In the

Supreme Court of the United States

DAVID WAYNE BURKS,

Petitioner,

vs

UNITED STATES,

Respondent.

No. 76-6528

Washington, D. C.
November 28, 1977

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DAVID WAYNE BURKS, Petitioner,	:	
v.	:	No. 76-6528
UNITED STATES	:	

Washington, D. C.

Monday, November 28, 1977

The above-entitled matter came on for argument at 1:38 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

BART C. DURHAM, III, ESQ., 1104 Parkway Towers, Nashville, Tennessee 37219, for the Petitioner.

FRANK H. EASTERBROOK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-6528, Burks against United States.

Mr. Durham.

ORAL ARGUMENT OF BART C. DURHAM, III, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DURHAM: Mr. Chief Justice, and may it please the Court:

This case arose in Nashville, Tennessee. It was a bank robbery which occurred there some two years ago. The defendant, at his arraignment, interposed a plea of not guilty by reason of insanity.

At that time in the Sixth Circuit, we were operating under the Smith rule, which we presently are today, known as "Smith One," the case decided in 1968. The defendant, as I said, entered a plea of not guilty by reason of insanity, and on motion of the Government he was ordered to be examined for mental competency. The order of the District Court which required him to be examined set out the three rules which the Sixth Circuit, which uses the ALI rule, basically requires, and ordered the physician to report to the court and the United States Attorney the answers to those questions.

Trial came on sometime later and the issue was contested on the facts at the trial, but the trial transcript, almost the bulk of it, if not probably the bulk, is consumed

with really the only defense, and that is insanity. The United States used a psychiatrist and a psychologist as their witnesses. They also used lay persons in the bank and a cab driver who was kidnapped just before the robbery for a few moments. As I said, they used the lay witnesses in the bank and they used the FBI agents who apprehended him just a few moments after the bank robbery and made the arrest.

The defendant used as his experts the family of the defendant who testified to bizarre, erratic and unusual behavior, and three medical witnesses, two highly qualified psychiatrists, one of whom had been used, a Dr. Munden, who had been used many times by the United States as their choice to examine potential defendants interposing insanity defenses and --

QUESTION: Are you suggesting we shall inquire into or try to re-evaluate the qualifications of the expert witnesses?

MR. DURHAM: No, sir. My point is just saying that there were five medical expert witnesses and it was extensively presented to the trial court.

The United States Court of Appeals for the Sixth Circuit looked into that matter and they reversed the case under the authority of 28 U.S.C. 2106 Federal Statute, which empowers this Court and the Courts of Appeal to enter such orders as are just and appropriate.

The Sixth Circuit, in my opinion, made a finding of fact that the Government did not make a prima facie case.

Counsel for the United States has raised the question of whether -- raised by the members of the Court a few minutes earlier -- as to whether the Government made a prime facie case or to what extent one might read that opinion of the Sixth Circuit. But, in any event, they found that because of insufficient evidence the case should be remanded.

The Sixth Circuit cited the Bryan rule which has been discussed today. As Your Honors know, and as I've set out, there was no criminal appeal except in extraordinary cases until 1890-something and then, I believe, only in capital cases. And in 1896, the Ball rule came forth which was an attack on double jeopardy and it is the leading case in that, and set forth the rule of waiver in which it was said that sometimes someone who got a new trial was either starting on a clean slate or that there was continuing jeopardy, or that by asking for a new trial he had waived it.

Much of my brief is taken up with rebutting the waiver rationale in light of this Court's later opinions, and particularly in light of the Green decision of this Court. I believe the Solicitor General's brief -- a fair reading of that -- pretty much agrees with me that waiver is not an issue. With respect to waiver where one specifically asks for a new trial as well as a judgment of acquittal -- which was a question asked sometime ago -- I would only say that any defendant would rather have an acquittal rather than a new trial. If that's the

only choice with which he is faced, then it is no choice at all. Whereas, in this case, we asked the District Judge both for a new trial, we filed a motion for a new trial alleging other errors --

QUESTION: What about the choice between a new trial and a judgment of conviction?

