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FIFTH AMENDMENT—EXTENSION OF DOUBLE JEOPARDY PROTECTION TO SENTENCING

Bullington v. Missouri, 101 S. Ct. 1852 (1981).

Last term, the Supreme Court for the first time extended double jeopardy protection to a criminal defendant sentenced by a jury. In *Bullington v. Missouri*,[1] the Court held that where a sentencing proceeding had the hallmarks of a trial on guilt or innocence, the Double Jeopardy Clause[2] prohibited the imposition of a greater sentence at retrial. Before *Bullington*, the Court had refused to extend to sentencing the well-established principle that the Double Jeopardy Clause forbids the retrial of a defendant who has been acquitted of an offense. The holding in *Bullington* represents a dramatic departure from the Court's longstanding judgment that the distinctions between a sentence and an acquittal are more critical than the similarities. The Court refused to adhere slavishly to precedent, and instead looked to the purposes behind the Clause in deciding whether to extend double jeopardy protection to sentencing.

I. MISSOURI LAW

Missouri's death penalty legislation contains, as a result of the Court's decision in *Furman v. Georgia*,[3] substantive sentencing standards and procedural safeguards. Missouri law requires a separate presentence hearing for a defendant whom a jury convicts of capital murder.[4] There are only two possible sentences for capital murder—death or life imprisonment without eligibility for probation or parole for

[1] 101 S. Ct. 1852 (1981), *rev'g*, State *ex rel.* Westfall v. Mason, 594 S.W.2d 908 (Mo. 1980).

[2] "[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.

[3] 408 U.S. 238 (1972). In *Furman*, the Court held that the eighth and the fourteenth amendments required the States to impose safeguards to protect against capricious or discriminatory impositions of the death sentence. *Id.*

[4] MO. REV. STAT. § 565.006 (1978). Section 565.006 sets forth Missouri's procedure for imposition of the death penalty by a jury:

> 1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. In

fifty years.[5] The same jury which finds the defendant guilty hears evidence in extenuation, mitigation, and aggravation of punishment at the presentence hearing.[6] The jury must decide whether there were any circumstances in mitigation or aggravation,[7] and whether the aggravating circumstances are sufficient to warrant the imposition of the death pen-

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each jury capital murder case, the court shall not give instructions on any lesser included offense which could not be supported by the evidence presented in the case.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge, at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty, or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

[5] *Id.* at § 565.008.1.

[6] *Id.* at § 565.006.2. The court may admit evidence in aggravation only if the prosecution has made it known to the defendant prior to his trial. *Id.*

[7] Section 565.012 lists the aggravating and mitigating circumstances:

1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence,

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence,

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former

alty or are outweighed by mitigating circumstances.[8] A jury imposing the death penalty must set forth in writing the aggravating circumstances it finds beyond a reasonable doubt[9] and must believe beyond a reasonable doubt that these circumstances warrant imposition of the death penalty.[10] The trial judge instructs the jury that it need not impose the death penalty, even if aggravating circumstances exist.[11] If the jury cannot arrive at a unanimous decision to impose the death sentence, it must impose the alternative sentence.[12]

II. FACTS

Petitioner Robert Bullington was indicted for capital murder in December 1977,[13] and the prosecution informed the defense that the State would seek the death penalty if the jury convicted the defendant

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circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

[8] *Id.* at § 565.012.1.

[9] *Id.* at § 565.012.4.

[10] 101 S. Ct. at 1856 (citing MISSOURI APPROVED INSTRUCTIONS— CRIMINAL § 15.42 (1979)).

[11] 101 S. Ct. at 1856 (citing MISSOURI APPROVED INSTRUCTIONS—CRIMINAL § 15.46).

[12] *Id.*; MO. REV. STAT. § 565.006.2.

[13] 101 S. Ct. at 1856. His conviction stemmed from the abduction and death by drowning of a young woman. *Id.*

of capital murder.[14] The jury found Bullington guilty of capital murder at the guilt or innocence phase of the trial, and after the presentence hearing fixed his punishment at imprisonment for life.[15]

The trial court granted Bullington's motion for a new trial[16] after the Court handed down its decision in *Duren v. Missouri*,[17] which held that a Missouri law allowing women to claim automatic exemption from jury service deprived a defendant of his right to a jury drawn from a fair cross-section of the community. The prosecution served a notice on the defense stating that it would once again seek the death penalty.[18] The defense moved to strike the notice on fifth amendment Double Jeopardy grounds.[19] The Supreme Court of Missouri ultimately sustained the State's position and held that the Double Jeopardy Clause did not bar the imposition of the death penalty upon the petitioner at his new trial.[20]

III. SUPREME COURT OPINION

Justice Blackmun, writing for the majority,[21] first acknowledged that the Court has not traditionally regarded the imposition of a particular sentence as an acquittal of any more severe sentence that could have been imposed.[22] He hastened to add, however, that the procedures resulting in the imposition of life imprisonment upon Bullington were very different from those in cases where the Court has held the Double Jeopardy Clause inapplicable to sentencing.[23] In *Bullington*, the sentencing procedures possessed the same critical characteristics as a trial on guilt or innocence: the jury lacked unbounded discretion to select a punishment from a wide range, and the prosecution undertook the bur-

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[14] The prosecution's notice announced that it would seek to prove two aggravating circumstances: first, that defendant had a history of criminal convictions for assaults, MO. REV. STAT. § 565.012.2 (1); and second, that the crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind," *id.* at § 565.012.2 (7).

[15] 101 S. Ct. at 1856.

[16] *Id.*

[17] 439 U.S. 357 (1979).

[18] 101 S. Ct. at 1856. This notice indicated that the prosecution would present evidence on the same aggravating circumstances as it did during the first trial. *Id.*

[19] *Id.* at 1856-57. Benton v. Maryland, 395 U.S. 784, 794 (1969), made the Double Jeopardy Clause of the fifth amendment applicable to the states through the fourteenth amendment.

[20] State *ex rel.* Westfall v. Mason, 594 S.W.2d 908 (Mo. 1980), *app'd sub nom.*, Bullington v. Missouri, 101 S. Ct. 1852 (1981). The court also held that neither the eighth amendment nor the Due Process Clause precluded the imposition of the death sentence. *Id.*

[21] Justices Brennan, Stewart, Marshall and Stevens joined in the opinion of the Court.

[22] 101 S. Ct. at 1857.

[23] *Id.* at 1858.

den of establishing certain facts beyond a reasonable doubt.[24]

The majority then explained that these procedures excepted this case from the established rule that because there is no bar to retrying a defendant who has succeeded in overturning his conviction—the "slate [has been] wiped clean,"[25] the defendant upon reconviction may receive whatever punishment is lawful.[26] The Court declared that Missouri's capital sentencing procedure in effect requires the prosecution to prove its case.[27] The jury must decide whether the prosecution proved additional facts beyond a reasonable doubt in order to justify the death sentence. If the jury decides that the prosecution has failed, a double jeopardy bar arises. Finally, the Court reasoned that the values underlying the absolute finality of a verdict of acquittal apply when a jury has rejected the death penalty.[28] Justice Black summarized those values in *Green v. United States*[29]:

> 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.[30]

Justice Powell's dissenting opinion[31] characterized the Court's opinion as a departure[32] from such precedents as *Stroud v. United States*,[33] *North Carolina v. Pearce*,[34] *Chaffin v. Stynchcombe*,[35] and *United States v.*

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[24] *Id.* The Court characterized the sentencing procedure as "a trial on the issue of punishment so precisely defined by the Missouri statutes." *Id.*

[25] *Id.* at 1860 (quoting North Carolina v. Pearce, 395 U.S. 711, 721 (1969)). *See* United States v. Tateo, 377 U.S. 463 (1964); United States v. Ball, 163 U.S. 662, 672 (1896).

[26] 101 S. Ct. at 1859-61. This is subject to the limitation that the defendant receive credit for time served. *Id.* at 1860.

[27] *Id.* at 1861.

[28] *Id.*

[29] 355 U.S. 184 (1957).

[30] *Id.* at 187-88.

[31] The Chief Justice, Justice White and Justice Rehnquist joined in the dissent.

[32] 101 S. Ct. at 1863 (Powell, J., dissenting).

[33] 251 U.S. 15 (1919). In *Stroud*, the defendant, the "Birdman of Alcatraz," was convicted of the murder of a prison guard and sentenced to life imprisonment by a jury. Upon retrial, another jury convicted Stroud of first degree murder, but sentenced him to death. The Supreme Court held that the jury's increased punishment of death upon retrial did not place him in double jeopardy.

