can be deemed correct or erroneous if it is duly made within the authority conferred by the legislature.³

In light of this difference in the nature of the decisions, the question in this case is not—as the Court ~~would~~ frame it—whether the procedures by which a sentencing decision is made are similar to the procedures by which a decision on guilt or innocence is made. Rather, the question is whether the reasons for considering an acquittal on guilt or innocence as absolutely final apply equally to a sentencing decision imposing less than the most severe sentence authorized by law. I would have thought that the pertinence of this question was clear, and that the answer consistently given in the past could not have escaped the Court. Earlier this Term, in

³ Of course, a sentence imposed upon one who did not commit the crime is "erroneous," but the error inheres in the decision and guilt or innocence, not in the sentencing decision. Also, a sentence may be called "erroneous" if it is grossly disproportionate to the severity of the crime committed. But in that event, the sentence is "cruel and unusual" in violation of the Eighth Amendment.

we proclaim that

, albeit in very rare instances,

? just not so

Exclusionary Rule! etc

prescribed by law.

fundamental

United States v. DiFrancesco, we stated that “[t]here are . . . fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal.” — U. S., at — (slip op., at 16).

The reasons for considering an acquittal on guilt or innocence as absolutely final do not apply equally to a sentencing decision for less than the most severe sentence authorized by law. A retrial of a defendant once found to have been innocent)“enhanc[es] the possibility that even though innocent he may be found guilty.” *Green v. United States, supra*, at 188. But in *Chaffin v. Stynchombe, supra*, at 25, we held that “[t]he possibility of a higher sentence was recognized and accepted [in *Pearce*] as a legitimate concomitant of the retrial process.” The possibility of a higher sentence is acceptable under the Double Jeopardy Clause, whereas the possibility of error as to guilt or innocence is not, because the second jury’s sentencing decision is as “correct” as the first jury’s. Similarly, a defendant once found to have been innocent cannot be forced a second time through the ordeal of trial. But when a defendant is found guilty, he must bear the ordeal of being sentenced just as he does the ordeal of serving sentence.

In sum, I find wholly unpersuasive the Court’s justification for applying the implicit-acquittal principle to sentencing. The Court does not purport to justify its conclusion with the argument that facing the death sentence a second time is more of an ordeal in the legal sense than facing any other sentence a second time. The death sentence, of course, is unlike any other punishment. For that reason, this Court has read the Eighth Amendment and the Due Process Clause to require that States prescribe unique procedural safeguards to protect against capricious or discriminatory impositions of the death sentence. *Furman v. Georgia*, 408 U. S. 238 (1972); *Gregg v. Georgia*, 428 U. S. 153 (1976) (joint opinion). But a death sentence imposed in accord with the

is prohibited
because it

~~DGT?~~

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 16, 1981

RE: No. 79-6740 Bullington v. Missouri

Dear Chief:

Harry has agreed to take the opinion for the
Court in the above.

Sincerely,



The Chief Justice
cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 27, 1981

RE: No. 79-6740 Bullington v. Missouri

Dear Harry:

I agree.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 25, 1981

Re: No. 79-6740, Bullington v. Missouri

Dear Harry,

I am glad to join your opinion for
the Court.

Sincerely yours,

P.S.
/

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 26, 1981

Re: 79-6740 - Bullington
v. Missouri

Dear Harry,

I shall await the dissent.

Sincerely yours,



Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 30, 1981

Re: 79-6740 -
Bullington v. Missouri

Dear Lewis,

Please join me.

Sincerely yours,



Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 1, 1981

Re: No. 79-6740 - Bullington v. Missouri

Dear Harry:

Please join me.

Sincerely,



T.M.

Justice Blackmun

cc: The Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice
 Mr. Justice

From: Mr. Justice

Circulated: MAR 24 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-6740

Robert Bullington, Petitioner,	}	On Writ of Certiorari to the Supreme Court of Missouri.
v. State of Missouri.		

[March —, 1981]

JUSTICE BLACKMUN delivered the opinion of the Court.

Stroud v. United States, 251 U. S. 15 (1919), concerned a defendant who was convicted of first-degree murder and sentenced to life imprisonment, and who then obtained, upon confession of error by the Solicitor General, a reversal of his conviction and a new trial. This Court, by a unanimous vote in that case, held that the Double Jeopardy Clause of the Fifth Amendment¹ did not bar the imposition of the death penalty when Stroud at his new trial was again convicted.

The issue in the present case is whether the reasoning of *Stroud* is also to apply under a system where a jury's sentencing decision is made at a bifurcated proceeding's second stage at which the prosecution has the burden of proving certain elements beyond a reasonable doubt before the death penalty may be imposed.

I

Missouri law provides two, and only two, possible sentences for a defendant convicted of capital murder:²

¹ ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

² The definition of capital murder in Missouri is set forth in Mo. Rev. Stat. § 565.001 (1978):

"Any person who unlawfully, willfully, knowingly, deliberately, and with

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: _____

MAR 26 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-6740

Robert Bullington, Petitioner, }
v. } On Writ of Certiorari to the
State of Missouri. } Supreme Court of Missouri.

[March —, 1981]

JUSTICE BLACKMUN delivered the opinion of the Court.

Stroud v. United States, 251 U. S. 15 (1919), concerned a defendant who was convicted of first-degree murder and sentenced to life imprisonment, and who then obtained, upon confession of error by the Solicitor General, a reversal of his conviction and a new trial. This Court, by a unanimous vote in that case, held that the Double Jeopardy Clause of the Fifth Amendment¹ did not bar the imposition of the death penalty when Stroud at his new trial was again convicted.

