July 2015

Fifth Amendment, Double Jeopardy in Capital Sentencing, Bullington v. Missouri

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CONSTITUTIONAL LAW

Fifth Amendment • Double Jeopardy in Capital Sentencing
Bullington v. Missouri, 101 S. Ct. 1852 (1981)

IN *Bullington v. Missouri*[1] the Supreme Court marked a significant departure from previous principles of double jeopardy. The Court, for the first time, applied the Double Jeopardy clause[2] to a criminal sentence. By prohibiting the state from seeking the death penalty at retrial, the case also casts important implications on capital punishment.

A jury convicted Bullington[3] of capital murder[4] and, pursuant to the state's death penalty statute,[5] a presentence hearing to determine the sentence was held before the same jury. Under Missouri law, a defendant convicted of capital murder faces one of only two possible sentences: death or life imprisonment without eligibility for probation or parole for 50 years.[6] The death penalty can be imposed only if the prosecution proves beyond a reasonable doubt at the presentence hearing that certain aggravating circumstances exist and that any mitigating circumstances found to exist are outweighed by the aggravating circumstances.[7] The jury is not compelled to impose the death penalty,[8] but if it does, it must designate in writing the circumstances which justify the death penalty.[9]

At Bullington's presentence hearing, the prosecution submitted proof of aggravating circumstances. The defense offered no evidence. The jury considered the state's evidence but sentenced the defendant to life imprisonment.

After Bullington's motion for retrial was granted,[10] the state served

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[1] 101 S. Ct. 1852 (1981).

[2] "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.

[3] Bullington was tried in the Sixteenth Judicial Circuit in Jackson County, Missouri. The decision was not reported.

[4] Capital murder is defined in MO. ANN. STAT. § 565.001 (Vernon 1979). "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."

[5] MO. ANN. STAT. §§ 565.006-.016 (Vernon 1979). § 565.006.2 describes the presentence hearing at which counsel make opening statements, testimony is taken, evidence is introduced, the jury is instructed, and final arguments are made.

[6] MO. STAT. ANN. § 565.008.1 (Vernon 1979).

[7] MO. STAT. ANN. § 565.012.1 (Vernon 1979). The aggravating circumstances are listed at § 565.012.2 and the mitigating circumstances are listed at § 565.012.3.

[8] A Missouri jury is instructed that, even if it finds sufficient aggravating circumstances which are not outweighed by mitigating circumstances, it need not impose the death penalty. Missouri Approved Instructions-Criminal (MAI-Cr) § 15.46 (1979).

[9] MO. STAT. ANN. § 565.012.4 (Vernon Supp. 1980).

[10] In granting his motion for a new trial, the trial court relied on Duren v. Missouri, 439 U.S. 357 (1979), which held that Missouri's statutory provision allowing women automatic exemption from jury service violated a defendant's sixth and fourteenth amendment right to a jury drawn from a fair cross-section of the community.

notice that it would again seek the death penalty based on the same aggravating circumstances considered at the first trial. The defense moved to strike the notice on double jeopardy grounds and the trial court granted the motion. The court of appeals denied the state's request for a writ of prohibition, but the Supreme Court of Missouri upheld the state's position and vacated the trial order.[11]

The Supreme Court reversed in an opinion written by Justice Blackmun.[12] The Court held that, under the Missouri bifurcated procedure for capital cases, a defendant sentenced to life imprisonment at his first trial may not be subjected to the death penalty at retrial.[13] The Court distinguished earlier cases,[14] which allowed increased sentences at retrial for the same offense, because the Missouri sentencing procedure "is like a trial on the issue of guilt or innocence" which "explicitly requires the jury to determine whether the prosecution has 'proved its case.' "[15] Since the jury at the first trial had "already acquitted the defendant of whatever was necessary to impose the death sentence,"[16] the protection afforded by the Double Jeopardy clause bars the state from retrying that issue.

