

The Burger Court Opinion Writing Database

Texas v. McCullough

475 U.S. 134 (1986)

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: JAN 13 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1198

TEXAS, PETITIONER *v.* SANFORD JAMES
McCULLOUGH

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[January —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the
Court.

We granted certiorari to decide whether the Due Process Clause was violated when the defendant in a state court received a greater sentence on retrial where the earlier sentence was imposed by the jury, the trial judge granted the defendant's motion for a new trial, the defendant requested that in the second trial the judge fix the sentence, and the judge entered findings of fact justifying the longer sentence.

I

In 1980, Sanford James McCullough was tried before a jury in the Randall County, Texas, District Court and convicted of murder. McCullough elected to be sentenced by the jury, as was his right under Texas law. Texas Code of Criminal Procedure, Art. 37.07. The jury imposed a twenty-year sentence. Judge Naomi Harney, the trial judge, then granted McCullough's motion for a new trial on the basis of prosecutorial misconduct.

Three months later, McCullough was retried before a jury, with Judge Harney again presiding. At this trial, the state presented testimony from two witnesses who had not testified at the first trial that McCullough rather than his accomplices had slashed the throat of the victim. McCullough was again found guilty by a jury. This time, he elected to have

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

STYLISTIC CHANGES THROUGHOUT

From: **The Chief Justice**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1198

TEXAS, PETITIONER *v.* SANFORD JAMES
McCULLOUGH

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[February —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the
Court.

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I

In 1980, Sanford James McCullough was tried before a jury in the Randall County, Texas, District Court and convicted of murder. McCullough elected to be sentenced by the jury, as was his right under Texas law. Tex. Code Crim. Proc. Ann., Art. 37.07 (Vernon 1981). The jury imposed a 20-year sentence. Judge Naomi Harney, the trial judge, then granted McCullough's motion for a new trial on the basis of prosecutorial misconduct.

Three months later, McCullough was retried before a jury, with Judge Harney again presiding. At this trial, the State presented testimony from two witnesses who had not testified at the first trial that McCullough rather than his accomplices had slashed the throat of the victim. McCullough was again found guilty by a jury. This time, he elected to have

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

From: Justice Brennan

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1198

TEXAS, PETITIONER *v.* SANFORD JAMES
McCULLOUGH

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[February —, 1986]

JUSTICE BRENNAN, concurring in the judgment.

After respondent was sentenced to twenty years imprisonment upon his conviction for murder, Judge Harney granted respondent's motion for a new trial based on prosecutorial misconduct. Under these circumstances, I believe that the possibility that an increased sentence upon retrial resulted from judicial vindictiveness is sufficiently remote that the presumption established in *North Carolina v. Pearce*, 395 U. S. 711 (1969), should not apply here. Because respondent has not shown that the fifty-year sentence imposed by Judge Harney after respondent's retrial resulted from actual vindictiveness for having successfully attacked his first conviction, I would reverse the judgment below.

I emphasize, however, that were I able to find that vindictiveness should be presumed here, I would agree with JUSTICE MARSHALL that "the reasons offered by Judge Harney [were] far from adequate to rebut any presumption of vindictiveness." *Post*, at 8. The Court's dictum to the contrary, see *ante*, at 6-9, serves in my view only to distort the holding of *Pearce*.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 14, 1986

84-1198 - Texas v. McCullough

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 13, 1986

Re: No. 84-1198-Texas v. McCullough

Dear Chief:

In due course I shall file a dissent in this one.

Sincerely,

J.M.

T.M.

The Chief Justice

cc: The Conference

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

From: **Justice Marshall**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1198

TEXAS, PETITIONER *v.* SANFORD JAMES
McCULLOUGH

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[January —, 1986]

JUSTICE MARSHALL, dissenting.

With little more than a passing nod to the considerations that prompted this Court, in *North Carolina v. Pearce*, 395 U. S. 711 (1969), to safeguard due process rights by establishing a prophylactic rule of presumptive vindictiveness, the majority first refuses to apply that rule in a case where those considerations are clearly relevant, and then proceeds to rob that rule of any vitality even in cases in which it will be applied. Because I believe that under the rationale of *Pearce* we must presume vindictiveness here and that the findings of the trial judge with respect to respondent's second sentence should not be permitted to defeat that presumption, I must dissent.