MR. DURHAM: A new trial and a judgment of conviction, that's one which a defendant on appropriate occasions prefers a judgment of conviction in light of Jackson v. Steinchrone and some of the cases this Court has decided that he might get more time on the second --

QUESTION: Well, suppose in the trial court you move for a judgment of acquittal, on insufficiency of the evidence, move for a new trial on the ground it's against the weight of the evidence, or whatever the rule may provide. Your motion for judgment of acquittal is denied, your motion for new trial is granted. Do you think that at the commencement of that second trial you can then raise a double jeopardy claim?

MR. DURHAM: No, sir.

QUESTION: Why not?

MR. DURHAM: Well, assuming it was denied -- Assuming it was spelled out, if you were denying it --

QUESTION: Supposing it is just a minute order of the trial judge, motion for judgment n.o.v. denied, motion for new trial granted on the grounds of -- against the weight of the

evidence.

MR. DURHAM: No, sir. I don't think you could. I think the only -- you would be limited to that to where it was clear it went to the sufficiency of the evidence, and if it was just a minute order I don't think you would have enough of a record, really.

QUESTION: He is being tried a second time for the same offense. How can that be done under the Double Jeopardy Clause?

MR. DURHAM: Well, it's one of the exceptions. One must bring one's self within the exceptions and I don't think that one properly has in that instance.

Bryan v. United States was what I believe to be the first considered opinion. It was decided in 1950 by this Court. As I point out, it was a twelve-paragraph decision. It was decided a few months, or within a short time after the new Rules of Federal Criminal Procedure were adopted, and it was primarily concerned, in my judgment, with the application of the rules that involve the district court vis-a-vis the power of the Court of Appeals. And the Court did have language in there and did say in the final paragraph that it does not violate the double jeopardy provision of the United States Constitution to re-try a man the second time for insufficient evidence.

Subsequent to 1950 in the Bryan case, it has been

the subject of nothing but uncomplimentary articles both in the courts, discussions in the courts and in the Law Review articles, to the fact that Bryan was wrongly decided. And if I read the brief of the United States fairly, I believe that they are willing to give a great deal on Bryan, although they are not, of course, willing to give all. In fact, if I read the brief fairly for the United States, we can almost make the argument that they are willing to give this case but they wish to urge the Court that the Bryan overruling, if such be the case, not be extended to all cases where the evidence is insufficient to support the verdict.

The reasons advanced for double jeopardy occurring where the evidence is insufficient to support the verdict have been numerous. Since 1950, I think, we've seen an increase in decisions on double jeopardy. Double jeopardy as a hierarchy of rights has taken a strong position.

Some of the reasons which I would urge on the Court why this distinction should be allowed would be as follows. And before I get to that let me point out the difference between reversals for procedural errors and reversals for insufficient evidence.

Where the case is reversed for procedural error, the defendant did not get the trial to which he was entitled. The prosecutor made some remark that was wrong, a statement was introduced against him which was not reliably probative, or

some other reason. And so, heretofore, it seems to me we have a great unrecognized quantum difference between a reversal for procedural error, such as, even in Bryan, the two cases it cited involved those type of cases. We have a quantum difference --

QUESTION: By procedural error, do you mean trial error, generally? Trial error, as distinguished from an insufficiency of the evidence.

MR. DURHAM: Yes, sir. I mean any other error other than just failure of the state to sufficiently --

QUESTION: Would there be any other categories --

MR. DURHAM: I am sorry.

QUESTION: Are there any other kinds of errors that could be raised on appeal, other than either errors in the trial or insufficient evidence to support the verdict?

MR. DURHAM: No, sir.

QUESTION: How about defective indictment?

MR. DURHAM: Yes, sir, a pretrial error, sir, defective indictment, statute of limitations, some of those errors.

QUESTION: Defective grand jury?

MR. DURHAM: Yes, sir.

QUESTION: So there could be pretrial errors?

MR. DURHAM: Yes, sir. In one category, I think, we put all errors involving sufficiency of the evidence, and in

Box B we put everything else. And I think it is readily ascertainable the quantum difference between the two.