Justice Powell, writing for the dissent, argued that the Court was simply ignoring the long established rule that "[t]he Double Jeopardy Clause does not protect a guilty defendant's interest in avoiding a harsher sentence upon retrial, even the death sentence."[17] The dissent also argued that the majority's extension of the "implicit acquittal" principle to sentencing was unwarranted. Since the jury was instructed that it could refuse to impose the death penalty even if the state proved the aggravating circumstances beyond a reasonable doubt, Justice Powell stated that there was little "reason to assume that the state failed to prove its case."[18]

The leading case supporting the principle that the Double Jeopardy clause does not prohibit the assessment of a greater punishment at retrial for the same offense is *Stroud v. United States*.[19] The *Stroud* decision was based upon the fiction that the defendant waived any double jeopardy claims

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[11] Westfall v. Mason, 594 S.W.2d 908 (Mo. 1980).

[12] Justice Blackmun was joined by Justices Stewart, Brennan, Marshall and Stevens. Justice Powell wrote the dissenting opinion and was joined by Justices White and Rehnquist, and Chief Justice Burger.

[13] 101 S. Ct. at 1862.

[14] United States v. DiFrancesco, 101 S. Ct. 426 (1980); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); North Carolina v. Pearce, 395 U.S. 711 (1969); Stroud v. United States, 251 U.S. 15 (1919), *rehearing denied*, 251 U.S. 380 (1920).

[15] 101 S. Ct. at 1861. "It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes." *Id.* at 1858.

[16] *Id.* at 1861 (quoting Westfall v. Mason, 594 S.W.2d at 922 (Bardgett C.J., dissenting)).

[17] *Id.* at 1865 (Powell, J., dissenting).

[18] *Id.* at 1865 n.4 (Powell, J., dissenting).

[19] 251 U.S. 15 (1919), *rehearing denied*, 251 U.S. 380 (1920).

he might assert by appealing his conviction.[20] Although the Court distinguished between conviction and punishment, the opinion does not explicitly address the question whether the Double Jeopardy clause bars an increased sentence on retrial.[21] As was pointed out in *Patton v. North Carolina*[22] and reiterated in *North Carolina v. Pearce*,[23] it is doubtful that the question was ever presented to the Court. Despite these doubts, the Court has refused to reexamine the *Stroud* rule.[24]

As the *Bullington* Court recognized, the continuing validity of *Stroud* rests on the distinction between the trial on the question of guilt or innocence and the sentence imposed following a conviction. Where the defendant is acquitted of the crime charged, it "is well established that the Double Jeopardy clause forbids [his] retrial."[25] But, the "imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed."[26] Thus, in the usual case where a defendant is convicted again after having his original conviction set aside the Double Jeopardy clause does not bar a greater punishment.[27]

This rationale has been attacked as violating the spirit if not the letter of the Double Jeopardy clause.[28] As Justice Douglas echoed in *Pearce*, "[m]anifestly it is not the danger or jeopardy of being found a second time guilty. It is the punishment that would legally follow the second con-

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[20] "[T]he plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the constitution." *Id.* at 18. The *Stroud* court based this conclusion on Trono v. United States, 199 U.S. 521 (1905). "[T]he reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been . . . . We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him." *Id.* at 533.

[21] Since the Court only discussed double jeopardy as it pertains to the protection from a second trial, it appears that the defendant argued that he was twice placed in jeopardy merely by being retried for first degree murder. The Court concluded that the defendant had waived any double jeopardy claim since he sought the new trial himself. 251 U.S. at 18.

[22] 381 F.2d 636, 644 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968).

[23] 395 U.S. 711, 732, (1969) (Douglas, J., concurring); *Id.* at 748 (Harlan, J., concurring in part and dissenting in part).

[24] *See, e.g.*, United States v. DiFrancesco, 101 S. Ct. 426 (1980); Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

[25] 101 S. Ct. at 1857 (citing United States v. DiFrancesco, 101 S. Ct. 426, 433 (1980); Burks v. United States, 437 U.S. 1, 16 (1978); United States v. Martin Linen Supply Co., 430 U.S. 571 (1977); Fong Foo v. United States, 369 U.S. 141, 143 (1962); Green v. United States, 355 U.S. 184 (1957)).

[26] *Id.*

[27] *Id.* at 1860.

[28] People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 86 (1963). "Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal." *Id.* at 497, 386 P.2d at 686, 35 Cal. Rptr. at 86. *See also* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965); Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239, 245 (1951).

viction which is the real danger guarded against by the Constitution."[29] Given the conflict of these rationales, it is not surprising that *Stroud* has not been consistently followed.