[34] 395 U.S. 711. In this case the Court held that

> at least since 1919, when *Stroud v. United States* . . . was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction.

Id. at 720.

DiFrancesco.[36] The dissent also highlighted the essential difference between determinations of guilt or innocence and sentencing—the objective nature of the question of guilt or innocence versus the lack of an objective measure by which the court may judge the sentencer's decision correct or erroneous.[37] Justice Powell focused on a question different from the one asked by the majority: he asked whether the reasons for considering an acquittal on guilt or innocence apply equally to a sentencing decision, rather than whether the two procedures were similar.[38] Since the dissent believed that the reasons for considering an acquittal final did not apply equally to a sentencing decision,[39] it refused to apply the implicit acquittal principle[40] to sentencing.[41]

IV. DISCUSSION

Before this case, the Court had held that the Double Jeopardy Clause forbids the retrial of a defendant who has been acquitted of a crime,[42] but had refused to hold the same principle applicable to sentencing.[43] The Court held the implicit acquittal theory applicable in cases such as *Green v. United States*,[44] but has refused to make this judgment in cases such as *North Carolina v. Pearce*.[45] In *Green*, the Court looked upon the jury's verdict of second degree murder as an implicit acquittal of first degree murder, while in *Pearce*, the Court held that a sentence imposed after a first conviction could be increased upon reconviction. The Court traditionally has explained the differing results in the two situations on the basis of the fundamental difference between acquittals and sentences.[46] In *Bullington*, the Court for the first time ap-

35 412 U.S. 17, 24 (1973). In *Chaffin*, the Court declined, for reasons stated in *Pearce*, to overrule *Stroud*. *Id.*

36 101 S. Ct. 426 (1980). *See* text accompanying notes 64-70 *infra*.

37 101 S. Ct. at 1863-64 (Powell, J., dissenting).

38 *Id.* at 1864 (Powell, J., dissenting).

39 *See* text accompanying note 30 *supra*.

40 The *Green* case illustrates the implicit acquittal approach. In *Green*, the Court considered whether the State could retry a defendant for first degree murder after the jury at the first trial had found him guilty only of second degree murder. The Court reasoned that the jury's first verdict was an implicit acquittal of first degree murder. The Court stated that Green was in direct peril of being convicted of first degree murder at his first trial and that he only need run that gauntlet once. Therefore, the second trial for first degree murder impermissibly put Green in jeopardy twice for the same offense. 355 U.S. at 190.

41 101 S. Ct. at 1864 (Powell, J., dissenting).

42 *See* United States v. DiFrancesco, 101 S. Ct. at 433; Burks v. United States, 437 U.S. 1, 16 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); Fong Foo v. United States, 369 U.S. 141, 143 (1962); Green v. United States, 355 U.S. at 188.

43 *See* United States v. DiFrancesco, 101 S. Ct. at 437; Chaffin v. Stynchcombe, 412 U.S. at 23-24; North Carolina v. Pearce, 395 U.S. at 723; Stroud v. United States, 251 U.S. at 18.

44 355 U.S. 184. *See* note 40 *supra*.

45 395 U.S. 711.

46 101 S. Ct. at 1863 (Powell, J., dissenting).

plied the theory of implicit acquittal to sentencing.

The Court accepted, for two major reasons, Bullington's claim that the Double Jeopardy Clause barred the imposition by the second jury of the death penalty when the first jury had declined to impose the death sentence.[47] First, the Court treated Bullington's first sentence as an implicit acquittal of a greater sentence.[48] Second, it reasoned that Bullington's interest in the finality of his first sentence prohibited the imposition of a harsher sentence on retrial.[49] Both of these reasons are tenable.

Bullington's first challenge to the increase in his sentence was on the ground that the increased sentence violated the prohibition against further prosecution following an acquittal.[50] The Court accepted the argument that his first sentence was an implicit acquittal of the death sentence, even though it had rejected this same argument in earlier cases.[51] Since the similarities between a favorable original verdict, such as a finding of not guilty, and the favorable original sentence in *Bullington* were so striking, the notion of implicit acquittal won a majority of the Court.

The Court also accepted Bullington's second argument, which was based on his interest in finality or repose. This is the defendant's interest in an end to the embarrassment, expense and anxiety of criminal prosecution.[52] Bullington's claim succeeded because the reasons for according an acquittal absolute finality apply with equal force to this particular sentencing decision.

Bullington's implicit acquittal theory convinced the Court because it decided the case not by reference to unhelpful labels but by looking to the substance of the sentencing procedure in relation to the purposes of the Double Jeopardy Clause. In the past, the Court refused to view determinations of sentence as implicit acquittals of a greater sentence because of the significant differences between sentences and decisions on the issue of guilt and innocence.[53] The similarities, however, between the Missouri sentencing procedures and procedures surrounding deci-

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47 Professor Westen's seminal articles on the Double Jeopardy Clause have identified three important values which underlie the clause: "(1) the integrity of jury verdicts of not guilty, (2) the lawful administration of prescribed sentences, and (3) the interest in repose." Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1002 (1980) [hereinafter referred to as *The Three Faces*]. *See* Westen & Drubel, *Toward A General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81 [hereinafter referred to as *General Theory*]. Only the first and third values are pertinent in the instant case.

48 101 S. Ct. at 1861.

49 *Id.*

50 *Id.* at 1859-61.

51 *Id.*

52 *Id.* at 1861. *See* Westen, *The Three Faces*, *supra* note 47, at 1033.

53 *See* cases cited in note 43 *supra*. The Court presumably will continue to hold that sentencing decisions reached under traditional procedures will not operate as implicit acquittals.

sions regarding guilt or innocence outweigh the differences.[54] Faced with a set of sentencing procedures unlike any that it had considered before, the Court refused to force its analysis into the old rubric for the sake of consistency alone, but instead fashioned a new theory to fit changed sentencing procedures.

A jury, rather than a judge, sentenced the defendant in *Bullington*.[55] This procedure is similar to the one followed for determinations of guilt and innocence, which are made by the jury. Another similarity is the lack of discretion to pick a punishment from an almost infinite number of possibilities.[56] The Court emphasized that in previous sentencing cases— *Pearce*, *Chaffin*, and *Stroud*—the sentencer possessed unbounded discretion to select a punishment.[57] In *Bullington*, in contrast, the jury had a choice between only two alternatives,[58] very much like the choice a jury has when it makes a guilt or innocence decision.[59]

The sentencing decision in *Bullington* also resembled a decision regarding guilt or innocence because the court instructed the jury which circumstances justified the imposition of a particular sentence, and because the standard used was proof beyond a reasonable doubt.[60] Traditionally, individuals making sentencing decisions, usually judges, receive no guidance as to "which factors should be considered, under what circumstances, and how they are to be weighted. . . ."[61]

The sentencing decision in *Bullington*, like all such decisions, is, however, different from a decision on guilt or innocence because the jury knows exactly the consequences of its decision to the defendant when it sentences, but knows only approximately the consequences to the defendant of a conviction on a particular offense.[62] For example, the jury cannot ascertain the ultimate consequences to the defendant of a conviction of murder in the first degree as contrasted with a conviction of second degree murder, but it knows precisely the effect on the defendant of a sentence of fifty years as opposed to ten years.[63] This characteristic of

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54 101 S. Ct. at 1858.

55 MO. REV. STAT. § 565.006.

56 *Id.* at 565.008.1.

57 101 S. Ct. at 1858.

58 MO. REV. STAT. § 565.008.1.

59 Indeed, a jury making a guilt or innocence determination may in certain situations have even more discretion than Bullington's Missouri jury possessed, for it may have several sentencing choices, including first, second, and third degree murder.

60 Westen, *The Three Faces*, *supra* note 47, at 1022-23 n.68.

61 Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinancy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 96 (1978). *See* M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962).

62 Westen, *The Three Faces*, *supra* note 47, at 1022-23 n.68.

63 *Id.*

the decision in *Bullington*, which is shared with all sentencing decisions, is not important enough to outweigh all the other characteristics which contribute to a strong analogy between this sentencing procedure and traditional guilt or innocence determinations.

The recent decision in *United States v. DiFrancesco*,[64] in which the Court held that the "dangerous special offender" provision of the Organized Crime Control Act of 1970 did not violate the Double Jeopardy Clause,[65] is distinguishable from *Bullington* on several grounds. In *DiFrancesco*, the Court held that a criminal sentence handed down at the second stage of a bifurcated trial was not to be accorded the same constitutional finality as that which attaches to a jury acquittal.[66] The Court reasoned that neither the history of sentencing practices in the United States, nor precedent, nor the policy barring repeated attempts to convict applied to sentencing decisions.[67] In *DiFrancesco*, however, the Government had no second opportunity to prove its case to a trier of fact; the federal statute merely provided for appellate review on the record of the sentencing court.[68] Also, the judge who made the sentencing decision in *DiFrancesco* had a far wider range of choices than did the jury in *Bullington*.[69] Moreover, the Government did not have to prove that the defendant was a "dangerous special offender" by the reasonable doubt standard used in trials on guilt or innocence, but only by a preponderance of the evidence.[70] The decision in *DiFrancesco*, therefore, did not mandate a similar result in the factually distinguishable *Bullington* case.

Because standards exist to guide the jury in making its sentencing decision, it is possible to fit *Bullington* into the exception to the general rule that there is no double jeopardy bar to retrying a defendant who has overturned his conviction. The exception recognized in *Burks v. United States*[71] and *Green v. United States*[72] that a defendant may not be retried if his conviction is reversed on the ground that the evidence was insufficient to convict, applies to Bullington. The standards and guidance given to the jury in Missouri's capital sentencing procedure ensure that the sentence of life imprisonment means that the prosecution failed to prove that the defendant deserved death.[73] The sentencing

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64 101 S. Ct. 426.

65 18 U.S.C. §§ 3575, 3576 (1976).

66 101 S. Ct. at 437.

67 *Id.* at 435-37.

68 18 U.S.C. § 3576. *See* 101 S. Ct. at 1859.

69 *See* 101 S. Ct. at 1859. Under 18 U.S.C. § 3575 (b), a judge may sentence a dangerous special offender to "an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony."

70 101 S. Ct. at 1859.

71 437 U.S. 1 (1978).

72 355 U.S. 184.

73 101 S. Ct. at 1861.

procedure in Missouri is so similar to a guilt or innocence trial that it deserves to be treated similarly.[74] This new mode of sentencing, occasioned by the Court's decision on death penalty legislation, *Furman v. Georgia*,[75] is a hybrid[76] deserving of exceptional treatment by the Court. The facts of *Bullington* required innovation, which the five members of the majority provided. Justice Harlan's statement in his concurring and dissenting opinion in *North Carolina v. Pearce* could have been written about the situation in *Bullington*:

> Every consideration enunciated by the Court in support of the decision in *Green* applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. . . . And the concept or fiction of an 'implicit acquittal' of the greater offense, . . . applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of a certain limited degree of 'badness' or gravity only, and therefore merited only certain limited punishment.[77]

The dissent's objection that there is a fundamental difference between the question of guilt or innocence and a sentencer's decision[78] ignores the unique nature of the sentencing function in capital cases in Missouri. Justice Powell correctly pointed out that underlying the guilt or innocence question, there is an objective, albeit undiscoverable fact, while in the typical sentencing decision, the sentencer decides what type and length of punishment fits the crime.[79] In the Missouri procedure, however, a jury must specify in writing which aggravating circumstances that it has found beyond a reasonable doubt that prompted it to impose the death penalty.[80] This is indeed an objective measure by which the sentencer's decision can be deemed correct or erroneous. Triers of fact engage in the same kind of fact finding process when making a guilt or innocence determination as a Missouri jury does when it finds an aggravating circumstance. The dissent simply misstates the law in Missouri when it says: "The sentencer's function is not to discover a fact, but to mete out just deserts as he sees them."[81] Since the prosecu-

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74 Westen, *The Three Faces*, *supra* note 47, at 1022-23 n.68.

75 408 U.S. 238.

76 The dissent's characterization of this hybrid procedure as a sentencing decision and therefore undeserving of fifth amendment protection adds little to the analysis of the decision, for the crucial inquiry should center on the reasons for affording a given procedure double jeopardy protection. If policy reasons support such protection, a mere label should not prohibit its extension.

77 395 U.S. at 746 (Harlan, J., concurring and dissenting).

78 101 S. Ct. at 1863-64 (Powell, J., dissenting).

79 *Id.*

80 MO. REV. STAT. § 565.012.4.

81 101 S. Ct. at 1864 (Powell, J., dissenting).

tion in a Missouri sentencing procedure must prove aggravating circumstances beyond a reasonable doubt,[82] and the jury must specify in writing which, if any, of those circumstances it found to exist,[83] the Missouri sentencing decision closely resembles a guilt or innocence decision in that it grounded on an objective fact.

The dissent did not believe that the Court should compare the procedures used in sentencing decisions imposing less than the most severe sentence allowed by law with those used in decisions on guilt or innocence.[84] The dissent instead focused on the reasons for desiring the finality of these decisions.[85] This argument runs contrary to established double jeopardy theory, which teaches that the implicit acquittal interest is more important and stronger than the finality interest.[86] Society has made a judgment that acquittals should be absolutely final no matter how erroneous they may be, while the defendant's interest in finality is carefully balanced against society's interest in law enforcement.[87] Society considers the jury's authority to acquit against the evidence to be so important that it overrides all other considerations.[88] The Double Jeopardy Clause was designed to prevent the overturning of jury decisions such as the one in *Bullington*.

The majority does, however, offer support for its theory that Bullington's interest in finality is deserving of protection. The prosecution, with its greater resources, may be able to wear down the defendant if the State had the chance to convince the jury to impose the death sentence.[89] This is similar to the classic double jeopardy concern over the

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82 MO. REV. STAT. § 565.012.4.

83 *Id.*

84 101 S. Ct. at 1864 (Powell, J., dissenting).

85 *Id.* The dissent did not, however, argue that the majority transfigured Missouri's crime of capital murder into two crimes: capital murder with capital punishment and capital murder without capital punishment. That argument would necessary fail, for the majority has merely responded to the reality of the Missouri sentencing procedures as the Missouri legislature enacted them. If Missouri law requires the State to prove certain circumstances beyond a reasonable doubt, the Constitution cannot require a defendant to endure that ordeal twice. The brilliance of Justice Blackmun's majority opinion is its refusal to rely on easy labels and characterizations and its insistence on delving into the realities of the situation before fashioning its response. *But see* State *ex rel.* Westfall v. Mason, 594 S.W.2d at 912, *app'd sub nom.*, Bullington v. Missouri, 101 S. Ct. 1852 (1981).

86 *See* Westen & Drubel, *General Theory*, *supra* note 47, at 122-23. The Court has said that the law attaches "particular significance" to an acquittal. United States v. Scott, 437 U.S. 82, 91 (1978).

87 Westen & Drubel, *General Theory*, *supra* note 47, at 123.

88 *Id.* at 129-30. "The Double Jeopardy Clause thus allows the jury to exercise its constitutional function as the conscience of the community in applying the law: to soften, and in the extreme case, to nullify the application of the law in order to avoid unjust judgments." *Id.* at 130.

89 101 S. Ct. at 1861 (citing United States v. DiFrancesco, 101 S. Ct. at 433). This could

risk of harassment and conviction of an innocent person.[90] A defendant who is found undeserving of the death penalty by one jury should not be subjected to the " 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' "[91] of a retrial. The dissent's argument that a second sentence is as "correct" as the first[92] does not take into account the special quality of the Missouri proceedings, during which the State must prove certain facts before the imposition of the death penalty is possible. Moreover, the assertion that the defendant is primarily concerned with the determination of guilt or innocence, and not with the determination of sentence[93] is merely a hypothesis, unsupported by facts. Even if, as Justice Powell argues, the societal interest in punishing the guilty outweighs the defendant's interest in finality,[94] the overriding importance of the finality of an acquittal amply supports the result reached by the majority.

V. CONCLUSION

The classic double jeopardy consideration which suggests finality for verdicts of acquittal also suggest finality for sentencing decisions rendered during procedures which resemble a trial on the issue of guilt or innocence. The majority persuasively likened sentencing decisions imposing less than the most severe penalty allowed by law to acquittals by reasoning that in both instances the prosecution has not proved its case, while the dissent countered with little else but precedent. It is true that this decision departs from established precedent. The Court has seized an opportunity to develop the law of double jeopardy in a logical way and to adapt it to varying statutory schemes.

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occur if the State had more than one opportunity to convince a jury that the defendant deserved the death penalty. 101 S. Ct. at 1861.

90 *Id.*

91 *Id.* (quoting Green v. United States, 355 U.S. at 187-88).

92 101 S. Ct. at 1864 (Powell, J., dissenting).

93 United States v. DiFrancesco, 101 S. Ct. at 437.

94 101 S. Ct. at 1865 (Powell, J., dissenting).