Now, as I said, this Court has never given, as far as I know, plenary consideration, or even discussed that difference until today. Some of the arguments in favor of granting acquittals after insufficient evidence have to do with the disparity of treatment which the same defendant might receive. For example, other trial courts -- Let's assume the evidence is insufficient to support the verdict. Trial Court A might affirm as we've heard here in the case in Florida. Another judge sitting might grant the new trial on the same proof. And also other appellate courts, two different panels of appellate courts might grant acquittal. In the Sixth Circuit, in the case I've cited in my brief, Rosenbarger, the Court of Appeals, one panel sent the case back a few years ago, ordered a judgment of acquittal. In the present case before you today, they sent it back for a new trial.

And then you have different standards. The case was sent back today under a Fifth Circuit standard. In other instances, the standard has been, rather than what's just and appropriate, sometimes they have -- like in the Wiley case or some of the other cases that have been mentioned -- they have been sent back as to the prosecution was unfairly prevented from bringing evidence.

So one has cases either being sent back or not sent

back and of those that are sent back, then we have different standards for that. So we almost have a lawless -- as Mr. Justice Stevens pointed out -- his question suggested to me in many ways we have a lawless system of appellate review. We are standardless.

Furthermore, there is the argument that the idea of allowing the Government two bites of the apple in instances of insufficient evidence condones and perpetuates careless prosecutorial trial and preparation. And I believe that a fair reading of the record would show that that is true in this instance.

In this instance, it seems egregious. Number one, there was a plea of not guilty, quote, "by reason of insanity," close quote, in minute entry, and orally in court. So they were advised at arraignment what it would be. Number two, the judge's order to determine competency set out the three rules of Smith. Number three, the defense at trial, of course, had to raise the issue of insanity first, and they asked every witness. They went right down the Smith rule in the Sixth Circuit. Furthermore, the record shows we had large charts and which we asked each witness, "What's your answer to Question 1, Question 2 and Question 3?" And lastly, the court in its charge to the jury followed that.

The Smith case, as I say, was decided in 1968. Smith Two which went into and amplified Smith One, which was the same

defendant back on a retrial, on a subsequent appeal, after a retrial, went into the question of the quantum of proof, or what was the evidentiary value of lay witnesses.

I think that this is an instance. We are not suggesting that the prosecutor has to bam, bam, bam, one, two, three, ask the ALI questions or Smith and Ninth Circuit questions, but he's got to some way elicit the ultimate facts of that. He failed to do that. He used the type of witnesses who the Sixth Circuit had already told him did not have proper credentials. In that 1970 opinion, they said someone who just sees the crime for a few minutes, and went on to describe the witnesses that the Government used, that those type of people don't have sufficient knowledge for the trier of fact to reach the ultimate issue.

Society, of course, should fear. In the Tateo case and the Wilson case decided a term or two ago by this Court, is urged a balancing of the equities. But that's not the instance in insufficient evidence cases. You know, society should fear the release of a defendant acquitted on a procedural error, because we make a judgment there that it's better, perhaps, to uphold the principle to let one man go for that reason than it is to insist upon a conviction. One of the striking examples of that, of course, is this Court's opinion not long ago, perhaps last term, in a case out of Arizona where the defendant had murdered a child and had given a confession

to the police officer driving back. A decision was made that it was better that that be suppressed and perhaps that defendant may have been ultimately released, as a societal balancing of the interests. But that's not true in the present case because, as I said, we have no interest in keeping a man where the evidence was insufficient to convict him. Forget the Double Jeopardy Clause and all it means for a moment. Society has no interest where a court of appeals has looked at the proof, everything there, and has found that the Government has not made a case against the man.

Furthermore, there is no difference between raising the issue of insufficient evidence at trial and on appeal. I think this really would conserve judicial energy, in that sometimes trial judges may let cases go on appeal thinking that the appellate court might sort all this out. But the defense counsel and trial lawyers should perhaps be more diligent in doing that.

Now, injustice can be exacerbated when the defendant cannot make bond. In the present case, for example, the defendant has not made bond. And in many other cases --

QUESTION: What do you think underlies the Federal Rule that you disagree with? What kind of a policy or judgment underlies or justifies the Federal Rule, barring other things have?

MR. DURHAM: If you restrict it to retrial for

insufficiency of evidence, I think one can make an argument that appellate courts get feel that this man is probably guilty and that it is in the interest, without any varying enunciated criteria, they get a feeling that he should be retried.

