

The Burger Court Opinion Writing Database

Missouri v. Hunter

459 U.S. 359 (1983)

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



To: Justice Brennan
Justice White
Justice Marshall ←
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1214

MISSOURI PETITIONER *v.* DANNY HUNTER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

[December —, 1982]

CHIEF JUSTICE BURGER delivered the opinion of the court.

We granted certiorari to consider whether the prosecution and conviction of a criminal defendant in a single trial on both a charge of "armed criminal action" and a charge of first degree robbery—the underlying felony—violates the Double Jeopardy Clause of the Fifth Amendment.

I

On the evening of November 24, 1978, respondent and two accomplices entered an A & P supermarket in Kansas City, Mo. Respondent entered the store manager's office and ordered the manager, at gun point, to open two safes. While the manager was complying with the demands of the robbers, respondent struck him twice with the butt of his revolver. While the robbery was in progress, an employee who drove in front of the store observed the robbery and went to a nearby bank to alert an off-duty police officer. That officer arrived at the front of the store and ordered the three men to stop. Respondent fired a shot at the officer and the officer returned the fire but the trio escaped.

Respondent and his accomplices were apprehended. In addition to being positively identified by the store manager and the police officer at trial and in a line-up, respondent made an oral and written confession which was admitted in evidence. At his trial, respondent offered no direct evidence

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



CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

December 13, 1982

Re: No. 81-1214, Missouri v. Hunter

Dear Lewis:

I will have a new draft out soon that will reflect your memo for which I thank you.

I started "hard" because I knew I'd run into some resistance to a firm opinion. My "fallback" position will meet your problems.

Regards,



Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

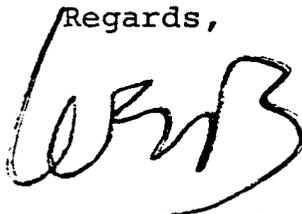
December 13, 1982

Re: No. 81-1214, Missouri v. Hunter

MEMORANDUM TO THE CONFERENCE:

I have several interesting but not earth-shaking suggestions on my first draft. I will have a new draft along soon.

Regards,

A handwritten signature in dark ink, appearing to be "W. E. B.", written in a cursive style.

To: Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: **DEC 21 1982**

STYLISTIC CHANGES

See Page 9

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1214

MISSOURI, PETITIONER v. DANNY HUNTER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

[December —, 1982]

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I

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Respondent and his accomplices were apprehended. In addition to being positively identified by the store manager and the police officer at trial and in a line-up, respondent made an oral and written confession which was admitted in evidence. At his trial, respondent offered no direct evidence

VO

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

CHAMBERS OF
THE CHIEF JUSTICE

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

December 21, 1982

'82 DEC 22 AIO:13

Re: No. 81-1214 - Missouri v. Hunter

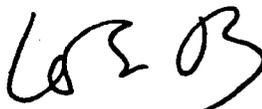
MEMORANDUM TO THE CONFERENCE

Upon a further reading of the opinion circulated earlier today I think it would clarify the new paragraph on page 9, if the two final sentences of the first full paragraph were altered to read as follows:

"Rather, that rule is intended only to limit a federal court's power to impose cumulative convictions and punishments when the will of Congress is not made clear. In this case the Ohio Legislature has made its intent crystal clear."

Also on line 7, page 9, leads should be "lead".

Regards,



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

CHAMBERS OF
THE CHIEF JUSTICE

December 22, 1982

Re: No. 81-1214, Missouri v. Hunter

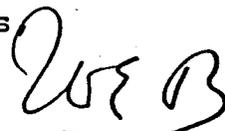
Dear Harry:

The change you suggest in your December 21 letter would make the opinion appear to reach the very question that you did not want to reach in paragraph four of your December 13 letter. The intent of the Missouri legislature is crystal clear in this case. We need not hold that the Missouri courts either are or are not bound by the Whalen rule of statutory construction because, whether it is applicable to state courts or not, that rule need not be resorted to when the legislative intent is clear. We have never held that a state court is required to use the Whalen rule of statutory construction in construing its legislature's statutes. See Whalen v. United States, 445 U.S. 688, 689 n.4 (1980). I am content to make the decision you suggest when we have a case that demands it.

If the following changes will allay your concerns I will be glad to make them:

"The rule of statutory construction noted in Whalen is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. Here the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments."

Regards



Copies to the conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES

See Page 9

From: **The Chief Justice**

Circulated: _____

Recirculated: **DEC 28 1982**

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1214

MISSOURI, PETITIONER v. DANNY HUNTER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

[December —, 1982]

CHIEF JUSTICE BURGER delivered the opinion of the court.

We granted certiorari to consider whether the prosecution and conviction of a criminal defendant in a single trial on both a charge of "armed criminal action" and a charge of first degree robbery—the underlying felony—violates the Double Jeopardy Clause of the Fifth Amendment.

I

On the evening of November 24, 1978, respondent and two accomplices entered an A & P supermarket in Kansas City, Missouri. Respondent entered the store manager's office and ordered the manager, at gun point, to open two safes. While the manager was complying with the demands of the robbers, respondent struck him twice with the butt of his revolver. While the robbery was in progress, an employee who drove in front of the store observed the robbery and went to a nearby bank to alert an off-duty police officer. That officer arrived at the front of the store and ordered the three men to stop. Respondent fired a shot at the officer and the officer returned the fire but the trio escaped.

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NO

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 23, 1982

RE: No. 81-1214 Missouri v. Hunter

Dear Chief:

Since you have adopted Harry's suggestions, I too
join your opinion.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 15, 1982

Re: 81-1214 - Missouri v. Hunter

Dear Chief,

On the assumption that you will look with favor on Harry's suggestions to you, especially his No. 1, I join.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

cpm

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: 1/6/82

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1214

MISSOURI, PETITIONER *v.* DANNY HUNTER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
MISSOURI, WESTERN DISTRICT

[January —, 1983]

JUSTICE MARSHALL, dissenting.

The Double Jeopardy Clause forbids both multiple prosecutions and multiple punishments for "the same offence." See, *e. g.*, *North Carolina v. Pearce*, 395 U. S. 711, 717-718 (1969); *United States v. Benz*, 282 U. S. 304, 307-308 (1931); *Ex parte Lange*, 85 U. S. 163, 169, 173-175 (1873). Respondent was convicted of both armed criminal action and the lesser-included offense of first-degree robbery, and he was sentenced for both crimes. Had respondent been tried for these two crimes in separate trials, he would plainly have been subjected to multiple prosecutions for "the same offence" in violation of the Double Jeopardy Clause.¹ See *Harris v. Oklahoma*, 433 U. S. 682 (1977) (*per curiam*); *Brown v. Ohio*, 432 U. S. 161 (1977). For the reasons stated below, I do not believe that the phrase "the same offence" should be interpreted to mean one thing for purposes of the prohibition against multiple prosecutions and something else for purposes of the prohibition against multiple punishments.

First-degree robbery and armed criminal action constitute the same offense under the test set forth in *Blockburger v. United States*, 284 U. S. 299, 304 (1932). To punish re-

¹The Double Jeopardy Clause would have forbidden multiple prosecutions regardless of which charge was brought first, and regardless of whether the first trial ended in a conviction or an acquittal.

STYLISTIC CHANGES THROUGHOUT.

PP. 2, 3, 5, 6

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: _____

Recirculated: JAN 12 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1214

MISSOURI, PETITIONER *v.* DANNY HUNTER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
MISSOURI, WESTERN DISTRICT

[January —, 1983]

JUSTICE MARSHALL, with whom JUSTICE STEVENS joins,
dissenting.

The Double Jeopardy Clause forbids either multiple prosecutions or multiple punishment for "the same offence." See, *e. g.*, *North Carolina v. Pearce*, 395 U. S. 711, 717-718 (1969); *United States v. Benz*, 282 U. S. 304, 307-308 (1931); *Ex parte Lange*, 85 U. S. 163, 169, 173-175 (1873). Respondent was convicted of both armed criminal action and the lesser-included offense of first-degree robbery, and he was sentenced for both crimes. Had respondent been tried for these two crimes in separate trials, he would plainly have been subjected to multiple prosecutions for "the same offence" in violation of the Double Jeopardy Clause.¹ See *Harris v. Oklahoma*, 433 U. S. 682 (1977) (*per curiam*); *Brown v. Ohio*, 432 U. S. 161 (1977). For the reasons stated below, I do not believe that the phrase "the same offence" should be interpreted to mean one thing for purposes of the prohibition against multiple prosecutions and something else for purposes of the prohibition against multiple punishment.

First-degree robbery and armed criminal action constitute the same offense under the test set forth in *Blockburger v.*

¹The Double Jeopardy Clause would have forbidden multiple prosecutions regardless of which charge was brought first, and regardless of whether the first trial ended in a conviction or an acquittal.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 13, 1982

Re: No. 81-1214 - Missouri v. Hunter

Dear Chief:

I would like to join your opinion for this case, but I have some problems with it that I pass on to you for your consideration:

1. I would prefer to see footnote 5 deleted. I think the Missouri courts have applied the Blockburger test correctly under principles enunciated by this Court. Bill Rehnquist urged a different reading of Blockburger in his dissent, which you joined, in Whalen, but the Court rejected that position.

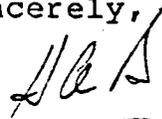
2. The opening sentence of the first full paragraph on page 9 states that the "holdings" in Whalen and Albernaz "compel" the result here. The relevant language from those two cases was clearly dicta, as the parties and the Missouri courts recognized and as your opinion in this case itself indicates at the top of page 8. Could the sentence be revised to say something like "Our reasoning in Whalen and Albernaz inevitably leads us to the conclusion that"

3. The first sentence in the same paragraph perhaps should also make clear that it is limited to the context of a single trial. My concern could be eliminated if the words "at a single trial" followed the words "sentences imposed." This also would be in line with what appears in the top line of page 10.

4. Footnote 6 also gives me concern. Could it either be eliminated or altered to include something like "We need not reach the issue whether the Blockburger rule of statutory construction is one that the Missouri Supreme Court was required to follow."

5. Footnote 7 may contain an implication that there is no other clause of the Constitution which imposes a limit on the legislature's power to punish. What do you think of saying "Provisions of the Constitution other than the Double Jeopardy Clause, of course, may limit the legislature's power to impose punishments in certain circumstances."

I am merely trying to be helpful, for I feel that the Missouri courts have certainly wandered off the reservation in this area.

Sincerely,


The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

'82 DEC 22 AIO:12

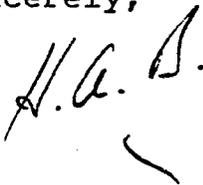
December 21, 1982

Re: No. 81-1214 - Missouri v. Hunter

Dear Chief:

I appreciate what you have done with your draft circulated December 21 to accommodate the concerns I expressed in my letter of December 13. I am quite content, with one exception. If the word "federal" in the second line of the revision set forth in your letter of December 21 could be deleted, and the word "Congress" in the fourth line could be replaced by "legislature," you have my joinder.

Sincerely,



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

December 22, 1982

Re: No. 81-1214 - Missouri v. Hunter

Dear Chief:

Your own phraseology does allay my concerns, and I now
join your opinion.

Sincerely,

H.A.B.
—

The Chief Justice

cc: The Conference

December 13, 1982

PERSONAL

81-1214 Missouri v. Hunter

Dear Chief:

I write, supplementing my join note, to make a suggestion or two with respect to language in your opinion.

On page 9, in the first sentence of the first full paragraph, you say the holding in Whalen and Abernaz "compel" the conclusion expressed therein. I do not think the holding in either of these cases can be so viewed. Perhaps you could say: "Our reasoning in Whalen and Abernaz fully justifies the conclusion that . . ."

In the next sentence, it is said that the Whalen rule is not constitutional. This is certainly true in the single trial context. We have held, of course, that it does impose constitutional limitations in a multiple trial context. Perhaps this should be clarified.

Footnote 6 also troubles me. It seems to say that state courts could adopt any rule of statutory construction that does not contravene constitutional rules and considerations. This, as far as it goes, is true. But, I read Whalen (that I joined), as coming close to creating a presumption that Blockburger does have constitutional implications that can be rebutted only by a clear showing of legislative intent, such as we have in this case. Actually, footnote 6 is dicta that could well be omitted.

Apart from the foregoing, I like your opinion - particularly its conciseness.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 13, 1982

81-1214 Missouri v. Hunter

Dear Chief:

Please join me.

Sincerely,



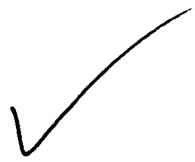
The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



December 13, 1982

Re: No. 81-1214 Missouri v. Hunter

Dear Chief:

Having joined your opinion for the Court in this case, I take the liberty of commenting on some of the concerns raised by Harry. I agree with his paragraphs numbered 2 and 3. Likewise, I have no objections to the point underlying the suggested change in Harry's paragraph 5 -- although I think it would be more faithful to your draft to say simply that "Of course, this case presents only issues under the Double Jeopardy Clause."

I do not agree, however, with paragraph 4. I think it is completely clear that the Double Jeopardy Clause does not require the Missouri Supreme Court to interpret state statutes according to the Blockburger test, or any other federal rule of statutory construction. Particularly in an area where, as Harry observes, the Missouri Court repeatedly has "wandered off the reservation," I believe it is appropriate to say clearly what the law is. If you are persuaded otherwise, I would prefer that footnote 6 simply be omitted rather than adopting Harry's suggestion that we explicitly leave the issue open; this would be an invitation to litigation that the question does not merit.

I also do not agree with the suggestion that footnote 5 be deleted. As your footnote indicates, Blockburger is a rule of statutory construction and, like most legal maxims, there are cases where it will not apply. I do not think Whalen is to the contrary. In that case, there was a statutory provision, backed by legislative history, explicitly adopting the Blockburger rule. It is one thing

to rely on this sort of legislative intent; it is another to adopt a blanket presumption that covers all statutes.

Sincerely,

A handwritten signature in cursive script, appearing to be the initials 'WJ' or similar, written in dark ink.

The Chief Justice

cc: Justice Blackmun
Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 13, 1982

Re: No. 81-1214 Missouri v. Hunter

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 6, 1983

Re: 81-1214 - Missouri v. Hunter

Dear Chief:

Although I agree with most of what Thurgood has written, I may want to add two or three paragraphs of my own. I'll try not to hold you up too long.

Respectfully,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 7, 1983

Re: 81-1214 - Missouri v. Hunter

Dear Thurgood:

As I mentioned on the telephone, I have two suggestions for you to consider in your dissent. First, would you consider rewriting the second sentence in the very last paragraph of the opinion to read as follows: "Indeed, the Blockburger test has long been used not only to define the phrase 'the same offense' in the case of multiple prosecutions, but also to provide the appropriate standard in multiple punishment cases as well.¹

¹The Blockburger case is itself instructive. In that case the defendant was convicted of two separate offenses arising out of a single sale of drugs--the first was based on the absence of a properly stamped package and the second on the absence of a written order from the purchaser. The defendant argued that he could not be punished twice for only one offense. The Court's response to that argument did not assume that only a question of legislative intent had been raised; rather, the Court assumed that two convictions for one offense would be improper whether they were returned simultaneously or successively. For the Court relied on successive prosecution cases as authority for rejecting the claim. The Court wrote:

"Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Gavieres v. United States, 200 U.S. 338, 342, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in Morey v. Commonwealth, 108 Mass. 43: 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the

Footnote continued on next page.

My second suggestion is to meet head on the point that

other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' Compare Albrecht v. United States, 273 U.S. 1, 11-12, and cases there cited. Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed." 284 U.S. at 304.

In the Albrecht case, which the Court cited in Blockburger, a similar contention had been advanced and expressly analyzed and rejected in constitutional rather than statutory terms. The Court wrote:

"There is a claim of violation of the Fifth Amendment by the imposition of double punishment. This contention rests upon the following facts. Of the nine counts in the information four charged illegal possession of liquor, four illegal sale and one maintaining a common nuisance. The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinct offenses. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offence. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction." Albrecht v. United States, 273 U.S. 1, 11.

The reasoning in both Blockburger and Albrecht obviously was based on the assumption that "multiple punishment"--in the sense of two separate convictions and sentences--for a single offense would have violated the Double Jeopardy Clause. The Court's opinion today offers no reason for departing from this well-settled approach to cases of this kind.

it is permissible to provide "multiple punishments" in the sense that a State could impose both a fine and a prison sentence for the same crime. In order to do that, perhaps you would like to consider revising the carry-over paragraph between pages two and three to read this way:

"A State has wide latitude to define crimes and to prescribe the punishment for a given crime. Thus, a State is free to prescribe two different punishments (e.g., a fine and a prison term) for a single offense. However, the Double Jeopardy Clause does not permit a State to make two crimes out of conduct that federal law declares to be a single offense. For whenever a person may be convicted of a 'crime' under State law, he is 'put in jeopardy of life or limb.' If the prohibition against being 'twice put in jeopardy' 'for the same offence' is to have any real meaning, a State cannot be allowed to convict a person two, three, or more times simply by enacting separate statutory provisions defining nominally distinct crimes."

Whether or not these suggestions seem advisable to you, I would like to join your opinion.

Respectfully,



Justice Marshall

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 10, 1983

Re: 81-1214 - Missouri v. Hunter

Dear Thurgood:

Please join me in your dissent.

Respectfully,



Justice Marshall

Copies to the Conference

P.S. Many thanks for making the changes. I really think your opinion is a strong one.

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

RECEIVED
SUPREME COURT U.S.
JUSTICE MARSHALL

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

'82 DEC 22 A10:13

December 21, 1982

No. 81-1214 Missouri v. Hunter

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

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