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## Commentary on *Bullington v. Missouri*

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# Commentary on *Bullington v. Missouri*

Richard Sindel\*

## INTRODUCTION

"Counsel, doesn't your argument really get down, as so many of these cases do, to the proposition that death is different?"<sup>1</sup>

In Missouri, as in most other states which have death penalties, a trial for capital murder<sup>2</sup> is a bifurcated proceeding.<sup>3</sup> The first phase of the capital trial evaluates the guilt or innocence of the defendant without any consideration of punishment. Following a guilty verdict, the second phase determines the sentence to be imposed.<sup>4</sup> At each of these two phases, Missouri requires the production of evidence and a final decision based on the evidence.<sup>5</sup>

Robert Bullington was the first person to be tried under Missouri's then recently enacted death penalty statute.<sup>6</sup> The jury in the "guilt or innocence" stage of the bifurcated proceeding convicted defendant Bullington of capital murder.<sup>7</sup> In the sentencing stage, after the presentation of evidence and arguments by counsel and after receiving instructions from the judge, the same jury deliberated and returned a verdict of life imprisonment.

This commentary will describe the events following Bullington's conviction but preceding the United States Supreme Court's decision in *Bullington v. Missouri*.<sup>8</sup> In addition, the arguments of the

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1. Justice Blackmun, Oral Argument in *Bullington v. Missouri* 451 U.S. 430 (Jan. 14, 1981).

2. In Missouri, capital murder is defined as follows: "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. ANN. STAT. § 565.001 (Vernon 1979).

3. A bifurcated proceeding is one in which the issue of guilt or innocence is tried separately from any subsequent determination of appropriate punishment.

4. MO. ANN. STAT. § 565.006 (Vernon 1979).

5. *Id.*

6. Missouri's criminal code was revised in 1977. The death penalty provision was included in the revisions.

7. *Bullington v. Missouri*, 451 U.S. 430, 435 (1981).

8. 451 U.S. 430 (1981).

defendant which were raised before the Court will be presented. The commentary will conclude with reactions to the Court's opinion in *Bullington*.

## BACKGROUND

### *Missouri's Statutory Scheme*

Under Missouri law, a 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."<sup>9</sup> Following a jury trial<sup>10</sup> for capital murder, the jury retires to consider the guilt or innocence of the defendant.<sup>11</sup> In the event that the defendant is found guilty of capital murder, the court is required by statute to resume the trial and conduct a presentence hearing before the same jury.<sup>12</sup> During the hearing, the jury is presented with additional evidence in extenuation, mitigation, and aggravation of punishment.<sup>13</sup> Moreover, the jury may hear argument from the defendant, the defendant's counsel, and the prosecuting attorney concerning the punishment to be imposed. At the conclusion of the presentation of evidence and arguments, the judge gives the jury the appropriate instructions and the jury then retires to determine the defendant's sentence.<sup>14</sup>

Only two sentences are available to a defendant in Missouri after a conviction for capital murder. The defendant may either be sentenced to death<sup>15</sup> or to life imprisonment with parole eligibility only after serving a minimum of fifty years of the sentence.<sup>16</sup> In capital murder cases in which the death penalty may be imposed, the judge's instructions to the jury must include statutorily specified considerations.<sup>17</sup> In capital cases tried before a jury, only the jury can impose the death penalty; if within a reasonable time the jury cannot agree on an appropriate punishment, the judge cannot,

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9. MO. ANN. STAT. § 565.001 (Vernon 1979).

10. Missouri's criminal code has provisions for both jury and bench trials in capital murder cases. MO. ANN. STAT. § 565.006 (Vernon 1979).

11. *Id.*

12. *Id.*

13. *Id.* This evidence may include "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." *Id.*

14. *Id.*

15. MO. ANN. STAT. § 565.008 (Vernon 1979).

16. *Id.*

17. MO. ANN. STAT. § 565.012 (Vernon 1979) (as amended 1980).

on his or her own initiative, sentence the defendant to death.<sup>18</sup>

The standard of proof applied to the evidence at the sentencing hearing is the same "beyond a reasonable doubt" standard applied during the guilt or innocence stage of the trial. Before a jury may impose the death penalty, its members must be unanimously convinced beyond a reasonable doubt that any aggravating circumstances found to exist are sufficient to warrant the defendant's death.<sup>19</sup>

## BULLINGTON V. MISSOURI

### *Procedural History*

Defendant Bullington was charged by indictment with capital murder, kidnapping, armed criminal action, burglary first degree, and two counts of flourishing a deadly weapon.<sup>20</sup> Before Bullington's trial commenced in 1978, the State of Missouri filed a notice of evidence in aggravation indicating the state's intention to seek the death penalty for the capital murder charge.<sup>21</sup> On October 11, 1978, Bullington was found guilty on all counts. A sentencing hearing, pursuant to Missouri law,<sup>22</sup> was conducted the next day. After deliberating as to the appropriate punishment, the jury refused to impose the death penalty and directed instead that Bullington be sentenced to life imprisonment without probation or parole for at least fifty years.<sup>23</sup>

Three months before the first phase of the trial began, however, defendant Bullington had filed a motion to quash the petit jury panel. In his motion, Bullington alleged that the process used to select the jury, in particular the practice of excluding women in some circumstances, violated his constitutional right to a jury composed of a fair cross section of the community.<sup>24</sup> Following the directives of the Missouri Supreme Court in *State v. Duren*,<sup>25</sup> the trial court overruled the defendant's motion.<sup>26</sup> Thus, Bullington was forced to proceed to trial with a jury which he claimed had not

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18. MO. ANN. STAT. § 565.006 (Vernon 1979).

19. 451 U.S. 430, 434 (1981).

20. *State ex rel. Westfall v. Mason*, 594 S.W.2d 908, 909 n.1 (Mo. 1980), *rev'd sub nom. Bullington v. Missouri*, 451 U.S. 430 (1981).

21. *Id.* at 909.

22. MO. ANN. STAT. § 565.006 (Vernon 1979).

23. 594 S.W.2d at 909.

24. 451 U.S. at 436.

25. 556 S.W.2d 11 (Mo. 1977), *rev'd sub nom. Duren v. Missouri*, 439 U.S. 357 (1979).

26. 594 S.W.2d at 910.

been selected constitutionally.

Bullington then filed a motion for a new trial, which again challenged the constitutionality of the jury panel. In light of the intervening decision by the United States Supreme Court in *Duren v. Missouri*,<sup>27</sup> the defendant's motion was sustained on February 13, 1979.<sup>28</sup> The State of Missouri, prompted by the granting of a new trial, announced its renewed intention to seek the death penalty.<sup>29</sup> The trial court prevented this action on the part of the state by striking, on double jeopardy grounds, the prosecution's notice of its intent. This decision was affirmed by the Missouri Court of Appeals which denied the state's request for a writ of prohibition or mandamus. The Missouri Supreme Court reversed, however, and granted the writ, which allowed the state to attempt for a second time to impose the death penalty. Before Bullington's retrial commenced, however, the United States Supreme Court granted his petition for writ of certiorari.<sup>30</sup>

#### *Defendant Bullington's Argument*

The irony in the *Bullington* case, that the defendant was contesting the constitutionality of the jury's composition at the guilt or innocence phase of the trial while concomitantly attempting to retain the jury's verdict of life imprisonment at the sentencing phase, did not escape notice by the Supreme Court. During oral argument in *Bullington*, Justice White posed the following question: "Well, why should you rely on, be entitled to rely on what this jury did when you say that jury was unconstitutionally constituted to render a decent verdict?"<sup>31</sup>

The true irony, however, would be in compelling the defendant to risk his life for a constitutional principle, that is, the defendant would again be subjected to the possible imposition of the death penalty as a result of requesting a proper jury. Our contention was that the defendant need not and should not bear this risk. Our position was that if a jury were re-impaneled, then under the circumstances of this case it could render only one legal verdict: not guilty. It is even arguable that the state, in refusing to acknowledge defendant Bullington's claim concerning the jury composi-

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27. 439 U.S. 357 (1979).

28. 594 S.W.2d at 910.

29. *Id.*

30. 449 U.S. 819 (1980).

31. Oral argument, *Bullington v. Missouri*, 451 U.S. 430 (Jan. 14, 1981).

tion, had invited the ironic result posed by Justice White, and that the state had assumed the risk that the only constitutional result possible at the first trial would be a verdict of acquittal.

Thus, defendant Bullington, in his petition for writ of certiorari to the Supreme Court, contended that permitting the state to seek the death penalty at his retrial would unconstitutionally chill his right to a trial by jury. For if the decision of the Missouri Supreme Court were upheld and the state were permitted to seek the death penalty at Bullington's new trial, the defendant would be able to avoid any consideration of a death sentence only by waiving his sixth amendment right to a trial by jury.<sup>32</sup> Under *United States v. Jackson*,<sup>33</sup> the state may not constitutionally subject Bullington to such a choice. Moreover, the Supreme Court in *North Carolina v. Pearce*<sup>34</sup> flatly prohibited a judge from imposing a sentence more severe than the one meted out at the first trial, unless there were reasons for a higher sentence "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."<sup>35</sup> The state never contended that such reasons were present in Bullington's case. To fall under the protective umbrella of *Pearce*, therefore, Bullington would have had to waive his right to a jury at the guilt or innocence phase of the proceedings.<sup>36</sup>

In a footnote to its opinion in *Chaffin v. Stynchcombe*,<sup>37</sup> the Supreme Court appeared to reject a contention analogous to the one set forth in Bullington's petition.<sup>38</sup> The *Chaffin* Court noted, how-

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32. U.S. CONST. amend. XI.

33. 390 U.S. 570 (1968).

34. 395 U.S. 711 (1969).

35. *Id.* at 726.

36. MO. ANN. STAT. § 565.006 (Vernon 1979).

37. 412 U.S. 17 (1973).

38. *Id.* at 33-34 n.21. The footnote stated as follows:

A footnote in the Court of Appeals opinion indicates that petitioner argued in that court that unrestricted jury resentencing would have an impermissible "chilling effect" on his right to select a jury trial upon retrial. 455 F.2d at 641 n.7. Although this argument is not mentioned in his appellate brief in this Court, petitioner's counsel touched on it briefly at oral argument. Tr. of Oral Arg. 13-14. What we have said here regarding the collective force of *Pearce*, *Colten*, the guilty-plea cases, and *Crampton* should make clear that this claim is without merit. *Jackson* is not to the contrary. Unlike that case, the choice here is subject to considerable speculation. Applying *Pearce*, the judge may or may not give a sentence as high as the jury might give. More importantly, the discouraging effect cannot be said to be "needless." 390 U.S. at 583. The parameters of judge- and jury-sentencing power, given the binding nature of *Pearce*, can only be made co-terminous by either (1) restricting the jury's power of independent assessment, or

ever, that it is usually open to "considerable speculation" whether even under *Pearce* the judge "may or may not give a sentence as high as the jury might give."<sup>39</sup> In Bullington's case, there was no room for such speculation; the state's concession that it possessed no additional evidence against Bullington "peculiarly insur[ed] that . . . [if Bullington] waived a jury trial in favor of a bench trial, . . . [he] could not be sentenced to death . . . ."<sup>40</sup> Furthermore, *Chaffin* did not involve a defendant actually sentenced to death by a jury under circumstances where the judge could have imposed no greater sentence than life imprisonment.<sup>41</sup> Bullington faced precisely this predicament. If he were to forfeit his sixth amendment right to a jury upon retrial, he would "absolutely preclude imposition of the death penalty."<sup>42</sup> The Supreme Court in *United States v. Jackson*,<sup>43</sup> however, clearly prohibits the defendant from having to make such an involuntary forfeiture.<sup>44</sup>

While we were well aware of the Court's holding in *Chaffin*, we felt that there were several crucial factual distinctions between *Chaffin* and Bullington's case which necessitated reexamination of the issue. First, Bullington, unlike *Chaffin*, if convicted of capital murder at his second trial faced only two possible punishments: death or imprisonment for fifty years without probation or parole.<sup>45</sup> When *Chaffin* elected to retry his case to a jury, the range of

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(2) requiring jury sentencing in every felony case irrespective whether guilt is determined by a bench trial or a guilty plea after reversal of the conviction. Either alternative would interfere with concededly legitimate state interests, and thus the burden imposed on the right to trial by jury is no less "necessary," *post*, at 44-46, than the burdens tolerated in *Brady* and *Crampton*. Where the burden of the choice is as speculative as this one is, such incursions upon valid state interests are not justified.

The argument was not, however, developed in the briefs in *Chaffin* and counsel for *Chaffin* merely "touched on it briefly" in argument before the Supreme Court. Further, the contention was advanced by all four dissenting justices in *Chaffin*. Justices Douglas, Stewart, Brennan and Marshall were the *Chaffin* dissenters.

39. 412 U.S. at 33 n.21.

40. *Lockett v. Ohio*, 438 U.S. 586, 618 (1978) (Blackmun, J., concurring). *See also* *North Carolina v. Pearce*, 395 U.S. 711 (1969).

41. 412 U.S. at 35.

42. 438 U.S. at 618.

43. 390 U.S. 570 (1968).

44. *Id.* at 582-83. *See Corbitt v. New Jersey*, 439 U.S. 212 (1978) (rationale of *Jackson* applies where waiver of a constitutional right "avoids any possibility of the death penalty's being imposed." *Id.* at 217).

45. MO. ANN. STAT. § 565.008 (Vernon 1979). *United States v. Jackson*, 490 U.S. 570 (1968), which held unconstitutional a provision of the Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1956), that limited the power to impose the death penalty to the jury on the basis that it needlessly chilled the defendants from exercising their right to trial by jury, was

punishment was from four years imprisonment to death.<sup>46</sup> Thus, the broad range of sentencing possibilities confronting Chaffin was a compelling factor in his choice to undergo the risk of a trial by jury. In contrast, Bullington was statutorily denied such a myriad of sentencing possibilities. The only sentence other than life imprisonment previously imposed for capital murder in Missouri was death. The Hobson's choice confronting Bullington rendered any decision to allow a jury to impose sentence, rather than the trial judge, a poisoned fruit that tipped the scale towards death. In addition, *Chaffin* was decided prior to *Gregg v. Georgia*,<sup>47</sup> which recognized that death is qualitatively different from any other penalty and requires unique treatment.

Another factor distinguishing Bullington's appeal from *Chaffin* was the sentencing procedure of the respective state in each case. While Chaffin was sentenced by a jury in a one-stage trial under Georgia's general sentencing procedure, which provides for finely graded sentences on a broad spectrum, Bullington was tried in a bifurcated proceeding.<sup>48</sup> In accordance with Missouri law, Bullington's jury was instructed in the penalty phase to sentence on the basis of specific findings.<sup>49</sup>

Finally, Chaffin's decision to invoke his right to a jury was not actually chilled by the possibility that his sentence would be increased to death on retrial. He accepted the risk and asserted his constitutional rights in spite of the gruesome possibility.<sup>50</sup> In contrast, Bullington's decision was, at the time of the Supreme Court argument, truly "chilled." Moreover, Bullington was aware of the consequences of the choice he had to make. Under these distinguishing circumstances, it was our contention that forcing Bullington to decide to forfeit a basic constitutional right in order to avoid

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ruled inapposite to the *Chaffin* case. 412 U.S. at 32 n.20.

46. 412 U.S. at 18 n.1.

47. 428 U.S. 153 (1976).

48. See *supra* notes 10-14 and accompanying text.

49. MO. ANN. STAT. § 565.012 (Vernon 1979). The requirement of specific findings in the sentencing stage eliminated many of the problems previously associated with imposing the sentencing standards of *North Carolina v. Pearce*, 395 U.S. 711 (1969), to jury sentencing.

50. The Supreme Court rejected Chaffin's argument that his rights had been chilled. 412 U.S. at 29-35.

The *Chaffin* Court dealt only with the hypothetical situation of a *Bullington*-like case. But in *Bullington*, because certiorari was granted prior to the defendant's retrial, Chaffin's hypothetical dilemma actually existed and was not viewed by the Court in hindsight from the sterile pages of a trial transcript.

death was unconstitutional.<sup>51</sup>

#### CONCLUSION

Although Bullington's case may have far-reaching implications only for future capital cases and may be judicially limited to that "unique and distinct penalty," the nagging question concerning the erosion of those principles enunciated in *United States v. Jackson* will continue. If a defendant can be forced to choose between his constitutional rights and death, the paradigm of forfeiture, he is compelled to engage in a deadly game of Russian roulette that pits his rights to a jury and to appeal against his instinctive desire for life.

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51. *Bullington v. Missouri*, 451 U.S. 430 (1981).