QUESTION: Do you think the Federal Rule is representative of most state practices, or do you know?

MR. DURHAM: I think that in most practices that historically there has been no differentiation between -- just as in the Federal courts -- between reversals for procedural, as opposed to reverses for insufficiency of the evidence.

QUESTION: So you are suggesting that we, on a constitutional basis, invalidate a rather wide majority of state rules, too?

MR. DURHAM: I don't think that it has ever been considered and it comes up that often, but it's -- I would urge this Court rule on a constitutional basis, firstly, and secondly, I would urge it rule on the statutory basis and its supervisory powers over the lower Federal courts, under the facts of this case, under Section 2106.

Society has no interest in re-trying no evidence cases. The time that is used --

QUESTION: By statutory basis, you mean a holding that this was an abuse of discretion to say that this was an appropriate order of the Court of Appeals and the facts

of the situation here; is that it?

MR. DURHAM: Yes, sir. I think you could look at the Sixth Circuit and say they've done two or three different things with different cases, the Rosenbarger case cited in my brief and this case. One they acquitted and one they did not. I cite an Illinois case from an Illinois Bar Journal article in which the commentator makes the point that in a rape case out of Illinois two men, two separate times, committed rape. One didn't match up to the corroborative rule, the other did. So they sent one back for a re-trial and they acquitted one.

QUESTION: Are you making essentially the same argument that was made in the preceding case which you heard that confronted with this situation an appellate court has just two choices, affirm or reverse, and that there are no other alternatives?

MR. DURHAM: Yes, sir.

MR. CHIEF JUSTICE BURGER: Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

FOR THE RESPONDENT

MR. EASTERBROOK: Mr. Chief Justice, and may it please the Court:

At least since 1896, when United States v. Ball was decided, it has been settled that the Double Jeopardy Clause imposes no limitations on the power to re-try a defendant who, after being convicted at trial, succeeds in having his

conviction set aside. The principle is as old as the Double Jeopardy Clause and this Court applied it in the Bryan case, two reversals for insufficient evidence. Bryan squarely controls this case, and in our view the open question is whether and to what extent Bryan should be reexamined.

Petitioner here, like Petitioner in the preceding case, invokes a syllogism. It runs like this: One, if the evidence is insufficient to support a conviction, the court should grant a judgment of acquittal without submitting the case to the jury. Two, if the trial judge grants such a judgment of acquittal, the Double Jeopardy Clause bars a second trial. Three, a reversal on appeal because of insufficient evidence amounts to a determination by the Court of Appeals that the trial judge should have granted that motion. Four, since what should have been done ought to be treated as if it had been done, this case should be treated as if the judge had granted the judgment of acquittal and the Double Jeopardy Clause, therefore, bars another trial.

QUESTION: You agree with the soundness of the first three premises but not with the conclusion, is that it?

MR. EASTERBROOK: We have in the past taken issue with the soundness of that premise. We took issue with it in Martin Linen. Mr. Justice Rehnquist argued in the Lee case that a decision by the judge should be treated the same as a dismissal of the indictment, but that's been settled by Martin

Linen.

QUESTION: Right.

MR. EASTERBROOK: For the purpose of this case, we take issue with the conclusion and the part of the fourth premise that is a conclusion, rather than a --

QUESTION: And not with the first three premises.

MR. EASTERBROOK: That's right.

We think the syllogism suffers from excessive attention to form. The rule that an acquittal by the judge is final and that the Double Jeopardy Clause bars a second trial is justified as a means to protect the ability of the defendant to receive a verdict of the jury and to protect his interest in an acquittal that he actually obtains. But it requires a leap to say that a person who was not acquitted at trial deserves the same treatment. This case does not require speculation about what a jury would have done if given the chance. It was given the chance and it returned the verdict of guilty. This case does not involve the defendant's interest in preserving a disposition in his favor.

QUESTION: Do you think this case, involving as it does the weight of the evidence on his criminal responsibility, is any different from the weight of the evidence on presence at the scene of the crime or any other element of the crime?

MR. EASTERBROOK: We believe it is, Your Honor. This is a case in which the prosecutor presented a prima facie

case that the defendant robbed the bank and, indeed, on appeal the defendant conceded that he robbed the bank. All of the testimony that his psychiatrist gave explained why he robbed the bank, what internal compulsion drove him to become a bank robber. We believe, for that reason, this case falls well within the argument of Tateo that there is a category of cases in which the public has an interest in avoiding seeing those who are actually guilty of crime go free because of an error made at trial.

QUESTION: Tateo was during the trial, wasn't it?

MR. EASTERBROOK: Yes, Your Honor, it was. Defendant pleaded guilty during the trial of Tateo.

QUESTION: A person who is insane cannot be guilty of a crime.

MR. EASTERBROOK: That's true and in that sense ultimately sanity is known to the offense, so --

QUESTION: There cannot be guilt on the part of the person who is insane. One may argue about the definition of insanity, but putting that to one side, a person who is insane cannot be guilty of a criminal offense. You would agree to that, wouldn't you?

MR. EASTERBROOK: I agree with that.

QUESTION: On what basis do you agree? Is it a statutory matter or a common law matter, constitutional?

MR. EASTERBROOK: It's a common law matter in the

Federal courts. The decision of this Court in the Davis case was that as a matter of Federal common law sanity is part of the offense. But in Federal cases, the usual order of proof is proof of the commission of the offense, then the defendant's proof of sanity, of insanity, then the prosecutor's --

QUESTION: Then you still stand on your response to my prior question, that there is a difference?

MR. EASTERBROOK: There is at least for constitutional purposes, Mr. Chief Justice. The Court held in Leland v. Oregon that as a constitutional matter sanity need not be part of the offense and that the defendant can be required to prove lack of sanity. For that purpose, there is a difference between those elements of the offense that the Constitution requires to be proven beyond a reasonable doubt, and that includes the fact that Petitioner robbed a bank, and those elements that the Constitution does not require to be so proven, and that the defendant, indeed, could be required constitutionally to prove.

QUESTION: Burden of proof is something else. I think you've already said, but let me be sure that I understand it, that you would concede, would you not, that an insane person cannot be guilty of a criminal offense if he's insane at the time of the conduct which on the part of a sane person would be a criminal offense?

MR. EASTERBROOK: Yes, Your Honor, but my answer to

the Chief Justice's question may be more easily understood once I've established some of the premises of my argument, and I would like to turn back in that direction.

I was trying to discuss the reasons why an actual acquittal at trial has been thought to deserve a special rule of finality. My point then was that Petitioner was actually not acquitted at trial, he had no interest in that sort of finality that he was seeking to preserve. In fact, this is a case in which the judge and all twelve jurors concluded that sanity had been proven beyond a reasonable doubt on the evidence that they heard. Petitioner's argument rests on a form of symmetry. "If I had been acquitted, I couldn't be re-tried. Since I should have been acquitted, I shouldn't be re-tried." But the argument from symmetry is weak because it slights the reasons for giving special force to an acquittal that actually took place, and it slights the rule that reversals on appeal of a conviction at trial always have been treated differently. It is hard to see why a non-obvious defect in the evidence, a defect so subtle that it was missed by the prosecutor, by the judge and by all twelve jurors, should confer automatic immunity from prosecution.

QUESTION: But this case didn't say any -- This case said insufficiency of evidence, and that's not like forgetting to show that the man was eight years old.

MR. EASTERBROOK: Your Honor, the Court of Appeals

did say that the evidence was insufficient.

QUESTION: No. They did more than that. That was the basis of the ruling, wasn't it?

MR. EASTERBROOK: I am sorry, Your Honor.

QUESTION: Wasn't that the basis of the ruling, of their ruling?

MR. EASTERBROOK: The decision of the Court of Appeals was that the evidence of sanity was insufficient. It is sometimes necessary, we think, in cases like this, to determine what the court meant by that. As Judge Leventhal said in the Wiley case on which we have relied heavily in our brief, Courts of Appeals sometimes use evidence, use language of insufficiency when they mean something else. The Court of Appeals might have meant two somethings else in this case. The first something else it might have meant was that the prosecutor should have asked his expert witnesses, point blank, the question whether the defendant was substantially capable of conforming his conduct to the requirements of the law. And not having asked that question, point blank, and gotten an answer, he hadn't put on a form of evidence that the Court of Appeals wants in insanity cases. But that might not mean that the jury was proscribed from inferring from the other things those psychiatrists said, how they would have answered that question if it had been asked.

QUESTION: Mr. Easterbrook, under the Glasser rule,

shouldn't the evidence have been taken most favorably to support the verdict and, therefore, wouldn't the Appellate Court have a duty to assume that the jury did make the inference, if that was a permissible inference?

MR. EASTERBROOK: I think, Mr. Justice Stevens, that the evidence should have been so taken, and indeed there is a strong argument that the Court of Appeals, in this case, was wrong in its evaluation of the evidence, precisely because --

QUESTION: But you didn't cross petition, so --

MR. EASTERBROOK: We did not cross petition and we did not raise it as an argument in support of the judgment.

QUESTION: Don't we have to take the case as though the Court of Appeals held the evidence was insufficient?

MR. EASTERBROOK: I understand that we do. My point in making this point was that, even taking the case that way, there are many varieties of insufficiency of the evidence. It comes in different shapes and colors, and it is not all the same as if the prosecutor for an unexplained reason had simply neglected to prove that the defendant robbed the bank.

The only way to put this, I think --

QUESTION: I don't really understand your example, because if we assume, in accordance with Glasser, that the jury did draw all the inferences favorable to the Government that it could have drawn, and the Court of Appeals nevertheless found the evidence insufficient, why is this different from the

last case, for example?

MR. EASTERBROOK: I might try the answer in a slightly different way. Wherever you draw the line between sufficiency of the evidence and insufficiency of the evidence, some cases are going to be very close to that line on either side. The Court of Appeals is confronted with a very difficult question when it gets that kind of case. If it has two alternatives and two alternatives only, reversing the conviction outright and discharging the defendant on the one hand, and affirming the conviction outright on the other hand, it may be influenced in making its decision, as the Court said in Tateo, by the fact that it believes that there has been a prima facie case of guilt and that the technical insufficiency of the evidence is really not enough to bar a conviction of someone who in the Court's view is actually guilty. If it views the case that way, it may be inclined to err on the side of affirmance. If it has only two options. It would have the duty to --

QUESTION: How can you say, then, it is erring on the side of affirmance? Just performing its duty, isn't it?

MR. EASTERBROOK: The question is how it resolves doubt. There is doubt in many of these cases, and some rules are necessary for resolving them.

QUESTION: This is on direct appeal.

MR. EASTERBROOK: On direct appeal.

If it ends up resolving doubt in those kinds of cases

in favor of affirmance, it is a rule that is probably not beneficial for defendants as a group.

QUESTION: But isn't it beneficial for inquiry for us, whether the rule is in the long run going to be helpful or harmful?

MR. EASTERBROOK: One of the concerns, one that I think is important, is how the Court of Appeals is going to deal with the cases in which it has substantial doubt, in which it finds itself on the razor's edge between conviction and outright dismissal of the charges.

The point I was trying to make is that a remand for a second trial in that class of cases offers the Court of Appeals, and defendants as a group, an attractive option that avoids the great dilemma that it might otherwise be in.

QUESTION: Why is it so clear that that's an attractive option? If you remand in doubtful cases, you put society to the expense of a second trial which, really, may be unnecessary and you may put both parties to the burden of another trial and you may also let a guilty man go free. There are two sides to all these arguments, it seems to me.

MR. EASTERBROOK: I agree that there are. I am not suggesting that the Court should resolve them in a particular way in a particular case. One of the -- I was using this as an argument to show that in some cases that kind of disposition is a proper one and, indeed, perhaps, the best one, fairly

reflecting the inability to decide whether the evidence technically described under the Glasser standard is sufficient. We have not argued, on the other hand, for a uniform rule that such cases should go back for a second trial. Our argument has been that the Court of Appeals ought to ask a number of questions. The first is: Whether the evidence that it thought was missing could be supplied at the second trial? The second question is: Whether there was some reason that it was not supplied at the first trial? The nature of that reason may be very important.

QUESTION: Is this still on direct appeal?

MR. EASTERBROOK: Still on direct appeal.

The nature of the reason why it was not supplied -- Excuse me -- Let me get back to your question, Mr. Justice Rehnquist.

I was not suggesting that the Court of Appeals would, itself, address those questions.

QUESTION: You say your opponent's argument is a triumph of form over substance. I am inclined to think yours is a triumph of substance over form, if you are going to have every one of these an ad hoc determination by the trial judge as to whether eighteen factors have been met or not. This is a rule that has to be applied by 400 Federal trial judges and thousands of state court judges. It has to have some black and white line-drawing character to it.

MR. EASTERBROOK: I think it is difficult, Mr. Justice Rehnquist, to have a clear-cut line in cases like this.

QUESTION: Well, your brief certainly revealed your feelings to that effect.

MR. EASTERBROOK: One reason for that is because we were starting -- at least I was starting here almost by hypothesis with the class of cases in which it is difficult to make a decision under the Glasser standard. But there are a variety of other cases, I think, in which it is also difficult to make a decision. Those are the classes of cases in which you can't tell whether the error is legal or simple inability to prove the offense. There are many cases in which there has been a reversal which purportedly is for insufficient evidence that may have other things underpinning it.

QUESTION: That's because the Court -- If I am trapping you -- That's because the Court had some other handles to grasp, that is an attack on the conviction that was based on trial errors or pretrial errors and insufficency of the evidence, and by singling on one of the trial errors the double jeopardy problem is avoided. But we can't rely on any such distinctions here, can we?

MR. EASTERBROOK: We can't rely on any pretrial errors here, but what I was suggesting and, indeed, suggested in response to one of the early questions, was that this may

be a case in which it is hard to tell legal rules and factual insufficiency apart, to the extent the Court of Appeals is saying that it believes that the right way to try an insanity case is to ask the point-blank question: Was the defendant substantially capable of conforming his conduct?

QUESTION: Except that this Court, something in the neighborhood of 60 years ago, said that's precisely what you cannot do, that's the question for the jury and the questions at the trial must be directed at furnishing all the bits and pieces from which the jury can draw that inference. That was in the disability case where the question was: "Doctor, in your opinion, is the Plaintiff totally and permanently disabled?" And this Court said you can't ask that kind of a question.

MR. EASTERBROOK: The Court said that, Mr. Chief Justice, but that decision has been reversed by Federal Rule of Evidence 704 which provides, which was intended --

QUESTION: Under our new Rules of Evidence. I am talking about the case law. You were addressing yourself to that.

MR. EASTERBROOK: My point was that there was, at least until the time the Sixth Circuit decided this case, an open question of law in that court about whether those questions in addition to being permissible were also mandatory. The Court of Appeals now seems to have decided that they are

mandatory. But that, ultimately, is a legal decision and can be described as either a mistake of law on the part of the prosecutor in not having recognized that before trial, or as a failure of proof. I think there are a lot of other examples of that.

For example, suppose hearsay evidence is admitted and the Court of Appeals then concludes that, disregarding the improperly admitted hearsay, what's left is insufficient. Is that insufficiency of the evidence or error in admitting the hearsay? Suppose the District Court misunderstands some of the elements of the offense and calls on the prosecutor to prove fewer than all of them. Or take a claim of variance between the charge and the proof which comes up especially often in conspiracy cases. That can be seen either as too little proof of the particular conspiracy charged in the indictment, or too much proof of other conspiracies. Suppose the prosecutor proves an offense but not the one charged in the indictment. Is that too little proof or proof of something else?

The examples can go on and on. Critical evidence can be suppressed in mid-trial on Fourth Amendment grounds and what's left is insufficient. The suppression may be erroneous, raising purely illegal questions. Even the questions the prosecutor asks --

QUESTION: Let me just test your example about the

multiple conspiracy versus the single conspiracy --
Your saying the trial judge could either hold, could either conclude there was not enough evidence to prove the particular conspiracy charge or, alternatively, he could hold that there was prejudicial evidence of a lot of other conspiracies.

MR. EASTERBROOK: Or he may hold both at once.

QUESTION: Well, if he holds the former, why isn't -- why doesn't that entitle the defendant to an acquittal? And if he holds the latter, it's clear he is entitled to a new trial. