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Double Jeopardy and Resentencing in Bifurcated Criminal Proceedings: *Bullington v. Missouri*

While the importance of the double jeopardy clause of the fifth amendment¹ in American jurisprudence has long been established,² its application has proven to be substantially less settled. The last decade has provided the Supreme Court with a plethora of opportunities to clarify defense and prosecutorial rights and protections under the double jeopardy clause.³ In *Bullington v. Missouri*,⁴ the Court considered whether the State of Missouri could impose the death penalty in a new trial under a bifurcated criminal proceeding when the earlier trial had resulted in a sentence of life imprisonment. According to the earlier sentence a weight of finality previously reserved for acquittals, the Court held that the double jeopardy clause barred imposition of the harsher sentence on retrial.

I. INSTANT CASE

In 1977 Robert Bullington was indicted for capital murder,⁵ kidnaping, and other criminal offenses⁶ arising out of the abduction and subsequent death by drowning of a young woman. Prior to trial, the state informed the defense of its intention to seek

1. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V.

2. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1874). The importance placed on the double jeopardy clause has been reiterated by the Court periodically since *Lange*. See, e.g., *United States v. DiFrancesco*, 449 U.S. 117, 127 (1980); *Green v. United States*, 355 U.S. 184, 187 (1957).

3. Cases in the last decade involving double jeopardy claims are both numerous and wide ranging. See, e.g., *United States v. DiFrancesco*, 449 U.S. 117 (1980) (government appeal of sentences under the Organized Crime Control Act of 1970); *Swisher v. Brady*, 438 U.S. 204 (1978) (use of recommendations by masters in juvenile proceedings); *Crist v. Bretz*, 437 U.S. 28 (1978) (determining when jeopardy attaches in a jury trial); *United States v. Wilson*, 420 U.S. 332 (1975) (statutory barriers to government appeals); *United States v. Jorn*, 400 U.S. 470 (1971) (reprosecution following mistrial). See 449 U.S. at 126-27 for a more extensive list.

4. 101 S. Ct. 1852 (1981).

5. "Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder." MO. REV. STAT. § 565.001 (1978).

6. Bullington was also charged with armed criminal action, burglary, and flourishing a dangerous and deadly weapon. 101 S. Ct. at 1856 n.7.

the death penalty should the jury convict Bullington of capital murder.⁷ The prosecution stated it would present evidence to the jury of two aggravating circumstances that, under Missouri law, are grounds for the imposition of the death penalty.⁸ The jury found Bullington guilty of all charges. A separate sentencing hearing was held the next day under a Missouri statute that mandates such a bifurcated proceeding for all defendants found guilty of capital murder.⁹ After hearing the prosecution's evidence, the jury directed that Bullington be sentenced to life imprisonment without probation or parole for not less than fifty years.

Bullington then moved for a judgment of acquittal¹⁰ or, alternatively, for a new trial, challenging the constitutionality of the Jackson County jury panel.¹¹ While the motion was pending, the United States Supreme Court in *Duren v. Missouri*¹² held Missouri's jury selection statutes unconstitutional, concluding that the Missouri provisions deprived a defendant of his right to a jury drawn from a fair cross section of the community.¹³ In light of *Duren*, Bullington was granted a new trial. The prosecution shortly thereafter filed a formal "Notice of Evidence in Aggravation" stating that the prosecution would once again seek the death penalty based on the same aggravating circumstances

7. *Id.* at 1856.

8. When deciding whether to impose the death penalty in capital murder cases, the jury must consider whether the evidence demonstrates the existence of any aggravating or mitigating circumstances specifically recognized by statute. See Mo. REV. STAT. §§ 565.012.2, .3 (1978). At the time of Bullington's trial, ten aggravating circumstances and seven mitigating circumstances were listed in the statutes. The defense must be notified of the prosecution's evidence of aggravation prior to trial. Mo. REV. STAT. § 565.006.2 (1978).

9. Mo. REV. STAT. § 565.006.2 (1978). The hearing must be held before the same jury or judge that convicted the defendant, and "the only issue shall be the determination of the punishment to be imposed." *Id.* A conviction for capital murder in Missouri carries with it only two possible sentences: death, or life imprisonment without the possibility of probation or parole for 50 years. *Id.* § 565.008.1.