The major departure from the *Stroud* rule was announced in *Green v. United States*.[30] In *Green* the defendant was tried under an indictment for first degree murder. The trial judge instructed the jury on both first degree murder and second degree murder, treating the latter as an offense included within the former. Green was convicted of second degree murder, but had his conviction set aside on appeal. Upon retrial, Green was again tried for first degree murder. A new jury found him guilty of this charge and he was sentenced to death. The Supreme Court reversed, holding that the original conviction for second degree murder operated as an "implicit acquittal" of the charge of first degree murder.[31] The Court noted that forcing the defendant either to submit to an erroneous conviction or to take the "desperate chance" of facing the death penalty should he successfully win a retrial placed the defendant in an "incredible dilemma" which the law would not tolerate.[32]

Although the *Green* Court distinguished *Stroud*,[33] the tension between the cases has not gone unnoticed.[34] Certainly the defendant in *Stroud* took no less of a chance in appealing his conviction. And, although these cases can be distinguished on neat procedural grounds, as a practical matter, "the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase in the degree of offense or an augmentation of punishment."[35]

The majority in *North Carolina v. Pearce*[36] did not see the matter in this light, however. The *Pearce* Court reaffirmed the *Stroud* rule, but limited its impact in two important ways. First, it held that the Double Jeopardy clause requires that any punishment already served be fully credited at the resentencing.[37] Second, to guard against judicial vindictiveness against

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[29] 395 U.S. at 735 (quoting *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1837)).

[30] 355 U.S. 184 (1957).

[31] *Id.* at 190-91.

[32] Id. at 193.

[33] *Id.* at 194 n.15.

[34] Justice Frankfurter, argued in *Green* that "it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment." 355 U.S. at 213 (Frankfurter, J., dissenting). *See also* People v. Henderson, 60 Cal.2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); and cases cited at notes 21 and 22.

[35] North Carolina v. Pearce, 395 U.S. at 746-47 (Harlan, J., concurring in part).

[36] *Id.* at 720. The same day that North Carolina v. Pearce was announced, the Court in Benton v. Maryland, 395 U.S. 784 (1969) announced that the Double Jeopardy clause applied to the states via the fourteenth amendment.

[37] 395 U.S. at 718.

a defendant who successfully appeals his conviction, the Due Process clause of the fourteenth amendment requires that whenever a judge imposes a more severe sentence on retrial, his reasons for doing so must affirmatively appear on the record.[38]

This due process protection proved to be limited. In *Chaffni v. Stynchcombe*[39] the Court reasoned that the judicial vindictiveness feared in *Pearce* would not be present where a jury imposed the sentence and thus refused to extend the due process requirements of *Pearce* to jury sentencing.[40] The Court held that a jury may constitutionally impose a higher sentence upon retrial "so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness."[41]

Thus, whatever their inconsistency, both *Pearce* and *Chaffin* reaffirmed the *Stroud* rule against the *Green* decision. Although the *Green* rationale was extended to another case,[42] it became clear after *Pearce* and *Chaffin* that the constitutional guarantee against double jeopardy did not "of its own weight [restrict] the imposition of an otherwise lawful single punishment for the offense in question."[43]

But, not all punishments are the same. As the Court made clear in *Furman v. Georgia*[44] and the many death penalty cases which followed,[45] capital punishment is "qualitatively different from a sentence of imprisonment, however long."[46] Since the defendants in both *Stroud* and *Chaffin* faced the death penalty on retrial, however, the "qualitative difference" of capital punishment could not of itself tip the scale in favor of double jeopardy protection.

Nonetheless, *Furman* and its progeny are important because of the procedural changes which they required. Although not ruling on the constitution-

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[38] *Id.* at 726.

[39] 412 U.S. 17 (1973).

[40] *Id.* at 26-27. Justice Marshall, argued that "by establishing one rule for sentencing by judges and another for sentencing by juries, the Court places an unnecessary burden on the defendant's right to choose to be tried by a jury after a successful appeal." *Id.* at 43-44 (Marshall, J., dissenting).