The issue in the present case is whether the reasoning of *Stroud* is also to apply under a system where a jury's sentencing decision is made at a bifurcated proceeding's second stage at which the prosecution has the burden of proving certain elements beyond a reasonable doubt before the death penalty may be imposed.

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² The definition of capital murder in Missouri is set forth in Mo. Rev. Stat. § 565.001 (1978):

"Any person who unlawfully, willfully, knowingly, deliberately, and with

✓
pp. 1, 8, 10, 12, 15

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 24, 1981

No. 79-6740 Bullington v. State of Missouri

Dear Harry:

The Chief has suggested that I try my hand at a dissent in this case.

It will probably take me a while to do this.

Sincerely,



Mr. Justice Blackmun

LFP/lab

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

0P6740G GREG-POW

GM 04/28/81

From: Mr. Justice Powell
 Circulated: APR 28 1981

Re-circulated: _____

DRAFT: NO. 79-6740: Bullington v. Missouri

JUSTICE POWELL, dissenting.

This case concerns the force of the Double Jeopardy Clause after a defendant convicted of a crime and sentenced has succeeded in having his conviction reversed. The Court holds that the jury's decision at petitioner's first trial to sentence him to life imprisonment precludes Missouri from asking the jury at petitioner's second trial to sentence him to death. I consider the Court's opinion irreconcilable in principle with the precedents of this Court.

I

It is well-established law that the Double Jeopardy Clause does not apply to sentencing decisions after retrial with the same force that it applies to re-determinations of guilt or innocence. Since Stroud v.

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

4-29-81

From: Mr. Justice Powell

APR 29 1981

1st DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-6740

Robert Bullington, Petitioner, }
 v. } On Writ of Certiorari to the
 State of Missouri. } Supreme Court of Missouri.

[May —, 1981]

JUSTICE POWELL, dissenting.

This case concerns the force of the Double Jeopardy Clause after a defendant convicted of a crime and sentenced has succeeded in having his conviction reversed. The Court holds that the jury's decision at petitioner's first trial to sentence him to life imprisonment precludes Missouri from asking the jury at petitioner's second trial to sentence him to death. I consider the Court's opinion irreconcilable in principle with the precedents of this Court.

I

It is well-established law that the Double Jeopardy Clause does not apply to sentencing decisions after retrial with the same force that it applies to redeterminations of guilt or innocence. Since *Stroud v. United States*, 251 U. S. 15 (1919), it has been settled that a defendant whose conviction is reversed may receive a more severe sentence upon retrial than he received at his first trial. The Court followed this principle in *North Carolina v. Pearce*, 395 U. S. 711 (1969), where it held that a "corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *Id.*, at 720. In contrast, where the question was whether a defendant could be retried for first-degree murder after the jury at his first trial had found him guilty only of second-

1 Pgs 1, 4-7

- 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

4-30-81

Circulated: _____

2nd DRAFT

Recirculated: **APR 30 1981**

SUPREME COURT OF THE UNITED STATES

No. 79-6740

Robert Bullington, Petitioner, }
 v. } On Writ of Certiorari to the
 State of Missouri. } Supreme Court of Missouri.

[May —, 1981]

JUSTICE POWELL, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

This case concerns the force of the Double Jeopardy Clause after a defendant convicted of a crime and sentenced has succeeded in having his conviction reversed. The Court holds that the jury's decision at petitioner's first trial to sentence him to life imprisonment precludes Missouri from asking the jury at petitioner's second trial to sentence him to death. I consider the Court's opinion irreconcilable in principle with the precedents of this Court.

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It is well-established law that the Double Jeopardy Clause does not apply to sentencing decisions after retrial with the same force that it applies to redeterminations of guilt or innocence. Since *Stroud v. United States*, 251 U. S. 15 (1919), it has been settled that a defendant whose conviction is reversed may receive a more severe sentence upon retrial than he received at his first trial. The Court followed this principle in *North Carolina v. Pearce*, 395 U. S. 711 (1969), where it held that a "corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *Id.*, at 720. In contrast, where the question was whether a defendant could be retried for first-degree murder after the jury at his first trial had found him guilty only of second-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 29, 1981

Re: No. 79-6740 Bullington v. Missouri

Dear Lewis:

Please join me in your dissent in this case.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Greg - I'll add the
cite

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

John

to Weems

I see
no reason
not to
cite it.
GM

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 29, 1981

Re: No. 79-6740 Bullington v. Missouri

Dear Lewis:

Please join me in your dissent in this case.

Sincerely,



Mr. Justice Powell

Copies to the Conference

P.S.

Dear Lewis:

On page 7 of your first ATEX draft circulated April 28th, footnote 3 states:

"Also, a sentence may be called 'erroneous' if it is grossly disproportionate to the severity of the crime committed. But in that event, the sentence is 'cruel and unusual' in violation of the Eighth Amendment."

I would appreciate it if you could see your way clear to add, after that statement, a citation to Weems v. United States, U.S. _____, in order not to give the impression that the doctrine of "disproportionality" which we fought out last year on opposite sides of the fence is being tilted one way or the other by this language. However, my preference is only that, and I do not condition my "join" of your dissenting opinion on your making the change.



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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 24, 1981

Re: 79-6740 - Bullington v. Missouri

Dear Harry:

Please join me.

Respectfully,



Justice Blackmun

Copies to the Conference