I

After the jury in Sanford James McCullough's first trial imposed a sentence of 20 years' imprisonment, the Randall County Criminal District Attorney thought McCullough had been treated much too leniently. A local newspaper quoted the prosecutor as commenting: "A guy's life ought to be worth more than that." *Amarillo Globe-Times*, Sept. 24, 1980, p. 25, col. 1. Defendant's Exhibit 5 in Cause No. 3237, 251st Judicial District Court, Randall County, Texas. Luckily for the District Attorney, McCullough was not satisfied with the results of his first trial either. McCullough filed a

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

From: **Justice Marshall**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1198

TEXAS, PETITIONER *v.* SANFORD JAMES
McCULLOUGH

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[January —, 1986]

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and
JUSTICE STEVENS join, dissenting.

With little more than a passing nod to the considerations that prompted this Court, in *North Carolina v. Pearce*, 395 U. S. 711 (1969), to safeguard due process rights by establishing a prophylactic rule of presumptive vindictiveness, the majority first refuses to apply that rule in a case where those considerations are clearly relevant, and then proceeds to rob that rule of any vitality even in cases in which it will be applied. Because I believe that under the rationale of *Pearce* we must presume vindictiveness here and that the findings of the trial judge with respect to respondent's second sentence should not be permitted to defeat that presumption, I must dissent.

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

From: **Justice Marshall**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1198

TEXAS, PETITIONER *v.* SANFORD JAMES
McCULLOUGH

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[February —, 1986]

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and
JUSTICE STEVENS join, dissenting.

With little more than a passing nod to the considerations that prompted this Court, in *North Carolina v. Pearce*, 395 U. S. 711 (1969), to safeguard due process rights by establishing a prophylactic rule of presumptive vindictiveness, the majority first refuses to apply that rule in a case where those considerations are clearly relevant, and then proceeds to rob that rule of any vitality even in cases in which it will be applied. Because I believe that under the rationale of *Pearce* we must presume vindictiveness here and that the findings of the trial judge with respect to respondent's second sentence should not be permitted to defeat that presumption, I must dissent.

I

After the jury in Sanford James McCullough's first trial imposed a sentence of 20 years' imprisonment, the Randall County Criminal District Attorney thought McCullough had been treated much too leniently. A local newspaper quoted the prosecutor as commenting: "A guy's life ought to be worth more than that." *Amarillo Globe-Times*, Sept. 24, 1980, p. 25, col. 1; Record, Defendant's Exhibit 5. Luckily for the District Attorney, McCullough was not satisfied with the results of his first trial either. McCullough filed a mo-

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 15, 1986

Re: No. 84-1198, Texas v. McCullough

Dear Chief:

For now, I shall wait upon the dissent in this case.

Sincerely,



The Chief Justice

cc: The Conference

(H)

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 29, 1986

Re: No. 84-1198, Texas v. McCullough

Dear Thurgood:

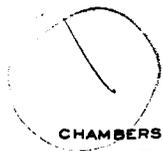
Please join me in your dissent.

Sincerely,



Justice Marshall

cc: The Conference



CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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

January 14, 1986

84-1198 Texas v. McCullough

Dear Chief:

Please join me.

Sincerely,

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 WILLIAM H. REHNQUIST

January 13, 1986

Re: No. 84-1198 Texas v. McCullough

Dear Chief,

Please join me.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 15, 1986

Re: 84-1198 - Texas v. McCullough

Dear Chief:

I shall await the dissent.

Respectfully,



The Chief Justice

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52 JAN 12 1986

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 29, 1986

Re: 84-1198 - Texas v. McCullough

Dear Thurgood:

Please join me in your dissent.

Respectfully,

John /cs

Justice Marshall

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 13, 1986

Re: 84-1198 Texas v. McCullough

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

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