[41] *Id.* at 35.

[42] *See* Burks v. United States, 437 U.S. 1 (1978).

[43] North Carolina v. Pearce, 395 U.S. at 721.

[44] 408 U.S. 238 (1972), *rehearing denied*, 409 U.S. 902 (1972).

[45] Some of the principal death penalty cases following *Furman* are: Beck v. Alabama, 447 U.S. 625 (1980); Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. Georgia, 428 U.S. 153 (1976), *rehearing denied*, 429 U.S. 875 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

[46] Woodson v. North Carolina, 428 U.S. at 305.

ality of capital punishment per se,[47] *Furman* and its companion cases,[48] held that, as it was then being enforced by the states, the death penalty violated the eighth amendment ban against cruel and unusual punishment. The separate opinions in *Furman* made it clear that the overriding constitutional defect in the states' death penalty statutes was the unbridled discretion of the jury in imposing sentences.[49]

After *Furman,* many states rushed to enact new death penalty statutes in an attempt to overcome these constitutional infirmities. These statutes were basically of two types. The majority of states provided for a mandatory death penalty for certain crimes. The others provided for bifurcated trials at which aggravating and mitigating circumstances could be considered at the sentencing stage.[50]

In 1976 the Court decided five death penalty cases involving these new death penalty statutes. In *Gregg v. Georgia,*[51] *Proffitt v. Florida*[52] and *Jurek v. Texas*[53] the Court upheld the respective states' death penalty statutes. The plurality opinion[54] approved of the bifurcated procedure employed by these states[55] because it diminished the possibility of arbitrarily imposed sentences. In the other two cases[56] decided the same day, the Court struck down mandatory death sentences as unconstitutional.[57]

If there was any doubt following *Gregg* that the qualitative differences between the death penalty and any other punishment required special pro-

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[47] Justices Brennan and Marshall thought capital punishment unconstitutional under all circumstances, but Justices Douglas, Stewart, and White held it unconstitutional only in the manner in which it was administered.

[48] *See* Moore v. Illinois, 408 U.S. 786 (1972), *rehearing denied,* 409 U.S. 897 (1972); Stewart v. Massachusetts, 408 U.S. 845 (1972); and the numerous memorandum decisions involving death sentences from other states all handed down the same day as *Furman.*

[49] *See, e.g.,* 408 U.S. at 309-10 (Stewart, J., concurring); *Id.* at 313 (White, J., concurring); *Id.* at 253-57 (Douglas, J., concurring); *Id.* at 398-99 (Burger, C.J., dissenting).

[50] Note, *Capital Punishment: A Review of Recent Supreme Court Decisions,* 52 N.D. LAWYER 261, 274 (1976).

[51] 428 U.S. 153 (1976), *rehearing denied,* 429 U.S. 875 (1976).

[52] 428 U.S. 242 (1976), *rehearing denied,* 429 U.S. 875 (1976).

[53] 428 U.S. 262 (1976), *rehearing denied,* 429 U.S. 875 (1976).

[54] Justice Stewart, Powell, and Stevens formed the plurality for all three cases.

[55] "In summary, the concerns expressed in *Furman* . . . are best met by a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentences and provided with standards to guide its use of the information." 428 U.S. at 195.

[56] Roberts v. Louisiana, 428 U.S. 325 (1976), *rehearing denied,* 429 U.S. 890 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

[57] A mandatory death penalty is unconstitutional insofar as it fails "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant." Woodson v. North Carolina, 428 U.S. at 303. In both *Woodson* and *Roberts,* the Court noted that a mandatory death penalty, while usually unconstitutional because it does not allow the sentencer to consider mitigating circumstances, may be constitutional if restricted to the intentional killing by a prisoner serving a life sentence. *Id.* at 292-93 n.25; Roberts v. Louisiana, 428 U.S. at 334 n.9.

cedural safeguards in capital cases, it was dispelled in *Lockett v. Ohio*.[58] The *Lockett* Court invalidated the Ohio death penalty statute because it limited the number of mitigating circumstances which the capital defendant was permitted to prove.[59] This further refinement of the procedure under which a capital defendant is sentenced was required, the Court said, because the death penalty is "so profoundly different from all other penalties . . . that an individualized decision is essential in capital cases."[60] The upshot of *Gregg* and *Lockett* is that now every current nonmandatory death penalty statute provides for some sort of bifurcated proceeding where the sentencer can consider circumstances in mitigation or aggravation of the crime.[61]