10. 101 S. Ct. at 1856.

11. *State ex rel. Westfall v. Mason*, 594 S.W.2d 908, 910 (Mo. 1980), *rev'd sub nom. Bullington v. Missouri*, 101 S. Ct. 1852 (1981).

12. 439 U.S. 357 (1979).

13. *Id.* at 363-70. At the time *Duren* was decided, Missouri had both constitutional and statutory provisions allowing an automatic exemption from jury service for any woman who so requested. Mo. CONST. art. I, § 22(b); Mo. REV. STAT. § 494.031(2) (Supp. 1978). The Court held that this practice, which resulted in an average of approximately 15% women on jury venires in Jackson County (where petitioner's trial was held), violated the "fair cross section" mandated by the sixth amendment for jury selection. 439 U.S. at 363-70.

presented in the first trial.¹⁴

The defense moved to strike the notice and exclude at trial the prosecution's evidence in aggravation of punishment. Bullington argued that because the first jury had set his punishment at life imprisonment, the double jeopardy clause barred the state¹⁵ from increasing his sentence on retrial by imposing the death penalty. The trial court stated that it would grant the defense's motion, but before the court had issued a formal order, the prosecution sought a writ from the Missouri Court of Appeals to prevent Bullington's retrial from proceeding without allowing the state to seek the death penalty should Bullington be reconvicted of capital murder. The court of appeals granted a temporary stop order but ultimately denied the prosecution's request and dissolved the order.¹⁶

The Supreme Court of Missouri, however, following the state's successful motion for transfer of the case to that court,¹⁷ issued a preliminary writ of prohibition. The court upheld the state's position and by a divided vote made the writ absolute, finding no constitutional barriers to the imposition of the death penalty upon Bullington's reconviction.¹⁸ Bullington argued that Missouri's capital murder statute defined not one crime, but two: capital murder without capital punishment, and capital murder with capital punishment. The court disagreed, however, and rejected Bullington's claim that the jury's sentence of life imprisonment meant that he was convicted only of the "lesser included offense" of capital murder without capital punishment and thereby "implicitly" acquitted of the greater crime carrying the death penalty.¹⁹

The United States Supreme Court granted certiorari²⁰ and in a divided opinion²¹ reversed the decision of the Supreme Court of Missouri and remanded the case. The Court held that

14. 101 S. Ct. at 1856.

15. The double jeopardy clause was made binding on the states through application of the 14th amendment in *Benton v. Maryland*, 395 U.S. 784 (1969), which overruled *Palko v. Connecticut*, 302 U.S. 319 (1937).

16. 101 S. Ct. at 1857.

17. *Id.*

18. *State ex rel. Westfall v. Mason*, 594 S.W.2d 908 (Mo. 1980), *rev'd sub nom. Bullington v. Missouri*, 101 S. Ct. 1852 (1981).

19. 594 S.W.2d at 912.

20. 449 U.S. 819 (1980).

21. The vote of the Court was five to four. Justices Brennan, Stewart, Marshall, Blackmun, and Stevens made up the majority, while Chief Justice Burger and Justices White, Powell, and Rehnquist constituted the minority.

the reasoning of *Stroud v. United States*²² did not apply to the Missouri system of jury sentencing at the second stage of a bifurcated proceeding.²³ In *Stroud* the defendant had been convicted of first degree murder and sentenced to life imprisonment. He later obtained a reversal of his conviction and a new trial on confession of error by the Solicitor General. Upon reconviction Stroud received the death penalty, and the Court held unanimously that the double jeopardy clause did not preclude imposition of the second, harsher sentence. Rather than apply the *Stroud* rationale, the *Bullington* Court accepted the implicit acquittal argument.²⁴ It has long been settled that the double jeopardy clause prohibits retrial of a defendant who has been acquitted of a crime,²⁵ and the Court held that because the sentencing hearing at Bullington's first trial had "the hallmarks of [a] trial on guilt or innocence,"²⁶ it should be given the substantive weight of an acquittal, therefore barring the imposition of a more severe sentence upon Bullington's reconviction.

In his dissent, Justice Powell denied that the first jury's sentence operated as an implied acquittal of a harsher sentence and stated, "the Double Jeopardy Clause does not apply to sentencing decisions after retrial with the same force that it applies to redeterminations of guilt or innocence."²⁷

II. ANALYSIS

In holding that the prosecution was barred from seeking the death penalty if Bullington were reconvicted, the Court treated Bullington's original sentence as having the constitutional finality of an acquittal. The Court discounted precedent that had established a fundamental difference between an acquittal of a charged offense and the imposition of punishment following conviction, concluding that imposition of the death penalty upon Bullington's retrial would violate the double jeopardy clause. This departure from past decisions, made without adequate ex-

22. 251 U.S. 15 (1919).

23. 101 S. Ct. at 1862.

24. *Id.* at 1861-62.

25. "[I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense." *United States v. Ball*, 163 U.S. 662, 671 (1896). *See, e.g., United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *Kepner v. United States*, 195 U.S. 100, 130 (1904).

26. 101 S. Ct. at 1858.

27. *Id.* at 1862.

planation, has left unclear the application of the double jeopardy clause to bifurcated criminal proceedings.

A. *The Legislative Creation of Bifurcated Proceedings*

Since the 1972 Supreme Court decision in *Furman v. Georgia*,²⁸ at least thirty-five states have enacted new capital punishment statutes in an attempt to comply with the *Furman* Court's suggestions.²⁹ A majority of the states have passed statutes providing for some type of bifurcated proceeding,³⁰ as suggested by the Court in *Gregg v. Georgia*.³¹ The *Furman* case reached the Court as a challenge to Georgia's death penalty statute. In ruling Georgia's capital punishment procedures unconstitutional, the Court expressed concern that the state's sentencing procedures permitted arbitrary and capricious imposition of the death penalty because they did not provide the sentencer with objective standards for determining the defendant's punishment.³²

The new capital punishment legislation enacted as a result of *Furman* was designed to eliminate the possibility of arbitrary and capricious pronouncement of the death penalty by establishing procedural safeguards limiting the sentencer's discretion and providing specific standards to be used in evaluating whether the defendant's behavior warranted capital punishment. The statutes follow a common pattern. They mandate a bifur-

28. 408 U.S. 238 (1972).

29. See *Gregg v. Georgia*, 428 U.S. 153, 179 n.23 (1976).

30. At least 34 states currently have such statutes: ALA. CODE § 13A-5-45 (Supp. 1981); ARIZ. REV. STAT. ANN. § 13-1703 (Supp. 1981); ARK. STAT. ANN. § 41-1301 (1977); CAL. PENAL CODE § 190.1 (West Supp. 1981); COLO. REV. STAT. § 16-11-103 (1978 & Supp. 1980); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1981); DEL. CODE ANN. tit. 11, § 4209 (1979); FLA. STAT. ANN. § 921.141 (West Supp. 1981); GA. CODE ANN. § 27-2503 (1978); IDAHO CODE § 19-2515 (1979); ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1979); IND. CODE ANN. § 35-50-2-9 (Burns 1979); KY. REV. STAT. § 532.025 (Supp. 1980); LA. CODE CRIM. PROC. ANN. art. 905 (West Supp. 1981); MD. ANN. CODE art. 27, § 413 (Supp. 1981); MASS. GEN. LAWS ANN. ch. 279, § 53 (West 1981); MISS. CODE ANN. § 99-19-101 (Supp. 1980); MO. ANN. STAT. § 565.006 (Vernon 1979); MONT. CODE ANN. § 46-18-301 (1981); NEV. REV. STAT. § 29-2520 (1979); N.H. REV. STAT. ANN. § 630:5 (Supp. 1979); N.M. STAT. ANN. § 31-18-14 (1978 & Supp. 1981); N.C. GEN. STAT. § 15A-2000 (1978 & Supp. 1979); OHIO REV. CODE ANN. § 2929.03 (Page 1975); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1981); 42 PA. CONS. STAT. ANN. § 9711 (Purdon Supp. 1981); S.C. CODE ANN. § 16-3-20 (Law. Co-op. Supp. 1980); S.D. CODIFIED LAWS ANN. § 23A-27A-2 (1979); TENN. CODE ANN. § 39-2404 (Supp. 1981); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981); UTAH CODE ANN. § 76-3-207 (1978); VA. CODE § 19.2-264.4 (Supp. 1981); WASH. REV. CODE ANN. § 10.94.020 (1980); WYO. STAT. § 6-4-102 (1977).

31. 428 U.S. at 189-90.

32. 408 U.S. at 295 (Brennan, J., concurring).

cated trial for all defendants charged with crimes carrying a possible penalty of death. A defendant's guilt or innocence is established in the first phase of the trial, followed by a separate hearing to determine punishment for defendants convicted in the first proceeding. The statutes generally limit punishment for such crimes to either the death penalty or life imprisonment, thus narrowing the range of punishment and thereby the sentencer's discretion; they also provide the sentencer with specific mitigating and aggravating factors to be used in evaluating the defendant's behavior. Additionally, the statutes establish procedural and evidentiary rules governing the sentencing phase of the trial that may or may not mirror the rules governing the guilt or innocence phase.

B. Double Jeopardy, Resentencing, and Precedent

Since *United States v. Ball*,³³ the Supreme Court has maintained that, while a defendant may be retried for an offense without violating the double jeopardy clause when his prior conviction for that same offense has been set aside on appeal, a verdict of acquittal is final and may not be reviewed.³⁴ This rule was expanded in *Green v. United States*,³⁵ in which the Court held that a defendant's conviction of a lesser included offense operates as an implicit acquittal of the charged greater offense, carrying the same constitutional weight of finality as an express judgment of acquittal and therefore barring retrial on the greater offense. The Court added in *Burks v. United States*³⁶ that the double jeopardy clause precludes retrial once a reviewing court finds the evidence insufficient to sustain a jury's conviction of a defendant.³⁷

33. 163 U.S. 662 (1896).

34. *Id.* at 671-72.

35. 355 U.S. 184 (1957).

36. 437 U.S. 1 (1978).

37. The *Burks* Court stated:

In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. . . .

The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. . . . Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying

In prohibiting the imposition of the death penalty on Bullington's reconviction, the Court applied the retrial barrier of acquittal to the sentencing phase of a bifurcated proceeding. The Court, in reaching its decision, relied on the similarities between a trial on the guilt or innocence of a defendant and a sentencing hearing held pursuant to Missouri's statutes, overlooking the fact that the rationale behind affording an acquittal such finality does not apply to retrial and resentencing equally.

In *Bullington* the Court attempted to justify its extension of the acquittal principle to resentencing by distinguishing Missouri's bifurcated proceedings³⁸ from proceedings in earlier cases in which the imposition of harsher sentences on retrial was upheld.³⁹ Placing importance on the sentencing proceeding's "hallmarks of [a] trial on guilt or innocence,"⁴⁰ the Court applied a principle to resentencing that had previously been used only as a bar to retrial. The Court ignored, however, that regardless of the extent to which the sentencing proceedings resembled a trial determining guilt, Bullington's guilt had already been determined, and the function of the sentencing proceeding was only to set punishment, not to redetermine Bullington's guilt. Since his guilt was already established, the double jeopardy clause would not be violated by an increased sentence, according to past Court holdings. As noted by Justice Powell in his dissent, the disparate results reached by the Court in *North Carolina v. Pearce*,⁴¹ in which the Court upheld a more severe sentence on retrial following an appeal, and in *Green v. United States*,⁴² which established the theory of implicit acquittal, demonstrate a fundamental difference in the weight of finality accorded imposition of a sentence compared with an acquittal of

a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Id. at 15-16 (footnote omitted).

38. The constitutionality of bifurcated proceedings had been established by the Court prior to *Bullington*. See *United States v. DiFrancesco*, 449 U.S. 117, 139-40 (1980).

39. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Court upheld imposition of a more severe sentence by the trial judge on retrial of a defendant whose conviction had been set aside on appeal. In *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), the Court validated imposition of a harsher sentence by a jury on retrial. If a judge imposes a more severe sentence, his reasons for doing so must appear in the record to avoid the possibility of "vindictiveness" entering into the judge's decision; juries need not elucidate their reasons for increasing a sentence. *Id.* at 24-28.

40. 101 S. Ct. at 1858.

41. 395 U.S. 711 (1969).

42. 355 U.S. 184 (1957).

a charged offense.⁴³ Despite the Court's express recognition in *United States v. DiFrancesco*⁴⁴ that imposition of a sentence less than the maximum authorized by law is not an implied acquittal of a greater sentence,⁴⁵ the Court in *Bullington* used the implicit acquittal principle to prevent the state from seeking a harsher sentence at Bullington's retrial. While using this principle to justify a decision contradicting earlier opinions, the Court failed to examine the rationale underlying the finality accorded an acquittal.

C. Acquittal Rationale Inapplicable

The constitutional finality given an acquittal is not the result of arbitrary lines drawn by the Court in past decisions, but reflects a basic distinction between the meaning of an acquittal and the function of sentencing.⁴⁶ Application of the double jeopardy clause involves striking a balance between the rights of a defendant in avoiding both multiple prosecutions and multiple punishments, and the public's interest in prosecuting and punishing those guilty of criminal offenses.⁴⁷ An acquittal, whether explicit or implicit, operates as a determination of the innocence of the accused; a finding of insufficient evidence operates as a decision by the court that the prosecution cannot muster the proof necessary to establish the defendant's guilt. In either case, the defendant is deemed innocent, and the double jeopardy clause is employed to prevent the state from prosecuting a person who has already been adjudged innocent.⁴⁸ Such protections are not invoked when the guilt or innocence of the accused is in

43. 101 S. Ct. at 1863.

44. 449 U.S. 117 (1980).

45. *Id.* at 133. *Contra* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965).

46. "There are . . . fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal." *United States v. DiFrancesco*, 449 U.S. at 133.

47. *See United States v. Tateo*, 377 U.S. 463, 466 (1964).

48. The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. at 187-88.

doubt, as in certain mistrials⁴⁹ or retrials of defendants whose convictions were set aside on collateral attack for trial error leading to their convictions.⁵⁰

The imposition of sentence, however, comes only after there has been a clear determination of the defendant's guilt. Thus, the underlying rationale for the finality of an acquittal—eliminating the possibility that a defendant already deemed innocent would later be convicted through a series of prosecutions—does not apply to the sentencing of one who has already been found guilty. As demonstrated by the *Pearce*⁵¹ and *Chaffin v. Stynchcombe*⁵² decisions, the double jeopardy clause does not restrict a state's authority to impose more severe sentences on retrial, and once a defendant is found guilty, the state's interest in punishment becomes paramount. The passing of sentence has been held not to warrant the same constitutional finality as the determination of a defendant's guilt or innocence. Yet the *Bullington* Court, in a departure from past decisions, gave equal weight to a sentence as it would to an acquittal, even though the defendant had been found guilty of the offenses charged.

Furthermore, the decision of the sentencing court in *Bullington* not to impose the death penalty did not signify the state's inability to prove the aggravating factors required to justify capital punishment. Under the Missouri provisions, jurors are instructed that they are not compelled to impose a death penalty even if aggravating factors are proven to exist and there are no mitigating factors.⁵³ Thus, unlike an acquittal for insufficiency of evidence, the jury's decision cannot be taken to mean that the state failed to prove its case. The Court's acquittal rationale is therefore inapplicable.

49. See generally C. WHITEBREAD, CRIMINAL PROCEDURE 487-92 (1980). Defendants can be reprosecuted following mistrials if there was a "manifest necessity" to stop the original trial. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). Mistrials as a result of prosecutorial error may sometimes be followed by re prosecution, depending on the error involved. See, e.g., *Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Jorn*, 400 U.S. 470 (1971). Mistrials caused by the defense can generally be followed by re prosecution. See, e.g., *Arizona v. Washington*, 434 U.S. 497 (1978); *United States v. Dinitz*, 424 U.S. 600 (1976).

50. See *United States v. Tateo*, 377 U.S. at 466.

51. 395 U.S. 711 (1969).

52. 412 U.S. 17 (1973).

53. 101 S. Ct. at 1856.

D. Bullington and DiFrancesco: *The Court Creates Confusion*

The Court's first opportunity to consider the application of the double jeopardy clause to bifurcated proceedings came in *United States v. DiFrancesco*.⁵⁴ The Organized Crime Control Act of 1970 provides for a more severe sentence for those defendants classified as "dangerous special offenders"⁵⁵ and permits the United States, under certain circumstances, to have such sentences reviewed by the court of appeals.⁵⁶ The *DiFrancesco* case was before the Court to decide whether allowing the government to appeal these sentences violated the double jeopardy clause.⁵⁷ DiFrancesco was convicted of federal racketeering offenses and other charges in two separate jury trials in federal district court.⁵⁸ Before the trials on the racketeering counts began, the government had filed a notice, as required by 18 U.S.C. § 3575(a), claiming that DiFrancesco was a "dangerous special offender."⁵⁹ In accordance with 18 U.S.C. § 3575(b), one of the district courts held a separate sentencing hearing and determined that DiFrancesco did come under the statutory definition. He was then sentenced to two ten-year terms on the racketeering counts, to be served concurrently with sentences totalling nine years from the other trial. Arguing that the sentence imposed under the dangerous special offender statute was too lenient, the government appealed under 18 U.S.C. § 3576 to the United States Court of Appeals for the Second Circuit. That court dismissed the government's appeal,⁶⁰ holding that allowing the government to appeal would violate the double jeopardy clause. The Supreme Court reversed the judgment,⁶¹ concluding that allowing the government to appeal a sentence with the intention of having the sentence increased was not unconstitutional.⁶²

The *Bullington* Court discounted previous cases permitting

54. 449 U.S. 117 (1980).

55. 18 U.S.C. § 3575 (1976).

56. *Id.* "Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused." *Id.*

57. 449 U.S. at 120-21.

58. See *United States v. DiFrancesco*, 604 F.2d 769 (2d Cir. 1979), *rev'd*, 449 U.S. 117 (1980).

59. 604 F.2d at 779.

60. *Id.* at 787.

61. 449 U.S. at 143.

62. *Id.*

harsher penalties on resentencing, such as *Pearce*, *Stroud*, and *Chaffin*, because they did not involve bifurcated proceedings.⁶³ The *DiFrancesco* case, however, dealt with precisely such separate sentencing hearings, and in that case the Court concluded that a more severe sentence on retrial did not conflict with the double jeopardy clause. The Court tried to justify the disparate results in *Bullington* and *DiFrancesco* by underscoring procedural and evidentiary differences in the two sentencing hearings: The appeal in *DiFrancesco* under section 3576 was on the record of the sentencing court, while the second *Bullington* hearing was a *de novo* proceeding; although a federal judge has wide latitude under section 3576 in setting punishment, the jury in *Bullington* had very limited discretion in imposing sentence; and while section 3576 requires only a preponderance of proof to establish that a defendant is a "dangerous special offender," the Missouri statute mandates use of the reasonable doubt standard to impose the death penalty.

The Court's analysis, however, is not persuasive. While ignoring a number of important procedural similarities between the two cases,⁶⁴ the Court relied on procedural and evidentiary differences that do not address the policies underlying the finality accorded acquittals. In each case, the possible consequences were the same: *Bullington* and *DiFrancesco*, each convicted and sentenced in bifurcated proceedings, faced the possibility of the imposition of a more severe sentence in subsequent proceedings.

63. 101 S. Ct. at 1858.

64. Many similarities exist between the procedures employed in *DiFrancesco* and *Bullington*. In both cases, the defendant was permitted the benefit of counsel. In each case, an additional fact had to be proven at the sentencing hearing to justify the more severe sentence. Rules of evidence were employed in both cases permitting the introduction of evidence inadmissible in the earlier trial phase but relevant to the defendant's particular situation—a clear departure from procedure at trials on guilt or innocence. Moreover, in many respects the *DiFrancesco* proceedings resembled a trial more than Missouri's proceedings did. The *DiFrancesco* proceedings provided for compulsory process and cross-examination of hearing witnesses, mirroring procedural safeguards provided defendants at trials determining guilt. While § 3757 allows a defendant to examine a presentencing report to be used in the sentencing hearing so as to verify its accuracy, the Missouri statutes go much further in providing that, in the sentencing phase of the trial, the prosecution can introduce "only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial," and the jury is allowed to examine the criminal record of the defendant for all prior criminal proceedings. Throughout the Missouri statutes, this phase of the trial is referred to as a "presentence hearing," and the evidentiary rules employed here resemble less those employed in a guilt or innocence trial than those used in presentencing hearings held commonly in nonbifurcated trials in which a sentencing report is used by the court in setting the defendant's punishment.

The question that should have been decided was not how similar or dissimilar the sentencing procedures may have been to a trial determining guilt, but whether a more severe sentence on retrial actually violated the double jeopardy clause. The procedural differences between the two hearings should not control the Court's decisions. The Court itself recognized in *DiFrancesco* that the *result* of the proceedings should be examined:

The double jeopardy focus . . . is . . . on the relief that is requested, and our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation.⁶⁵

In contrast to *DiFrancesco*, the *Bullington* Court focused on procedural rather than policy considerations. As a result, the Court failed to adequately distinguish the two decisions.

As a result of *Bullington*, any state seeking the death penalty under a statute requiring bifurcated proceedings for offenses carrying a possible death penalty must attain the death penalty at the first trial; a lesser sentence acts as a ceiling for punishment upon retrial. Since all of the states that allow capital punishment have adopted procedures similar to Missouri's, there can be no capital sentences on appeal if the earlier trial resulted in a lesser sentence. While the *Bullington* Court relied partially on the lack of jury discretion in pronouncing sentence under the Missouri statute, *Furman* suggested that such limitations, designed to eliminate arbitrary and capricious capital sentences, are necessary for death penalty statutes to be constitutional.⁶⁶ A state's compliance with the guidelines provided in *Furman* may preclude that state from attempting to seek the death penalty after the first trial. Yet, the Court allowed the prosecution in *DiFrancesco* to seek a more severe sentence on retrial when it had been unable to get the harsher sentence at the first trial.

These conflicting decisions create confusion as to when sentences pronounced in bifurcated proceedings may be in-

65. 449 U.S. at 132.

66. See *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976) (construing *Furman v. Georgia*, 408 U.S. 238 (1972)).

creased on retrial. The Court provides no guidelines as to when the sentencer has sufficient discretion to come under *DiFrancesco* rather than *Bullington*, or what evidentiary rules will not violate the double jeopardy clause. Had the Court intended to preclude the states from seeking the death penalty after the first trial, it could have done so explicitly; the Court has long recognized the special consideration given and standards applied to the death penalty because of its unique severity.⁶⁷ Instead, the Court created confusion as to when sentences pronounced in bifurcated proceedings may be increased on retrial without violating the double jeopardy clause.

III. CONCLUSION

Drawing only superficial distinctions between the *Bullington* case and prior double jeopardy cases, the Court applied the principle that an acquittal acts as a bar to retrial to the very different circumstances of resentencing. The Court chose to ignore that the rationale for the finality attributed to an acquittal—the protection of innocent defendants from multiple prosecutions—does not apply with equal force to the resentencing of a convicted offender.

The Court's assertion that the Missouri procedure's similarity to a trial determining guilt or innocence justifies application of the acquittal rationale to resentencing does not withstand close scrutiny. The *Bullington* decision subjugates the public's interest in punishing the guilty to a defendant's desire to escape stricter sentencing on retrial. And, by contradicting the *DiFrancesco* case, the Court creates uncertainty as to the constitutionality of increased sentences on retrial in bifurcated proceedings.

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67. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).