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Death & Double Jeopardy
The U.S. Supreme Court on January 14 heard oral argument in a case that has both specific and general significance for law students: specific, because it teaches us something about the particular meaning of double jeopardy in death penalty cases; general, because in doing so it tells us something about the nature of legal rules and, hence, about the ends of legal education.

The case, *Bullington v. Missouri*, asks whether a defendant who was convicted and originally sentenced to life imprisonment for a capital offense may be resentedenced to death if he is now reconvicted following the reversal of his original conviction. The facts in *Bullington* are starkly simple. Robert Bullington, a white male, was charged with breaking into Pamela Sue Wright's home with a shotgun, binding three members of her family, abducting the 18-year old girl by force and later murdering her. Bullington was found guilty by a jury and, following a subsequent and separate sentencing hearing, sentenced by the jury to life imprisonment. The trial judge granted his motion for a new trial based on the ground that the Missouri procedure for excluding women from jury service violated Bullington's right to be tried by a jury drawn from a cross section of the community. Prior to retrial, the prosecutor filed notice of intent once again to seek the death penalty. The trial judge struck the prosecutor's notice, ruling that resentencing Bullington to death would violate the double jeopardy clause. The prosecutor took an immediate appeal, the Missouri supreme court ruled in his favor, and the U.S. Supreme Court granted certiorari.

The key to the case is *North Carolina v. Pearce*, holding that a defendant who was originally sentenced to 12 years in prison could be resentenced to 15 years in prison upon retrial following a reversal of his original conviction. To decide whether *Bullington* is like *Pearce* or different from it for double jeopardy purposes, one must first possess a standard for measuring likeness and difference. That is to say, in order to decide whether one double jeopardy case is like another, or different from it, one must identify the standards or values that inform the double jeopardy guarantee.

As I have suggested elsewhere, the double jeopardy clause safeguards three separate constitutional values, each possessing its own particular weight: (1) the integrity of jury verdicts of not guilty, (2) the faithful administration of prescribed sentences, and (3) the defendant's interest in repose. To resolve *Bullington*—indeed, to resolve any double jeopardy problem—one must first, determine which of the three respective values is implicated and, second, assess the strength of the state's interests in light of the particular weight the respective value enjoys.

Given the foregoing standards, *Pearce* was a relatively easy case from the prosecution's standpoint, because values (1) and (2) were not implicated at all, while the third value of repose was weighted in favor of the state. The contrary is true of *Bullington*: the defendant in *Bullington* invokes two of the double jeopardy values—i.e., the conclusiveness of jury verdicts of not guilty, and an interest in repose—and both are weighted in his favor.

**Jury Verdicts of Not Guilty**

The Court has said that the most "fundamental" of double jeopardy values is that jury acquittals (including implicitly acquitting a defendant of a greater offense by solely convicting him of a lesser offense) are "absolutely final" and may not subsequently be set aside, even if the acquittals are "egregiously erroneous." Yet the Court also ruled in *Pearce* that a sentencing judge's decision to give a defendant a 12-year sentence is not an "implicit acquittal" of any greater sentence and, thus, does not preclude a judge...
from subsequently increasing the sentence to 15 years following retrial and reconviction. More importantly, the Court has reaffirmed the rule first announced in the 1919 case of Robert Stroud, the famous "Bird Man of Alcatraz," that a defendant who is convicted and sentenced to life imprisonment by a jury in a unitary proceeding may be resentenced by a jury to death following a reversal of his original conviction.4

Once again, in order to decide whether Bullington is governed by the rule against retrial following an implicit acquittal on the one hand, or by the rule of Pearce and Stroud on the other hand, one must first identify the constitutional value that underlies the acquittal rule. Fortunately, the Court last year cast light on the issue by suggesting that the prohibition on retrial following an acquittal "is based on a jury's prerogative to acquit against the evidence." That is, the absolute finality of jury acquittals is based on the unreviewable authority of sixth amendment juries to dispense mercy in the face of clear evidence of guilt.

Now that we have identified the constitutional value underlying the acquittal rule, we can see that Bullington is significantly different for double jeopardy purposes from both Pearce and Stroud. It is different from Pearce, because the principle of jury nullification that informs the acquittal rule is an aspect of a defendant's sixth amendment right to trial by jury and does not extend to favorable rulings by a trial judge. Thus, while the acquittal rule presumptively applies to the jury's favorable choice of life sentence in Bullington, the rule has no relevance at all to the trial judge's original 12-year sentence in Pearce.

Moreover, even if Pearce had been sentenced by a jury to 12 years, the implicit-acquittal rule would not have operated to render his sentence final, because the jury's prerogative of nullification does not extend to ordinary sentencing decisions.4 The difference between determinations of guilt or innocence (to which the jury's prerogative of nullification applies) and ordinary sentencing (to which nullification does not apply) is that decisions regarding guilt or innocence are either/or decisions, while decisions regarding length of sentence are line-drawing decisions on a continuous spectrum of nearly infinite possibilities. By that standard, Bullington is

distinguishable from Pearce, because while sentencing in Pearce involved a decision as to where to draw a somewhat arbitrary line between one and 15 years in prison, the sentencing in Bullington involved the starkest of either/or decisions: the decision between life imprisonment or death.

Finally, Bullington is also distinguishable from Stroud for purposes of jury nullification and, hence, for purposes of the acquittal rule. Although Bullington and Stroud both involved jury choices between death and life imprisonment, the structure of their decisionmaking was very different. The Stroud jury, acting without standards or guidelines and proceeding without instructions regarding burden of proof, was allowed to exercise unbridled discretion at the close of a unitary proceeding in making its choice between death and life imprisonment. The Bullington jury, in contrast, was directed to act in the fashion of a jury making a traditional determination of guilt or innocence: it was required to make its decision at a separate adversary hearing on the basis of detailed death-penalty standards and instructions regarding the prosecution's burden of proof. These differences are significant because just as the jury's nullification prerogative is confined to either/or decisions regarding culpability, it also appears to be confined to determinations of culpability on which the jury's discretion is guided and focused by separate submissions of evidence, specific standards of culpability, and instructions on burdens of proof.

To conclude, while Bullington and Stroud both involved capital sentencing by juries, they are significantly different from one another for double jeopardy purposes, because the determination by the Bullington jury was identical to the traditional judgments of culpability made by juries possessing nullification authority, while the procedures followed in Stroud more closely approximated the kinds of sentencing judgments to which a jury's nullification prerogative does not apply. The consequence is that the jury's original verdict of life imprisonment in Bullington may be regarded as an implicit acquittal of the more onerous verdict of death and, thus, is "absolutely final,"7 even if later determined to be erroneous.
The Defendant’s Interest in Repose

_Bullington_ also differs from _Pearce_ (as well as _Stroud_) with respect to the defendant’s interest in repose. The argument for repose is to be distinguished from the argument regarding “implicit acquittals.” The acquittal rule is a reflection of the jury’s unreviewable authority to dispense mercy and is apparently absolute, operating even if the jury’s verdict is otherwise erroneous. The rule of repose, in contrast, is not tied to the jury; it is a principle of _res judicata_, applicable to proceedings terminating in mistrials, dismissals and convictions (as well as acquittals).

Moreover, as a principle of _res judicata_, the rule of repose is not an absolute: it seeks instead to strike a balance between the state’s interest in having a fair opportunity to make its case and the defendant’s interest in not having to relitigate something that has or should have been fully litigated before. Thus, the prosecution may appeal erroneous pretrial and post-verdict rulings in a defendant’s favor, may appeal erroneous sentences in his favor, and may retry a defendant following a reversed conviction; yet it may not try a defendant on an issue that was fully adjudicated against it in an earlier proceeding, or retry a sentence that might have nothing to do with the facts as he then understood them to be.

_Bullington_, on the other hand, is a paradigm of _res judicata_. The prosecution there is not asking that the trial jury be allowed to impose a sentence in accord with probative evidence that will independently be before it on the matter of guilt or innocence. Rather, the prosecution is asking to be allowed to present adversary proofs in a _de novo_ proceeding before a jury to be instructed under independent standards of law—all for the purpose of relitigating historical facts that the prosecution had already fully and fairly litigated once before.

Consequently, unless the prosecution in _Bullington_ has preserved a sufficient objection to the exclusion of women from the original jury, it should be precluded by constitutional rules of repose from seeking a “second bite of the apple.”
I suggested at the start that we might learn from Bullington something about legal rules and, hence, about legal education. If ever there has been a rule of criminal procedure that we all assumed we understood, it is the double jeopardy rule of Pearce, that a defendant who is reconvicted following a successful appeal may be given a greater sentence than he originally received. Now Bullington comes along and reveals that those of us whose knowledge of law consists of hornbook rules know less than we thought we did. For however Bullington is eventually decided, the very granting of certiorari shows that the Pearce rule—like all legal "rules"—is elusive; that the real meaning of Pearce inheres in the balance of constitutional values it reflects; that if a school can teach its students how to identify and analyze such values, it can largely dispense with hornbook rules; and that if a school does not equip its students with skills of analysis, no amount of learned rules will do them much good.

Footnotes

7. Burks, supra at 16. To be sure, if death penalty decisions are not required to be allocated to sixth amendment juries in the first place, the acquittal rule might be deemed not to apply to such decisions as are left to juries by legislative choice. The Supreme Court, however, has never explicitly passed on whether a defendant today is constitutionally entitled to a sixth amendment jury verdict on issues of life or death. But cf. Proffitt v. Florida, 428 U.S. 242 (1976). Indeed, now that death penalty practice so closely approximates traditional sixth amendment determinations of guilt or innocence, it can be persuasively argued that the death penalty has become a mandatory sixth amendment issue for final resolution by juries.
8. Burks v. United States, supra at 16 ("fair"); Palko v. Connecticut, 302 U.S. 319, 328 (1937) ("free from error"); Burks, supra at 17 ("second bite").

Peter Westen