The death penalty statute[62] considered by the court in *Bullington* reflects this constitutionalization of capital punishment. Although the *Stroud* line of cases had already answered the issue posed in *Bullington*, the intervening developments on the constitutionality of the death penalty required that the issue be confronted again.[63] Thus, the decision in *Bullington v. Missouri* does not rest on the fundamental uniqueness of the death penalty.[64] Rather, it rests on the uniqueness of the sentencing procedures which are constitutionally mandated in a capital case.[65]

The decision in *Bullington* turns on this difference between Missouri's capital sentencing statute and the sentencing practices employed in the *Stroud* line of cases. The Court confined the *Stroud* cases to the usual sentencing proceeding where "it is impossible to conclude that a sentence less than the statutory maximum" confirms that the prosecution "has failed to prove its case."[66] Under the normal proceeding, "there are virtually no rules or tests or standards - and thus no issues to resolve."[67] But in *Bullington*, there were specific issues which the jury was required to resolve before passing sentence.[68] Since, in this case, the prosecution was required

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[58] 438 U.S. 586 (1978).

[59] *Id.* at 604-05.

[60] *Id.* at 605.

[61] Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 3 n.4. In an appendix to his article, the author provides a very useful analysis of the death pnealty statutes of 35 states. *Id.* at 101-19.

[62] MO. ANN. STAT. §§ 565.006-.016 (Vernon 1979) (amended 1980).

[63] The defendants in *Stroud*, *Pearce* and *Chaffin* were not sentenced under a bifurcated procedure, not was the prosecution required in those cases to prove additional facts.

[64] 101 S. Ct. at 1864 (Powell, J., dissenting).

[65] "The history of sentencing practices is of little assistance to Missouri in this case, since the sentencing procedures for capital cases instituted after the decision in *Furman* are unique." *Id.* at 1859 n.15.

[66] 101 S. Ct. at 1860.

[67] *Id.* at 1860-61 (citation omitted).

[68] "The jury in this case was not given unbounded discretion to select an appropriate punishment . . . . Rather . . . the jury was presented both a choice between two alternatives and standards to guide the making of that choice." *Id.* at 1858.

"to prove its case," the jury's verdict of life imprisonment operated as an implicit acquittal of the death penalty.[69]

Actually, as the dissent suggested,[70] there is a serious question whether the application of the implicit acquittal principle was truly supported by the facts of this case. Under Missouri procedure, the jury is not totally without discretion - it can reject the state's evidence of aggravating circumstances, even if these are proved beyond a reasonable doubt, and instead impose a sentence of life.[71] For whatever reason, the court does not address this question.

Notwithstanding the flaws of the majority opinion, the dissenting opinion is also suspect. The dissent's refusal to acknowledge that the sentencing changes mandated by *Furman* could have any effect on the rational of *Stroud* gives undue weight to cases decided under now archaic procedures. Although it is true that Bullington's "ordeal upon retrial would not be different in kind from that of the defendants in *Chaffin* and *Stroud,*"[72] it is no less true that the "evolving standards of decency"[73] have vitiated the procedure under which the defendants in *Stroud* and *Chaffin* were sentenced. The dissent would ignore this difference and mechanically apply *stare decisis*. Thus, both opinions in Bullington appear to be logically defective. Each conveniently fails to account for pertinent facts to reach the desired result. Nevertheless, the majority opinion is preferable on policy grounds.[74]

In fact, one can argue that the court should have gone further and overruled *Stroud*. As previously stated,[75] the rule which *Stroud* has come to represent was never argued before the Court. Additionally, there are compelling reasons for applying the Double Jeopardy clause to criminal sentences.[76] Besides the double jeopardy arguments, *Stroud* can be attacked on other grounds. For example, it has been held that the imposition of an increased sentence at a new trial for the same offense violates the basic policies

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[69] *Id.* at 1862.

[70] *Id.* at 1865 n.4 (Powell, J., dissenting).

[71] *See* note 7 and accompanying text.

[72] 101 S. Ct. at 1864-65 (Powell, J., dissenting).

[73] The Court's analysis of the death penalty in *Gregg* suggests that the procedures under which capital defendants are sentenced must periodically be re-evaluated against "the evolving standards of decency that mark the progress of a maturing society." 428 U.S. at 173 (citation omitted).

[74] *See* State v. Wolfe, 46 N.J. 301, 309, 216 A.2d 586, 590 (1966) where the court said:

> Awareness of that principle [that no person shall be deprived of his life or liberty except by a trial free from prejudicial error] stimulates judicial reluctance to see the price of an appeal from an erroneous conviction set at the risk of a man's life. Such a price, in our judgment, is a hardship so acute and so shocking that our public policy cannot tolerate it. Consequently, we hold that since the State has granted the universal right of appeal, standards of procedural fairness forbid limiting the right by requiring the defendant to barter with his life for the opportunity of exercising it.

[75] *See supra* notes 20-22 and accompanying text.

[76] *See supra* notes 27-28 and accompanying text.

of criminal justice by imposing an unjust burden on the defendant's right to appeal a conviction.[77] Finally, the inconsistencies between *Stroud* and *Green* and between *Pearce* and *Chaffin* expose the arbitrary nature of the *Stroud* rule.

The Court, however, chose not to overrule *Stroud*. Despite its inconsistencies, *Stroud* has flourished and is now an established principle of law. Earlier this term, in *United States v. DiFrancesco*,[78] the Court reaffirmed *Stroud*. One could hope, but hardly expect, that *Stroud* would be abandoned at this late stage. Thus, *Bullington* and *Stroud* both must be seen as vital principles of double jeopardy law. Under the usual sentencing procedure, *Stroud* will apply and the successful criminal appellant must face the possibility of an increased sentence at retrial. Under a bifurcated procedure, however, the rule announced in *Bullington* will have to be considered.

If the defendant did not face the death penalty at the first trial, then it is doubtful that *Bullington* will prevent the assessment of an increased sentence at the new trial. *DiFrancesco*, decided before *Bullington*, involved a bifurcated procedure too, yet the Court held that the defendant had not been twice placed in jeopardy when the government appealed his sentence. The issue in *DiFrancesco* involved the validity of section 1001(a) of the Organized Crime Control Act of 1970,[79] which authorized the imposition of an increased sentence upon a dangerous special offender and grants the government the right to take that sentence to the court of appeals for review.[80] There are important differences between *DiFranceso* and *Bullington* though. *DiFrancesco* involved appellate review, "not a *de novo* proceeding that gives the government the opportunity to convince a second factfinder of its view of the facts."[81] More importantly, the bifurcated procedures were different in the two cases. In *DiFrancesco*, the sentencer was given much discretion[82] and although the prosecution was required to prove the additional fact that the defendant was a dangerous special offender, its burden of proof was only a preponderance of the evidence. In contrast, the jury at Bullington's first trial had much less discretion and the prosecution was required to prove the existence of additional facts beyond a reasonable doubt. Assuming the continued validity of *DiFrancesco*,[83] the rule announced in *Bullington* will not apply in all cases where the defendant is sentenced under a bifurcated proceeding. Specifically, it will not apply in

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[77] People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966).

[78] 101 S. Ct. 426 (1980).

[79] 18 U.S.C. § 3576 (1976).

[80] *Id.*

[81] 101 S. Ct. at 1859.

[82] *Id.*

[83] We must assume that *DiFrancesco* is still valid, given the length to which the court went in distinguishing that case from *Bullington*, 101 S. Ct. at 1858-59.

a non-capital case where the jury is given broad discretion at the sentencing phase and the prosecution's standard of proof at the pre-sentence hearing is less than "beyond a reasonable doubt."

These considerations highlight the importance of *Bullington* for defendants charged with capital crimes. As was mentioned above, all the states which have a nonmandatory death penalty provide for a bifurcated proceeding where the sentencer can consider additional evidence before assessing the punishment.[84] Twenty-eight of these states currently provide that the prosecution must prove beyond a reasonable doubt the existence of aggravating circumstances before the accused can be sentenced to death.[85] It follows that in these states, if a defendant is not sentenced to die at his first trial, the decision in *Bullington* necessarily prohibits the prosecution from seeking the death penalty at any retrial for the same offense. Additionally, it should make no difference whether the sentencer is the judge or the jury.[86] Thus, it is unlikely that the decision in *Bullington* will spawn a dichotomy similar to that in *Pearce* and *Chaffin* with different rules of double jeopardy being followed where the identity of the sentencer is not the same. Furthermore, the fact that many of these states do not require the sentencer to impose the death penalty even though the prosecution has "proved its case" appears to be of little importance in the application of the *Bullington* principle since the jury at Bullington's first trial had this discretion also.

In those states where the prosecution's burden of proof is less than the reasonable doubt standard,[87] *Bullington* raises two distinct questions. The first question is whether *Bullington* will be extended to protect the defendant sentenced to life imprisonment under this lesser standard from facing the death penalty at retrial. The decision in *Bullington* placed considerable weight on the fact that the prosecution had to prove its case beyond a reasonable doubt. Indeed the decision implicitly seems to require this higher standard before double jeopardy protection is available to the capital defendant in a *Bullington* situation.[88] Under the better view, though, if a state imposes a lesser burden of proof on the prosecution and the prosecution fails to secure the death penalty at the first trial, then the prosecution should be prevented from seeking the death penalty at any retrial. For

[84] *See supra* note 61 and accompanying text.

[85] *Id.*

[86] *See* Gillers, *supra* note 61, at 101-19 for a compilation of how each state determines who the sentencer will be in a particular case.

[87] *Id.*

[88] The majority framed the issue in *Bullington* as "whether the reasoning of *Stroud* is also to apply under a system where a jury's sentencing decision is made at a bifurcated proceeding's second stage at which the prosecution has the burden of proving certain elements *beyond a reasonable doubt* before the death penalty may be imposed." 101 S. Ct. at 1854 (emphasis added). Furthermore, as was mentioned at *supra* notes 82 and 83 and accompanying text, the Court relied at least partly on this greater standard of proof in distinguishing *Bullington* from *DiFrancesco*. 101 S. Ct. at 1859.

if the prosecution is barred from seeking the higher punishment in those states where its burden of proof is beyond a reasonable doubt, then it surely should be prevented from twice seeking the death penalty where its burden of proof is less.

The second problem that *Bullington* raises is whether a state may impose the death penalty at all where the prosecution's burden of proof is less than the reasonable doubt standard. It is a fundamental principle of criminal law that the prosecution must prove the defendant's guilt beyond a reasonable doubt.[89] Although the prosecution is ordinarily not required to prove that the defendant should receive a particular sentence, the Supreme Court has required that the prosecution prove the existence of aggravating circumstances in addition to proving the defendant's guilt before the defendant can be sentenced to death.[90] The decision in *Bullington,* by applying the Double Jeopardy clause - another fundamental principle of criminal law - to cases where the defendant faces the possibility of capital punishment, appears to implicitly require the prosecutor to prove the existence of aggravating circumstances beyond a reasonable doubt before the death pealty can be imposed.[91] For insofar as the sentincing stage of a bifurcated procedure "is like a trial on the question of guilt or innocence,"[92] the prosecution should be required to "prove its case" beyond a reasonable doubt.

In conclusion, although the decision in *Bullington* was based on the procedural aspects of a capital trial and not on the fundamental uniqueness of capital punishment, its impact on the death penalty, as a practical matter, is just as important. By holding that, under the Missouri bifurcated system for capital murder, a defendant who is sentenced to life imprisonment may not be subjected to the death penalty at retrial for the same offense, the decision further defines the "qualitative difference" between death and other punishments. And by its novel use of the Double Jeopardy clause, the Supreme Court accords finality to the judgment that a capital defendant shall not die.

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[89] Mullaney v. Wilbur, 421 U.S. 684 (1975).

[90] *See* notes 58-61 and accompanying text.

[91] *Cf.* Lockett v. Ohio, 438 U.S. at 605 [t]he qualitative difference between death and other penalties calls for a greater degree of reliability when the death penalty is imposed).

[92] 101 S. Ct. at 1861.