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# The Double Jeopardy Clause Expanded: Harsher Sentences on Retrial Prohibited in Bifurcated Capital Offense Hearings - Bullington v. Missouri

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# THE DOUBLE JEOPARDY CLAUSE EXPANDED: HARSHER SENTENCES ON RETRIAL PROHIBITED IN BIFURCATED CAPITAL OFFENSE HEARINGS— *BULLINGTON V. MISSOURI*

The fifth amendment to the United States Constitution provides that no person shall undergo the risk of punishment more than once for the same offense.[1] This principle, referred to as the double jeopardy clause, bars retrial for the same offense after acquittal,[2] retrial for the same offense after conviction,[3] and multiple punishment for the same offense.[4] The underlying policy of the double jeopardy clause is to prevent the state from continually harassing the accused.[5]

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1. The double jeopardy clause provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

Initially, the double jeopardy clause only provided protection in federal matters. In Palko v. Connecticut, 302 U.S. 319 (1937), the Court refused to extend the double jeopardy prohibition to protect defendants in state criminal proceedings. The Court reasoned that protection from double jeopardy was not a fundamental right and, consequently, could not be incorporated into the due process clause of the fourteenth amendment. In 1969, however, in Benton v. Maryland, 395 U.S. 784 (1969), the Court extended this protection to state criminal proceedings via the fourteenth amendment. For a general discussion of the double jeopardy clause, see H. WAY, CRIMINAL JUSTICE AND THE AMERICAN CONSTITUTION 237 (1980) [hereinafter cited as WAY]; C. WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE § 23 (1978 & Supp. 1981). A more detailed analysis of the history of double jeopardy law appears in Sigler, *A History of Double Jeopardy*, AM. J. LEGAL HIST. 283 (1963).

2. *See, e.g.*, Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam) (retrial barred following final judgment of acquittal regardless of erroneous ruling); United States v. Ball, 163 U.S. 662 (1896) (retrial barred following acquittal based on faulty indictment). *Cf.* Arizona v. Washington, 434 U.S. 497 (1978) (retrial unfair if final judgment confirms innocence of accused); Green v. United States, 355 U.S. 184 (1957) (conviction of lesser included offense implies acquittal of greater offense, thus precluding retrial).

3. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711 (1969) (double jeopardy clause prohibits second prosecution for same offense following an acquittal or conviction); Nunley v. United States, 339 F.2d 442, 443 (10th Cir. 1967) (judgment of conviction bars further prosecution on charge that was or could have been included in the indictment).

4. *See, e.g.*, *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (defendant sentenced to pay fine and serve prison term under statute that required only one sanction or the other did not have to serve prison term after paying fine); United States v. Sacco, 367 F.2d 368 (2d Cir. 1966) (judge not permitted to increase sentence once defendant had begun serving the sentence originally imposed); United States v. Adams, 362 F.2d 210 (6th Cir. 1966) (judge precluded from increasing sentence from one year to ten years on first count in order to maintain full sentence term of defendant when statute required reduction of sentence on second count from ten years to one year).

5. *See* United States v. Jorn, 400 U.S. 470, 479 (1971) (to allow the government repeated attempts to convict a defendant would violate constitutional procedural protections established for criminal trials); Green v. United States, 355 U.S. 184, 187-88 (1957) (state should not be allowed to make repeated attempts to convict defendants thereby subjecting them to embarrassment and increasing likelihood of finding them guilty).

One author has distinguished four separate policy considerations underlying the principle of

The ban on double jeopardy, however, is not absolute.[6] One exception arises when a defendant, after a conviction and sentence, successfully attacks the adverse finding of the trial court and obtains a new trial.[7] In this situation, the United States Supreme Court has held that the accused may be retried[8]

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double jeopardy. First, the theory that guilt must be established by proving the elements of the alleged offense to a single jury. This theory is based upon the belief that the state should not be permitted to capitalize on the increased probability of conviction by arguing before several juries. Second, the prosecution should not be able to seek a harsher sentence by bringing the case before more than one judge. Third, double jeopardy protection prevents criminal proceedings from becoming a tool for unwarranted harassment of the accused by the state. Finally, multiple punishment for a single offense at the same trial is prohibited due to the perception that judges should not impose more than one punishment for a legislatively defined offense. Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 266-67 (1965).

6. *See* Michigan v. Payne, 412 U.S. 47, 50 (1973) (although there is no absolute bar to a harsher sentence, such a penalty may not be based on judicial vindictiveness); North Carolina v. Pearce, 395 U.S. 711, 723 (1969) (neither the double jeopardy clause nor the equal protection clause absolutely bars a more severe sentence upon reconviction).

7. The attack may be a direct attack, such as an appeal, or a collateral attack, such as a motion for a new trial. *See, e.g.*, Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (harsher sentence imposed on retrial following successful appeal by defendant); Robinson v. United States, 144 F.2d 392, 397 (6th Cir. 1944) (death sentence upheld following nullification of prior life imprisonment sentence on defendant's application for habeas corpus), *aff'd on other grounds*, 324 U.S. 282 (1945).

8. *See, e.g.*, United States v. Ewell, 383 U.S. 116 (1966) (retrial permitted after successful appeal because retrial protects societal interest in trying those accused of crime); United States v. Tateo, 377 U.S. 463 (1964) (retrial after reversal for trial error is necessary to protect societal interest in punishing the guilty); Forman v. United States, 361 U.S. 416 (1960) (retrial permitted following reversal of conviction); United States v. Ball, 163 U.S. 662 (1896) (retrial permitted after conviction set aside).

Courts frequently have relied on the "waiver theory" to dismiss double jeopardy claims. Under this theory, the defendant who voluntarily attacked the decision of the trial court, waived his right to assert the protections of double jeopardy. *See* Brewster v. Swope, 180 F.2d 984, 986 (9th Cir. 1950) (dictum) (retrial permissible where defendant waives protection of double jeopardy through a motion for retrial or on appeal); State v. McCord, 8 Kan. 161, 168 (1871) (by appealing or moving for new trial, defendant waived a right neither courts nor legislature can take away); Cross v. Commonwealth, 195 Va. 62, 63, 77 S.E.2d 447, 448 (1953) (defendant's appeal and motion for a new trial waived double jeopardy defense); Smith v. State, 196 Wis. 102, 103, 219 N.W. 270, 271 (1928) (retrial properly ordered because defendant moved for new trial and, therefore, waived plea of double jeopardy. *But see* Kepner v. United States, 195 U.S. 100, 134-37 (1904) (Holmes, J., dissenting) (waiver theory rejected); Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV 1, 6-7 (1960) (waiver theory erroneously assumes a voluntary act, however, defendant may prefer a reversal of conviction rather than a new trial) [hereinafter cited as Mayers & Yarbrough].

Double jeopardy claims also were dismissed and retrials granted under a second theory—"continuous jeopardy". This theory provided that jeopardy continued until a final, errorless decision was rendered. *See* Kepner v. United States, 195 U.S. 100, 134-37 (1904) (Holmes, J., dissenting) (jeopardy continued until final disposition of case regardless of number of times defendant is tried); State v. Aus, 105 Mont. 82, 69 P.2d 584 (1937) (defendant not placed in new jeopardy but in same jeopardy when new trial granted); Mayers & Yarbrough, *supra* at 7-8 (if double jeopardy protects against successive prosecutions for same conduct, theory that jeopardy continues until final settlement of same prosecution best explains allowing retrial). The United States Supreme Court, in Green v. United States, 355 U.S. 184, 191-93 (1957), however, expressly rejected both the "waiver" and the "continuous jeopardy" theories.

and, if convicted again, may be subject to a harsher sentence than originally was imposed.[9]

In 1981, the Supreme Court greatly restricted this exception to the double jeopardy clause in *Bullington v. Missouri*.[10] In *Bullington*, the Court considered the issue of whether the double jeopardy clause prohibits the imposition of a harsher sentence on retrial in the context of the bifurcated proceeding[11] when that harsher sentence may be capital punishment. A five justice majority held that if the original jury in a bifurcated proceeding imposes a sentence of life imprisonment, the double jeopardy clause prohibits the state from seeking the death penalty upon retrial.[12]

In prohibiting the imposition of capital punishment on retrial in a bifurcated proceeding, the *Bullington* Court departed from the double jeopardy exception. To understand this departure, an examination of the distinctions between single hearings and bifurcated proceedings[13] is essential. By providing double jeopardy protection to the defendant at resentencing, the Court overlooked the fact that the Missouri capital murder statute already provided adequate protection to the accused.[14] The *Bullington* decision will result in nonuniform double jeopardy treatment based on irrelevant procedural distinctions rather than on the underlying policy of the double jeopardy clause.[15] Consequently, this decision will infringe upon the states' interests in punishing criminals.[16]

## HARSHER SENTENCING ON RETRIAL

### *Single Hearing Trials*

Traditionally, the single hearing trial has been utilized to try defendants accused of capital offenses.[17] Under this procedure, the guilt or innocence

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9. *See, e.g.*, Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (following reversal of conviction and prior sentence of 15 years imprisonment the Court affirmed sentence of life imprisonment for robbery conviction); Stroud v. United States, 251 U.S. 15 (1919) (upholding death sentence on retrial where sentence in original trial was life imprisonment); Gully v. Kunzman, 592 F.2d 283 (6th Cir.) (permitting prosecution to seek death penalty on retrial in a bifurcated hearing following reversal of conviction and prior sentence of life imprisonment), *cert. denied*, 442 U.S. 924 (1979); United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976) (defendant may face harsher sentence on retrial provided there is little possibility of vindictiveness or retaliation by judge or prosecution); Martinex v. Estelle, 527 F.2d 1330 (5th Cir. 1976) (upholding life imprisonment sentence where defendant had received 15 year sentence in prior trial after waiving jury trial as part of plea bargain); Arechiga v. Texas, 469 F.2d 646 (5th Cir. 1972) (upholding sentence of life imprisonment for possession of narcotics, following reversal of conviction with sentence of two to 15 years imprisonment), *cert. denied*, 414 U.S. 932 (1974).

10. 451 U.S. 430 (1981).

11. *See infra* notes 33-52 and accompanying text.

12. 451 U.S. at 446.

13. *See infra* notes 17-52 and accompanying text.

14. *See infra* notes 105-12 and accompanying text.

15. *See infra* notes 117-18 and accompanying text.

16. *See infra* notes 123-28 and accompanying text.

17. One common objection to single hearing trials is that sentencing juries in capital offense cases do not receive enough evidence on the issue of guilt to render an informed decision

of the accused is determined, and upon a finding of guilty, a sentence is imposed.[18] If this initial conviction was reversed but the defendant was convicted upon retrial, an issue arose as to whether the imposition of a harsher sentence than that imposed in the original trial violated the double jeopardy clause. The Supreme Court first confronted this issue in *Stroud v. United States*.[19] In *Stroud*, the Supreme Court held that a defendant who successfully attacked a prior conviction and sentence of life imprisonment could be sentenced to death if reconvicted of first degree murder.[20]

The Supreme Court subsequently limited the *Stroud* rule. In *North Carolina v. Pearce*,[21] the Court held that when a judge was the sentencing authority, a harsher sentence could be imposed on retrial only when the judge set forth his reasons for so doing.[22] The *Pearce* Court recognized the possibility that a defendant could be exposed to prosecutorial or judicial vindictiveness for having successfully obtained a reversal of the

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regarding the death sentence. Before a judge imposes a sentence, he is given a presentence report containing information pertinent to a determination of the sanction. If a judge cannot make an informed decision without additional information, it is argued that a jury, comprised of people less experienced in penology than a judge, cannot make a reasonable decision without such information. Note, *The Bifurcated Trial Procedure and First Degree Murder*, 3 SUFFOLK U.L. REV. 628, 628-31 (1969) [hereinafter cited as *Bifurcated Trial*]. *See* Note, *Bifurcating Florida's Capital Trials: Two Steps are Better than One*, 24 U. FLA. L. REV. 127, 133-35 (1971) (major problem with Florida's single hearing trial procedure is that both defendant and state are precluded from introducing evidence that would enable jury to make informed decision regarding sentence) [hereinafter cited as *Two Steps*].

18. In the majority of states that retain the death sentence, the jury is the sentencing authority. *Two Steps, supra* note 17, at 128.

19. 251 U.S. 15 (1919).

20. *Id.* at 18. The facts in *Stroud* were unique. The defendant, charged with killing a prison guard, obtained reversal of his first degree murder conviction which imposed the death sentence. On retrial, he was again convicted but the jury did not recommend the death penalty. After another successful appeal, the defendant was found guilty of first degree murder. In the second retrial the jury imposed the death sentence. The Supreme Court affirmed the death sentence. *Id.*

21. 395 U.S. 711 (1969).

22. *Id.* at 726. Moreover, the Court asserted that the judge's reasons must be based on objective information concerning the defendant's conduct after the original sentencing. *Id.* Specifically, the reasons had to be founded upon events throwing "new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Id.* at 723 (quoting Williams v. New York, 337 U.S. 241, 245 (1949)). The justification for this requirement was that punishment should fit the person rather than the crime. 395 U.S. at 723 (1969).

Justice Douglas, concurring in *Pearce*, argued that the majority's position would permit a criminal defendant's conduct, subsequent to his first trial, to justify an increase of his sentence. Justice Douglas, however, reasoned that the state is not allowed to reopen every verdict and readjust every sentence. To permit a harsher sentence based on conduct subsequent to a conviction would be to hold a defendant criminally liable for that conduct when he has not been tried. Furthermore, the state should not be permitted to do so simply because the defendant has appealed a conviction. *Id.* at 736 & n. 6 (Douglas, J., concurring). *But see* Comment, *Harsher Sentence on Retrial*, 38 TENN. L. REV. 562, 568-69 (1971) (subsequent conduct should be considered because defendant initiated the reopening of his case and the state has remedies against subsequent wrongdoers who do not reopen their cases such as loss of the chance for early parole) [hereinafter cited as *Harsher Sentence*].

conviction.[23] Thus, the Court required that the reasons for the imposition of the harsher sentence appear on the record. This requirement afforded an appellate court the opportunity to review the constitutional legitimacy of the harsher sentence.[24]

Despite the imposition of restrictions on judicial resentencing, the *Pearce* Court reaffirmed the principle that the Constitution does not raise an absolute bar to the issuance of a more severe sentence after a successful appeal of a conviction.[25] The Court declared that when the original conviction is set aside at the defendant's request and a new trial ordered, the original proceedings are nullified and the trial process begins anew.[26] Thus, although the *Pearce* decision substantially curtailed judicial freedom to impose a harsher penalty on retrial, the Court did not abrogate that power.[27]

In *Chaffin v. Stynchcombe*,[28] the Court refused to extend the *Pearce* restrictions on judicial resentencing to a jury.[29] Unlike the situation in which a judge is the sentencing authority, vindictiveness is not a concern when a jury imposes the sentence because, in most cases, the second jury has no knowledge of the prior sentence.[30] The Court also rejected the argu-

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23. 395 U.S. at 723-24. The possibility of vindictiveness might make defendants fearful and thus deter them from exercising their right to appeal an adverse decision. *Id. Cf.* Midgett v. McClelland, 547 F.2d 1194 (4th Cir. 1977) (harsher sentence disallowed due to retaliatory appearance of sentence); Sommerville v. State, 521 S.W.2d 792 (Tenn. 1975) (harsher sentence impermissible because nine jurors, having read newspaper article that had erroneously reported defendant's initial sentence, were tainted with vindictiveness). *See infra* notes 113-14 and accompanying text.

24. 395 U.S. at 723-24. *See also Harsher Sentence, supra* note 22, at 568 (if the judge justifies the increased punishment, a defendant cannot complain of unfair treatment because the sentence would not be constitutionally barred).

25. 395 U.S. at 721.

26. *Id.* at 720-21. This is referred to as the "clean slate" doctrine and permits not only a new trial, but also a possible harsher sentence. *Id.* at 720.

27. For a discussion of *Pearce* and its ramifications, see generally *Harsher Sentence, supra* note 22.

28. 412 U.S. 17 (1973).

29. *Id.* at 23-24. The defendant in *Chaffin* had been convicted of robbery by open force, a capital offense in Georgia, and sentenced to 15 years imprisonment. He obtained a reversal of the conviction on appeal, and subsequently was retried before a different judge and jury. He was found guilty on retrial and sentenced to life imprisonment. *Id.* at 18-20. In affirming the harsher sentence, the Court rejected the defendant's double jeopardy argument and refused to overrule *Stroud*. *Id.* at 23-24.

30. *Id.* at 26. One reason for possible judicial vindictiveness was that the judge was likely to be prejudiced by his knowledge that the defendant had already been convicted of the offense for which he was again on trial. Accordingly, Justice Powell stated that "[t]he first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence." *Id.*

The Court articulated two other distinctions between judge and jury sentencing which justified disparate treatment. First, the jury has no personal stake in the prior conviction. The jury is without motivation for self-vindication. On the other hand, the judge in the second trial may be the same judge whose prior handling of the case was deemed unacceptable by an appellate court and, thus, he may seek self-vindication. Second, unlike a jury, the judge may be sensitive to administrative concerns which dictate the discouragement of what some may consider unwarranted appeals. *Id.* at 27.

Justice Stewart, in his dissent, argued that jury trials were not free of vindictiveness. He

ment that fear of receiving a harsher sentence on retrial will unconstitutionally chill a defendant's right to appeal.[31] Thus, while *Pearce* imposed limitations on harsher resentencing by a judge, the Court in *Chaffin* granted a jury, in a unitary trial context, unrestrained freedom to impose a harsher sentence on retrial.[32]

Analysis of the double jeopardy clause, therefore, reveals no absolute prohibition to the imposition of a more severe sentence on retrial subsequent to a defendant's successful attack of his conviction. While the Supreme Court has attached certain qualifications to this general rule, it has consistently refused to overrule it in the context of a unitary trial proceeding.

### *The Bifurcated Approach*

The bifurcated proceeding was popularized in legislative response to the

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maintained that possible vindictiveness existed on the part of the prosecution and trial judge. As such, a judge may instruct the jury in a manner calculated to sway the decision, or a prosecutor may ask for a sentence more severe than the original to punish the defendant for appealing. *Id.* at 35-36 (Stewart, J., dissenting). Justice Stewart, however, conceded that the jury should not be precluded from imposing a harsher sentence. He suggested that a judge be required to reduce any sentence on retrial to that imposed by the jury in the original trial, unless he could set forth reasons for the harsher sentence as required by *Pearce*. *Id.* at 37. Moreover, this procedure would not forfeit the benefits of jury sentencing because at most, the verdict of the original jury would be given effect. *Id.*

31. The Court noted that the criminal law is replete with situations that require a defendant to make difficult choices. One example cited by the Court was decisions involved in "plea bargaining." *Id.* at 32. In addition, the Court recognized the legitimacy of the jury sentencing process and maintained that an incidental consequence of that process was the requirement that a defendant choose between waiving his constitutional right to a jury trial and facing a potentially harsher sentence. *Id.* at 32-33. Finally, Justice Powell expressed doubt that the fear of a harsher sentence would influence a defendant in his decision to appeal because at the time this decision was made, the possibility of receiving a harsher sentence was too speculative and remote. *Id.* at 33-35.

32. Justice Marshall filed a strong dissent in *Chaffin*, in which he raised two arguments. First, he contended that *Pearce*-like restrictions imposed on juries would not significantly infringe a state's interest in permitting juries to impose harsher sentences on retrial. Chaffin v. Stynchcombe, 412 U.S. at 38-43 (Marshall, J., dissenting). He noted that the jury's duty in sentencing—to fit a punishment to the crime—was impaired by limiting the sentence imposed on retrial. This function was not substantially impaired, however, because one jury would already have determined a sentence. *Id.* at 42-43. Justice Marshall also argued that because judges are limited in imposing harsher sentences on retrial while juries are not, the defendant's right to a jury trial is burdened. *Id.* at 44-46. He reasoned that a defendant will readily waive his right to a jury trial on retrial if he is cognizant that a judge will be limited in imposing a harsher sentence, but a jury will not. Following United States v. Jackson, 390 U.S. 570 (1968), placing such a burden on a constitutional right was impermissible if it was unnecessary to accomplish some legitimate state interest. Chaffin v. Stynchcombe, 412 U.S. at 44 (Marshall, J., dissenting). Because *Pearce* restrictions could be imposed on sentencing juries, according to Justice Marshall, without significantly infringing upon any state interest, the burden on an individual's sixth amendment right to a jury trial was unnecessary to the state interest and, therefore, was unconstitutional. *Id.* at 46. *See also Harsher Sentence, supra* note 22, at 572 (to distinguish between jury and judge imposed sentence overlooks the major concern of *Pearce*,

Supreme Court decision of *Furman v. Georgia*.[33] The *Furman* Court held that total discretion in the imposition of the death sentence constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.[34] As a result, death penalty legislation was instituted to provide various procedural safeguards to control the discretion of the decision-maker.[35] One such safeguard, the bifurcated trial,[36] requires two separate hearings.[37] The first hearing addresses the issue of whether the accused is

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which was to prevent defendant's right to appeal from being "chilled" by fear of unjustified harsher sentence).

33. 408 U.S. 238 (1972) (per curiam).

34. *Id.* at 256-57 (Douglas, J., concurring). Justice Douglas argued that statutes permitting discretionary imposition of the death sentence violated the equal protection clause of the fourteenth amendment and the "cruel and unusual punishment" prohibition of the eighth amendment. *Id.* He noted the tension between the holdings of *Furman* and McGautha v. California, 402 U.S. 183, 207 (1971), *vacated*, 408 U.S. 941 (1972), which held, in part, that the Constitution did not prohibit a state from granting absolute discretion to sentencing juries in determining whether to impose the death sentence. In analyzing the different holdings, Justice Douglas stressed that discretionary capital sentencing procedures permit arbitrary and random imposition of the death penalty. Furman v. Georgia, 408 U.S. 238, 248 n.11 (1972) (per curiam) (Douglas, J., concurring).

35. Note, *Capital Punishment Statutes After Furman*, 35 OHIO ST. L.J. 651 (1974). The author discusses the various types of capital punishment statutes enacted after *Furman*. These statutes are divided into three categories: (1) statutes conferring mandatory death sentences; (2) statutes limiting the discretion of the judge or jury; and (3) statutes limiting the exercise of discretion by prescribing specific aggravating circumstances upon which a death sentence must be based. *Id.* at 670-84. The post-*Furman* statutes, however, have not effectively abrogated the discretion of sentencing authorities and, therefore, violate the spirit of *Furman*. *Id.* at 684-85. *Cf.* Comment, *Capital Sentencing—Effect of McGautha and Furman*, 45 TEMP. L.Q. 619, 626 (1972) (legislatures seeking to retain capital punishment will have to either retain present specification of capital crimes and generate standards to guide penalty decision or make death sentence mandatory for certain offenses). *See also The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. L. & CRIMINOLOGY 2 (1973) (analysis of competing policy and legal considerations of *Furman* with regard to the constitutionality of the post-*Furman* Florida capital punishment statute).

36. The bifurcated trial, a means for preserving the constitutional rights of a defendant, existed prior to *Furman*. Its popularity among those states retaining death penalty statutes, however, has greatly increased in the wake of the *Furman* decision. For an analysis of pre-*Furman* bifurcated trial statutes, see Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U. L. REV. 50 (1964). *See also Two Steps, supra* note 17 (advocating use of bifurcated trials to achieve fairer sentences by allowing jury to hear evidence regarding sentencing that would be inadmissible at guilt phase). *But see* Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 997-1000 (1967) [hereinafter cited as *Virginia*] (presenting some problems with the bifurcated approach).

37. Commentators emphasize two basic advantages in the use of bifurcated proceedings. First, this procedure allows for the introduction of all evidence essential to an informed determination of a sentence. Traditional rules of evidence preclude the introduction at a trial on guilt of much of the evidence a sentencing authority might find relevant. In a bifurcated trial, such evidence commonly is admissible at the presentence hearing. *Bifurcated Trial, supra* note 17, at 631.

Second, the sentencing evidence in a bifurcated trial is admitted without prejudicing the jury on the issue of guilt because this evidence is not admissible until a verdict of guilty has been rendered. Conversely, the possibility of prejudice exists in the unitary procedure because the

innocent or guilty.[38] If the defendant is adjudged guilty, a second, or presentence, hearing is held. In this presentence hearing, the sentencing authority,[39] usually the same judge or jury that found the accused guilty, hears evidence relevant to the possible sentences that can be imposed[40] and determines the appropriate sentence based on that evidence.

The Missouri capital murder statute involved in *Bullington* is a typical bifurcated trial statute.[41] Pursuant to this statute, the jury is given the choice between two sentences: death; or life imprisonment without parole or probation for fifty years.[42] To aid the jury in its determination, counsel must present evidence of statutorily prescribed aggravating and mitigating circumstances.[43] The jury is instructed that for the death sentence to be imposed, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances.[44] Further, these aggravating factors must be sufficient, in the jury's estimation, to warrant the death sentence.[45] The jury is also instructed that it is not compelled to impose the death sentence.[46] That is, the defendant can be sentenced to life imprisonment, even if the jury finds that the state has proven the aggravating circumstances beyond a reasonable doubt and that such circumstances outweigh all of the mitigating factors.[47] Finally, the jury's decision to impose the death sentence must be unanimous or life imprisonment will be imposed.[48] In ad-

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defendant introduces mitigating evidence before the jury deliberates on the issue of guilt. *Id.* *See also Two Steps, supra* note 17, at 136 (urging adoption of the bifurcated procedure in Florida capital trials primarily because of evidentiary benefits).

38. In the first phase of the bifurcated proceeding, guilt is determined in the same manner as it is in the unitary trial procedure. *Two Steps, supra* note 17, at 136.

39. The majority of states that retain capital punishment statutes permit jury sentencing in capital cases. This may be due, in part, to popular sentiment that the decision to impose the death penalty should reflect the judgment of a cross section of the community. *Virginia, supra* note 36, at 969.

40. Rules of evidence regarding admissibility are usually liberal in the presentence hearing. *See Two Steps, supra* note 17, at 137. *Cf.* Gregg v. Georgia, 428 U.S. 153, 195 (1976) (bifurcated proceeding is the best method for obviating arbitrariness in death sentencing because sentencing authority is presented with evidence relevant to imposing death penalty).

41. *See* MO. REV. STAT. § 565.006.2 (1979).

42. *Id.* § 565.008.1.

43. *Id.* § 565.006.2. Under the Missouri statute, the evidence presented is subject to the rules of evidence and may include the record of any prior criminal convictions, pleas of guilty, pleas of nolo contendere, or the absence of such convictions or pleas. In addition, the prosecution may introduce evidence in aggravation only if such evidence was made known to the defendant before trial. *Id.*

44. *Id.* § 565.012.5 (1979 & Supp. 1980). The statute specifies 12 aggravating circumstances, *id.* § 565.012.2, and seven mitigating circumstances, *id.* § 565.012.3.

45. *Id.* § 565.012.1(4).

46. *See* 451 U.S. at 435. *See also* State *ex rel.* Westfall v. Mason, 594 S.W.2d 908, 913 (Mo. 1980) (final decision rests with jury because jury's predilections as to mercy are part of the statutory safeguards), *rev'd on other grounds sub nom.* Bullington v. Missouri, 451 U.S. 430 (1981).

47. 451 U.S. at 434.

48. MO. REV. STAT. § 565.006.2 (1979) (judge may never impose death sentence when jury does not agree, but rather is to impose life imprisonment).

dition, the statute compels the jury to designate in writing the aggravating circumstances it found to be proved beyond a reasonable doubt.[49] By doing so, the reasons for a death sentence recommendation are made available for review by the state supreme court.[50] Missouri's Supreme Court then has the authority to affirm the death sentence[51] or remand the case for resentencing.[52]

Thus, the bifurcated trial is procedurally different than the single hearing trial. Although the United States Supreme Court has ruled that the single hearing procedure allows harsher sentencing on retrial, until *Bullington v. Missouri*, it has not determined whether harsher sentences could be imposed in a bifurcated proceeding. Specifically, *Bullington* presented the Court with the question of whether to follow the single hearing approach to resentencing in a bifurcated proceeding.

## THE *BULLINGTON* DECISION

### *Facts and Procedural History*

In September of 1977, an intruder, armed with a shotgun, broke into the home of Pamela Sue Wright.[53] Directing Pamela's mother and brother to lie on the kitchen floor, the intruder blindfolded them, bound their hands and feet, and abducted Pamela.[54] Several days later, Pamela's body was found floating in a creek several miles from her house.[55]

Robert Bullington was indicted in St. Louis County, Missouri and charged with capital murder of Pamela Wright.[56] Pursuant to Missouri law, the prosecution advised Bullington's counsel that the state intended to seek the death penalty if Bullington was convicted. The prosecution alleged that

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49. *Id.* § 565.012.4.

50. This provision requires the Missouri Supreme Court to determine the constitutionality of any death sentence by reviewing the record of the bifurcated proceeding. *Id.* § 565.014.1.

51. *Id.* § 565.014.5(1).

52. *Id.* § 565.014.5(2). In reviewing the sentence, the state supreme court determines the validity of the sentence. That is, the court determines whether the sentence was imposed on the basis of some arbitrary factor such as passion or prejudice, *id.* § 565.014.3(1), whether the evidence supports the finding of the aggravating circumstances, *id.* § 565.014.3(2), and whether imposition of the death penalty is excessive compared to penalties imposed in similar cases. *Id.* § 565.014.3(3).

53. Brief for Respondent at 1-2, Bullington v. Missouri, 451 U.S. 430 (1981).

54. *Id.* at 2.

55. *Id.* at 4. The body was clad only in jeans; her blouse, shoes, and socks had been removed. Decomposition had progressed to the point that no determination could be made regarding sexual assault. *Id.*

Several teenagers had reported to police that they had seen a truck similar to that driven by Bullington near Pamela's home the evening of the abduction. Police searched Bullington's truck and found a blonde hair, believed to have belonged to Pamela. *Id.* at 2. Based on this and other incriminating evidence, Bullington was arrested in California in October of 1977 and was returned to Missouri. *Id.* at 4.

56. 451 U.S. at 435 & n.7. The Circuit Court of St. Louis County granted Bullington's motion for a change of venue to Jackson County, Missouri. *Id.* at 435.

Bullington had a history of serious criminal convictions for assault[57] and that his offense in this case was outrageous and involved torture and mental depravity.[58] The jury returned a verdict of guilty.[59] The following day the sentencing stage of the bifurcated trial commenced.[60]

After hearing the evidence and arguments, the jury rendered a sentence of life imprisonment.[61] Bullington, however, successfully moved for a new trial based on *Duren v. Missouri*,[62] a United States Supreme Court decision which recently had held Missouri's jury selection procedure unconstitutional.[63] Before commencement of the retrial, the state notified Bullington of its intention to again seek the death penalty.[64] Bullington moved to strike the state's notice arguing that relitigation of the aggravating circumstances alleged in the original trial would violate the double jeopardy clause and chill his right to appeal.[65] In the alternative, Bullington contended that any death sentence determination should be subject to the sentencing restrictions enunciated in *Pearce*.[66]

The trial court notified the parties that it intended to sustain the defendant's motion. Consequently, the prosecution sought a writ of prohibition[67] to prevent such a ruling.[68] The appellate court rejected the prosecution's request.[69] On appeal, however, the Supreme Court of Missouri issued the writ, holding that the possibility of a harsher sentence being imposed on retrial did not chill the defendant's right to appeal.[70] The court further ruled that the *Pearce* sentencing restrictions imposed on judges were inapplicable to juries.[71] Bullington petitioned for certiorari to the United States Supreme Court on the ground that the state supreme court's decision was inconsistent with the dou-

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57. *Id.*

58. *Id.* The state alleged 2 of the 12 statutorily prescribed aggravating circumstances. MO. REV. STAT. § 565.012.2 (1979 & Supp. 1980).

59. 451 U.S. at 435.

60. *Id.*

61. *Id.* at 436. Bullington moved for a judgment of acquittal and, in the alternative, for a new trial. The court denied the motion for judgment of acquittal. *Id.*

62. 439 U.S. 357 (1979).

63. *Id.* at 370. Missouri's jury selection statute provided women with several opportunities to refuse jury duty that were not granted to men. In *Duren*, the defendant claimed that these practices violated his sixth amendment right to an impartial trial by a fair cross section of his community. *Id.* at 360. The Supreme Court sustained Duren's claim. *Id.* at 370.

64. 451 U.S. at 436. In the retrial, the state relied on the same two aggravating circumstances alleged in the first trial. *Id. See supra* note 58.

65. 451 U.S. at 436.

66. *Id. See supra* notes 21-27 and accompanying text.

67. Prohibition is a remedy whereby a superior judicial authority prevents an inferior judicial authority from exceeding its jurisdiction. A writ of prohibition is often sought when all other remedies fail to offer adequate relief. Note, *The Writ of Prohibition in Missouri*, 1972 WASH. U.L.Q. 511, 530.

68. 451 U.S. at 436.

69. *Id.*

70. State *ex rel.* Westfall v. Mason, 594 S.W.2d 908, 915 (Mo. 1980). *See infra* notes 113-16 and accompanying text.

71. State *ex rel.* Westfall v. Mason, 594 S.W.2d 908, 913-14 (Mo. 1980).

ble jeopardy clause. The United States Supreme Court subsequently reversed and remanded the decision of the Missouri Supreme Court.[72]

*The Majority's Rationale*

In *Bullington*, the Court was faced with a recent development in the law of criminal procedure, the bifurcated trial. Justice Blackmun, writing for the majority, recognized fundamental procedural differences between the bifurcated proceeding and the traditional single hearing trial. Consequently, the Court ruled that existing precedent, all of which involved traditional single hearing proceedings, was inapplicable to an analysis of the bifurcated trial.[73]

In particular, the Court reasoned that the bifurcated proceeding in *Bullington* did not afford the jury unlimited discretion in determining the appropriate punishment for a capital offense.[74] Once the jury found the defendant guilty, a separate presentence hearing was required before the same jury. In this proceeding, the prosecution was compelled to prove, beyond a reasonable doubt, the existence of certain aggravating factors before the death penalty could be imposed. Moreover, the *Bullington* Court found that in a bifurcated proceeding the jury was given only a choice between two punishments rather than discretion to choose from a wide range.[75]

Although the bifurcated hearing presented the Court with a novel approach to sentencing,[76] it had addressed a similar type of sentencing procedure on a previous occasion. In *United States v. DiFrancesco*,[77] the Court considered a presentence hearing provision under the Organized Crime Control Act of 1970.[78] Under this provision, a court could not impose a harsher sentence unless the government proved at a presentence hearing that the defendant was a "dangerous special offender."[79] The *DiFrancesco* Court held that the double jeopardy clause prohibited neither government appeal of a sentence under the "special offender" provision,[80] nor the increased sentence provided for therein.[81]

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72. 451 U.S. at 446-47.

73. *Id.* at 439.

74. *Id.* at 438.

75. *Id.* at 439. The Court stated that "the sentencing procedures considered in the Court's previous cases did not have the hallmarks of the trial on guilt or innocence." *Id.*

76. *See supra* note 36.

77. 449 U.S. 117 (1980).

78. 18 U.S.C. § 3575(b) (1976).

79. *Id.*

80. 449 U.S. at 137.

81. *Id.* at 138-39. DiFrancesco had argued that by imposing a harsher sentence on him at the appellate level, the special offender provision violated the double jeopardy guarantee against multiple punishments. *Id.* at 138. The Court rejected this contention and held that when Congress specifically provided for the appeal of a sentence by the prosecution, increased sentencing pursuant to that appeal was not multiple punishment within the meaning of double jeopardy prohibitions. *Id.* at 139.

The *Bullington* Court distinguished the *DiFrancesco* decision on several grounds. First, the *Bullington* majority reasoned that *DiFrancesco* involved appellate review of the sentence rather than a new trial.[82] Second, the Court noted that the statute in *DiFrancesco* granted more discretion to the sentencing judge than the Missouri statute gave to the sentencing jury.[83] Finally, the statute in *DiFrancesco* permitted an increased sentence if a preponderance of the evidence proved that the defendant was a dangerous special offender.[84] In contrast, the statute in *Bullington* required proof of aggravating circumstances beyond a reasonable doubt before the death penalty could be imposed.[85] Based on these distinctions, the Court ruled that *DiFrancesco* did not apply.[86]

After distinguishing the application of existing case law, the *Bullington* majority analyzed the underlying rationale of prior double jeopardy cases. The Court acknowledged the *Pearce* "clean slate" doctrine, which nullifies the original trial when a retrial occurs,[87] but noted two major exceptions to that doctrine in single hearing proceedings. First, in *Burks v. United States*,[88] the Court held that despite the general rule permitting retrial, the defendant could not be retried if the conviction, on appeal, had been reversed because the evidence presented at trial was insufficient to convict the accused.[89] Second, in *Green v. United States*,[90] the Court held that conviction of a lesser included offense was an implied acquittal of the greater offense and thus, the double jeopardy clause barred retrial for the greater offense.[91]

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82. 451 U.S. at 440. The Court distinguished an appellate review from a de novo hearing. In *Bullington*, which involved a de novo hearing, the prosecution had a second chance to prove the case before a new fact finder. Appellate review, on the other hand, involves only findings of law, not of fact. *Id.*

83. *Id.* While the jury in *Bullington* had a choice between life imprisonment and death, *id.* at 440-41, the sentencing judge in *DiFrancesco* could sentence a dangerous special offender to any prison term not in excess of 25 years or not disproportionately severe, in comparison, to the maximum penalty ordinarily imposed for the felony. *See* 18 U.S.C. § 3575(b) (1976).

84. *Id.* at 441. *See* 18 U.S.C. § 3575(b) (1976).

85. 451 U.S. at 441. *See supra* note 49 and accompanying text.

86. 451 U.S. at 440-41.

87. *Id.* at 442. For a discussion of the "clean slate" doctrine of *Pearce*, see *supra* note 26 and accompanying text.

88. 437 U.S. 1 (1978).

89. *Id.* at 15-17. In ruling that there had been insufficient evidence to convict, the *Burks* Court impliedly held that the defendant should have been acquitted as a matter of law. Because double jeopardy law precluded retrial after acquittal, the defendant could not be retried. *Id. See* 31 U. CHI. L. REV. 365 (1964) (supporting prohibition of retrial following reversal based on insufficient evidence).

90. 355 U.S. 184 (1957).

91. *Id.* at 189-91. The defendant in *Green* had been indicted for first-degree murder. The jury, after being instructed that it could convict the defendant of either first or second-degree murder, found him guilty of the latter. The defendant successfully appealed, but on retrial was convicted of first-degree murder. The Supreme Court invalidated the second trial and held that the prior conviction of second-degree murder was an implied acquittal of first-degree murder. *Id.* Because retrial after acquittal was barred by the double jeopardy clause, the most severe offense for which the defendant could thereafter be tried was second-degree murder. *Id.*

Relying on these exceptions, the *Bullington* Court ruled that Missouri could not seek the death penalty in the retrial proceeding against Bullington.[92] The imposition of the death sentence under Missouri's capital sentencing procedure requires the prosecution to prove the existence of aggravating facts beyond a reasonable doubt. Based on this statutory requirement, the *Bullington* Court, like the Court in *Burks*, reasoned that by imposing a sentence of life imprisonment, the jury had determined that there was insufficient evidence to impose the death penalty.[93] In addition, the majority followed *Green* and concluded that because the jury had been given a choice between two possible sentences, the imposition of the lesser sentence served as an implied acquittal of the greater.[94] As a result, the prosecution was barred from seeking the death penalty on retrial.[95]

## CRITICISM

Although the *Bullington* Court correctly recognized the necessity of preserving a defendant's constitutional rights,[96] the decision represents a reversal of the Court's position on the validity of imposing harsher sentences on retrial. The underlying premise for granting double jeopardy protection in *Bullington* was that the presentence hearing had the essential characteristics of a trial on the issue of guilt. Because the double jeopardy clause prohibited retrial after acquittal on the issue of guilt, the *Bullington* Court reasoned that the imposition of a life sentence was an implied acquit-

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92. 451 U.S. at 442-45.

93. *Id.* at 445.

94. *Id. Contra* United States v. DiFrancesco, 449 U.S. 117, 135 n.14 (1980) (*Pearce* and *Green* are reconcilable on grounds that imposition of sentence does not operate as an implied acquittal of any greater sentence).

95. 451 U.S. at 445. The dissenting opinion, written by Justice Powell, and joined by Chief Justice Burger, Justice White, and Justice Rehnquist, argued that the majority disregarded precedent in applying the double jeopardy clause to sentencing. The dissent maintained that double jeopardy prohibitions never have been applied to determinations of sentence with the same force as they have been applied to determinations of guilt because of the essential difference between the two. *Id.* at 447 (Powell, J., dissenting). Justice Powell reasoned that the underlying goal in the determination of guilt was to arrive at the truth, an objective standard which could be right or wrong. The determination of an appropriate sentence, however, was discretionary. Accordingly, one jury's sentence was no more right or wrong than another's, provided that the sentence was within statutory limits. Justice Powell argued that the possibility of error as to guilt or innocence was unacceptable because there were objective measures for testing the correctness of such a decision. Because of the nature of the determination of sentence, however, no such standard existed; therefore, the double jeopardy clause should be applied to determinations of guilt but not of sentence. *Id.* at 450.

Additionally, Justice Powell noted that the imposition of life imprisonment by the jury did not amount to an implied acquittal of the death sentence because the jury was not compelled to impose the death penalty even if the prosecution proved aggravating circumstances beyond a reasonable doubt. *Id.* at 452 n.4.

96. 451 U.S. at 445. The court relied on Green v. United States, 355 U.S. 184, 187-88 (1957), which held that the underlying concept of double jeopardy protection was to protect a defendant from repeated attempts by the state to convict him.

tal of the death penalty and precluded a harsher sentence on retrial.[97] An examination of the presentence hearing, however, reveals that the Court erred in ruling that the jury's imposition of life imprisonment was an implied acquittal of the death penalty.

First, Bullington's motion for a new trial was granted pursuant to the Supreme Court's decision in *Duren v. Missouri*.[98] According to the *Duren* Court, Missouri's statutory provisions governing jury duty were unconstitutional.[99] Bullington's jury, which had been chosen pursuant to these provisions, therefore was invalid. The *Bullington* Court, however, permitted the invalid jury's sentencing determination to serve as an implied acquittal of the death sentence. This implied acquittal, reasoned the Court, precluded the state from seeking a harsher sentence on retrial. Although the invalidity of the jury required retrial as to guilt, the Court permitted the sentence imposed by that same invalid jury to preclude a retrial of the original sentence. The Court failed to recognize, however, that just as an invalid jury cannot render a valid conviction, neither can it render a valid sentence.[100] To avoid this anomaly, the Court should have rendered Bullington's original sentence a nullity rather than interpreting it as an implied acquittal of the death penalty.

Second, the Court misinterpreted the Missouri capital sentencing statute, which provided for a bifurcated proceeding. The Court maintained that the jury imposed the lesser of the two sentences because the prosecution had failed to prove the elements necessary to impose the death penalty beyond a reasonable doubt.[101] Relying on *Burks* and *Green*, the Court reasoned that this was an implied acquittal of a death sentence.[102] The jury in *Bullington*, however, was permitted by law to sentence the defendant to life imprisonment even if it found that the prosecution had proven the existence of the aggravating circumstances beyond a reasonable doubt.[103] Therefore, the *Bullington* jury's imposition of a sentence of life imprisonment did not necessarily establish that the prosecution had failed to prove its case or that the jury's verdict acquitted the defendant of the greater sentence.[104] Thus,

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97. 451 U.S. at 445. The term "implied acquittal" is not used by the majority in reference to its opinion. Rather, it is the dissent that refers to the majority's holding as applying the "implicit-acquittal principle" of *Green* to sentencing. *See id.* at 448 (Powell, J., dissenting).

98. 439 U.S. 357 (1979).

99. *Id.* at 370. *See supra* note 63 and accompanying text.

100. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968) (death sentence overruled where jury was composed only of jurors willing to render capital punishment rather than impartial jurors); Turner v. Louisiana, 379 U.S. 466 (1965) (death sentence overruled where primary witnesses for prosecution were deputy sheriffs who had custody of jurors thereby prejudicing jury and rendering the jury invalid); Irvin v. Dowd, 366 U.S. 717 (1961) (conviction and death sentence reversed and new trial ordered where jury was not impartial due to extensive media coverage).

101. 451 U.S. at 440-41.

102. *Id.* at 443. *See supra* notes 87-95 and accompanying text.

103. 451 U.S. at 434-35.

104. In State *ex rel.* Westfall v. Mason, 594 S.W.2d 908 (Mo. 1980), *rev'd sub nom.* Bull-

neither *Burks* nor *Green* was applicable to the facts in *Bullington*. Instead, the Court should have focused on whether the policy underlying the double jeopardy clause required intervention in the bifurcated procedure.

An analysis of the bifurcated trial procedure utilized in *Bullington* reveals that it was consistent with double jeopardy policy. The double jeopardy clause is designed to protect the defendant from undue harassment.[105] The presentence hearing, essential to a bifurcated trial, protects the defendant from harassment in the sentencing process.[106] For instance, this procedure places an additional burden on the prosecution. In addition to the facts necessary to prove guilt at the first stage of the bifurcated proceeding, the prosecution must prove the existence of aggravating circumstances beyond a reasonable doubt to obtain the imposition of the death sentence.[107] Moreover, the rules regarding admissibility of evidence are more flexible in a presentence hearing, thus allowing a jury to hear mitigating evidence that it normally would not hear in a trial on guilt.[108] In short, the bifurcated procedure makes it more difficult for the prosecution to obtain imposition

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ington v. Missouri, 451 U.S. 430 (1981), the Missouri Supreme Court, in upholding the state's right to seek the death penalty on retrial, rejected the argument that by not imposing life imprisonment the first jury necessarily concluded that there were no aggravating circumstances. The Missouri court based its rejection on the test formulated in Ashe v. Swenson, 397 U.S. 436 (1970), which incorporated the doctrine of collateral estoppel in the double jeopardy clause. For purposes of collateral estoppel, the *Ashe* Court held that to determine whether an issue of ultimate fact was necessary to a jury's verdict, a court is required to infer from the record of the prior proceedings whether a reasonable jury could have based its verdict on some other issue. *Id.* at 444. Similarly, the Missouri Supreme Court reasoned that a rational jury could have based its imposition of life imprisonment upon several factors other than a finding of no aggravating circumstances. For example, such a ruling may have been based upon a defendant's plea for mercy. 594 S.W.2d at 913. In addition, the court noted that juries need not sentence a defendant to death if they conclude that mitigating circumstances outweigh the aggravating ones. *Id.* Finally, the Missouri Supreme Court stated that even if the mitigating facts did not outweigh the aggravating circumstances, a jury had full discretion in sentencing. *Id.*

105. *See supra* note 5 and accompanying text.

106. The majority in *Bullington* stated that the use of the separate sentencing hearing acts as a procedural safeguard for the defendant. 451 U.S. at 433. *See also* Gregg v. Georgia, 428 U.S. 153, 191-92 (1976) (bifurcated system is likely to remove deficiencies in the capital sentencing system including admissibility of evidence in a single hearing which is prejudicial to question of guilt, but relevant to issue of sentence); Lane v. Maryland Penitentiary, 320 F.2d 179, 186 (4th Cir. 1963) (use of separate proceeding to resentence habitual offender is preferable practice to unitary procedure because evidence of defendant's prior convictions will not bias jury's decision as to guilt); *Bifurcated Trial, supra* note 17, at 631 (bifurcated proceeding is advantageous because it permits the introduction of all evidence critical to enlightened determination of punishment and it avoids the possibility of prejudice on the issue of guilt that exists in unitary trials); *Two Steps, supra* note 17, at 135-36 (bifurcated hearings are preferable because they permit sentencing jury to hear evidence regarding appropriate sentence that would be excluded in unitary trials).

107. *See supra* notes 43-44 and accompanying text.

108. *See supra* note 37. *See also Virginia, supra* note 36, at 997 (two-trial process allows presentation of evidence on issue of death penalty at presentence hearing only, thus preventing jury from becoming prejudiced in determination on guilt).

of the death sentence. These procedures adequately protect the defendant from undue harassment.

Further, if the *Bullington* Court's inquiry had been properly limited to whether the Missouri statute was consistent with the policy underlying double jeopardy, it would have recognized that by providing for mandatory state supreme court review, the Missouri capital murder statute indeed satisfies double jeopardy policy.[109] If the death penalty is recommended, the statute compels the jury to designate in writing the aggravating circumstances that the prosecution had proven beyond a reasonable doubt.[110] As such, the statute allows the Missouri Supreme Court to review a jury's reasons for recommending a death sentence.[111] If evidence presented in the presentence hearing does not support the sentence imposed by the jury, the reviewing judge is required to overrule the death sentence and remand the case for resentencing.[112] This procedure clearly affords the defendant sufficient protection from prosecutorial harassment and preserves the state's right to impose just punishment, thereby satisfying double jeopardy policy.

A final criticism of the Court's decision involves its treatment of an individual's right to appeal. Although opponents of harsher sentencing often argue that the threat of a harsher sentence chills the defendant's right to appeal, prior to *Bullington*, this concern had not been problematic for the Court. Opponents of harsher sentencing contend that a convicted defendant may be unwilling to appeal the conviction if a harsher sentence might be imposed on retrial.[113] In consistently rejecting this objection,[114] the Court

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109. *See supra* notes 50-52 and accompanying text.

110. MO. REV. STAT. § 565.012.4 (1979).

111. *See id.* § 565.014.1.

112. *Id.* § 565.014.5(2). *See also* Sanders v. State, 338 So. 2d 473 (Ala. Crim. App. 1976) (increased sentence on retrial for buying stolen property improper because record failed to show any valid reason for increased sentence), *aff'd on rehearing*, 344 So. 2d 1243 (Ala. Crim. App.), *cert. denied*, 344 So. 2d 1246 (Ala. 1977); Marshall v. State, 265 Ark. 302, 578 S.W.2d 32 (1979) (harsher sentence reduced to original sentence because record failed to demonstrate factual data supporting harsher sentence); State v. Leonard, 39 Wis. 2d 461, 159 N.W.2d 577 (1968) (harsher sentence on retrial following conviction for forgery overruled because reasons for harsher sentence not satisfactorily stated on record). *Cf.* North Carolina v. Pearce, 395 U.S. 711, 726 (1969) (judge imposing harsher sentence on retrial must set forth reasons for doing so to allow for review of constitutional legitimacy).

113. *See, e.g.*, Note, *Harsher Sentencing By Jury on Retrial Is Permissible: Chaffin v. Stynchcombe*, 28 SW. L.J. 469, 476 (1974) (possibility of harsher sentence chills right to appeal and deters the defendant from seeking the errorless trial that he is entitled to). The basis for this argument originated in United States v. Jackson, 390 U.S. 570 (1968). In *Jackson*, the Court invalidated the death penalty provision of the Federal Kidnapping Act. 18 U.S.C. § 1201(a) (1976). Under this provision, only a jury could impose the death sentence. As such, the Court held that the statute placed an impermissible burden on a defendant's fifth amendment right to plead not guilty and on his sixth amendment right to a jury trial. 390 U.S. at 581-82.

114. *See, e.g.*, Chaffin v. Stynchcombe, 412 U.S. 17 (1973). In *Chaffin*, the defendant argued that the *Jackson* Court had interpreted the Constitution as prohibiting government imposed choices that discouraged the exercise of constitutional rights in the criminal process. 412 U.S. at 29-30. The *Chaffin* Court rejected the defendant's interpretation of the *Jackson* decision. Instead, the *Chaffin* Court relied on case law which upheld the validity of guilty pleas

has reasoned that criminal law is replete with situations that require a defendant to forfeit one right in order to gain another.[115] The Court has determined that this tension is constitutionally permissible as a legitimate attendant to the retrial process.[116] Thus, the position taken by the Court in *Bullington* seems inconsistent with precedent.

## IMPACT

The *Bullington* Court extended double jeopardy protection to the sentencing portion of a bifurcated trial. This expansion results in different double jeopardy treatment for defendants depending on whether they are tried in a bifurcated[117] or a single hearing. Consequently, under *Bullington*, a defendant on retrial for a capital offense in a bifurcated proceeding will enjoy double jeopardy protection of his original sentence. On the other hand, under the *Stroud, Pearce*, and *Chaffin* decisions, a defendant charged with a similar offense in a state that employs a single trial procedure will be vulnerable to the death penalty on retrial, regardless of whether he initially received a lesser sentence.

Ultimately, the Supreme Court must reevaluate its position on harsher retrial sentencing in capital offense cases involving single hearing proceedings.

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made to avoid death sentences. 412 U.S. at 30. The justification underlying these decisions was that such difficult choices were inevitable attributes of a legitimate system of plea bargaining. *See, e.g.*, North Carolina v. Alford, 400 U.S. 25 (1970) (plea of guilty to second-degree murder to avoid possible death sentence); Brady v. United States, 397 U.S. 742 (1970) (plea of guilty to kidnapping necessary to avoid possible death sentence under federal statutes); Parker v. North Carolina, 397 U.S. 790 (1970) (plea of guilty to first-degree burglary to avoid potential death sentence if convicted by jury after trial).

115. *See, e.g.*, McGautha v. California, 402 U.S. 183, 213 (1971) (criminal process is replete with situations which require defendant to make difficult choices); Brady v. United States, 397 U.S. 742 (1970) (plea bargaining is not in itself unconstitutional although it requires defendant to make difficult choices).

116. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 35 (1973). *See also* Lernieux v. Robbins, 414 F.2d 353, 356 (1st Cir. 1969) (procedures chilling right to post-conviction review must be tolerated if they support legitimate state interests and are reasonable); Johnson v. Commonwealth, 212 Va. 579, 585-86, 186 S.E.2d 53, 58 (1972) (possibility of harsher sentence where state procedure afforded defendant opportunity to have second de novo trial before a jury did not unconstitutionally chill right to appeal). *But see* Pendergrass v. Neil, 456 F.2d 469, 471 (6th Cir. 1972) (right to appeal cannot be impeded by threat of facing harsher sentence); Marano v. United States, 374 F.2d 583, 585 (1st Cir. 1967) (harsher sentence invalidated because possibility that defendant would face harsher sentence may chill right to appeal).

117. The Constitution does not compel the states to use bifurcated hearings. McGautha v. California, 402 U.S. 183 (1971), *vacated on other grounds*, 408 U.S. 941 (1972). *See also* Spencer v. Texas, 385 U.S. 554 (1976) (bifurcated trials are not constitutionally compelled even though defendant in single hearing trial may not introduce evidence to mitigate sentence without harming his case on guilt); Longberger v. Jago, 635 F.2d 1189 (6th Cir. 1980) (use of single hearing trial does not violate fifth amendment privilege against self-incrimination nor sixth amendment right to jury trial); Nail v. Slayton, 353 F. Supp. 1013 (W.D. Va. 1972) (use of single hearing trial does not violate constitutional right against self-incrimination).

The basis for this reevaluation should be *Furman v. Georgia*[118] and subsequent cases which limit the sentencing authority's discretion.[119] These cases require that to impose the death sentence, the sentencing authority must find that certain statutorily prescribed aggravating circumstances exist beyond a reasonable doubt.[120] This requirement was critical to the *Bullington* Court's conclusion that the presentence hearing of a bifurcated trial was procedurally similar to the determination of guilt in a single hearing proceeding.[121] Because of this similarity, the *Bullington* Court reasoned that the double jeopardy protection afforded in trials on the issue of guilt should be extended to the sentencing stage of the bifurcated trial. Because post-*Furman* cases do not distinguish between bifurcated and single hearing trials, but rather mandate that aggravating circumstances be proven beyond a reasonable doubt in all capital offense trials, double jeopardy protection should be extended to sentences issued by a jury in a single hearing trial. Thus, a strong argument exists that when the issue of the harsher resentencing in a single hearing confronts the Court again, it should overrule *Stroud, Chaffin*, and subsequent cases that allow harsher sentences on retrial in the single hearing context involving capital offenses. In the alternative, the Court may choose to distinguish these cases because they were decided prior to *Furman* and its progeny and, thus, did not require the additional finding by the sentencing authority.[122] Unless the Court chooses one of these alternatives, defendants charged with capital crimes will have different double jeopardy protection depending upon whether they are tried in bifurcated or single trial proceedings.

Furthermore, the *Bullington* decision neutralizes the jury's role as a sentencing authority on retrial in a bifurcated proceeding. The *Bullington* Court has undermined the jury's function by removing the death sentence from the jury's consideration when a prior jury had imposed a lesser sentence. Double jeopardy protection, however, should not shield a defendant from the punishment that his offense merits,[123] but rather should prevent

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118. 408 U.S. 238 (1972). *See supra* notes 33-40 and accompanying text.

119. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (capital punishment statute that required jury to find existence of at least one of ten prescribed aggravating circumstances beyond a reasonable doubt was constitutional); Proffitt v. Florida, 428 U.S. 242 (1976) (statute requiring judge to find that aggravating circumstances outweigh mitigating circumstances to impose death sentence was constitutional); Jurek v. Texas, 428 U.S. 262 (1976) (statute requiring jury to find existence of prescribed aggravating circumstances beyond a reasonable doubt to impose death sentence satisfied *Furman* requirements).

120. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

121. 451 U.S. at 438-39. *See supra* notes 75-77 and accompanying text.

122. The *Furman* Court did not hold that a finding of aggravating circumstances beyond a reasonable doubt was a prerequisite to the imposition of capital punishment. *See supra* notes 33-34 and accompanying text. The *Chaffin* decision, which did not impose any sentencing limitations upon the jury, was decided one year after *Furman* but pre-dated the cases that asserted this rule. *See* note 120 *supra.*

123. *See* United States v. Tateo, 377 U.S. 463, 466 (1964) (society would pay a high price if

the accused from being unduly harassed.[124] Because the bifurcated proceeding in *Bullington* adequately protected the defendant from harassment,[125] it was not necessary to preclude a second jury from rendering a just punishment. Further, under the *Bullington* decision, the sentence imposed on the retrial of a capital offense will be limited to life imprisonment, regardless of the circumstances surrounding the offense.[126] Thus, in the retrial context of the bifurcated proceeding, the second sentencing decision has become an administrative rubber-stamp of the first.[127] The legislature, not the judiciary, is the proper body to determine the offenses that warrant capital punishment.[128] By disregarding this legislative function, *Bullington* prevents the jury from considering whether the death penalty is warranted in a capital punishment case.

## CONCLUSION

In *Bullington v. Missouri*, the United States Supreme Court extended the protection of the double jeopardy clause to a bifurcated proceeding. In so doing, the Court precluded the imposition of a harsher sentence upon the retrial of a defendant whose previous conviction for the same crime had been invalidated. Double jeopardy protection was extended because the presentence hearing of the bifurcated trial bears the essential characteristics of a trial on the issue of guilt. The Court reasoned that the imposition of life imprisonment had impliedly acquitted the defendant of the death sentence and, thus, barred imposition of capital punishment.

The *Bullington* Court's analysis, however, was flawed. The *Bullington* jury was invalid and could not impose a valid sentence. Moreover, the Missouri statute permitted the jury to impose life imprisonment even if the prosecution had proven the aggravating circumstances necessary to impose capital punishment. The Court erred by not relying on established policy to determine whether double jeopardy protection should be extended to presentence hearings in bifurcated trials.

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defendant was immune to punishment because of a defect serious enough to constitute reversible error). *Cf.* Green v. United States, 355 U.S. 184, 218-19 (1957) (Frankfurter, J., dissenting) (framers of Bill of Rights were aware of societal interest in vindication of criminal justice and, therefore, set outer limits for the protection of those accused of crime).

124. *See supra* note 5 and accompanying text.

125. *See supra* notes 105-08 and accompanying text.

126. In states that permit the jury to impose either life imprisonment or the death sentence in a bifurcated trial, *Bullington* will limit the sentence on retrial to life imprisonment if the prior jury had rejected the death sentence. Practically speaking, in this situation there will be no need for a jury to impose the sentence and, thus, no need for a presentence hearing.

127. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 43 (1973) (Marshall, J., dissenting) (limiting a jury as to sentences it may impose impairs its ability to determine the punishment a crime merits).

128. *See* Furman v. Georgia, 408 U.S. 238, 418 (1972) (Powell, J., dissenting) (it is the historic prerogative of the legislative branch to protect citizens by designating penalties for prohibitable conduct). *See also* United States v. DiFrancesco, 449 U.S. 117, 142-43 (1980) (upholding legislative authority to attack problem in criminal justice system).

Because the double jeopardy extension is founded on an untenable distinction between bifurcated and unitary trial procedures, defendants in bifurcated trials involving possible capital punishment will have greater double jeopardy protection against harsher sentences than will their counterparts in single hearing trials. The Court would have avoided this disparate treatment if it had based its decision in *Bullington* on double jeopardy policy rather than procedural distinctions. As a result, the Court will have to redetermine the extent of double jeopardy protection in single hearing, capital offense cases.

*Bernard J. Toussaint*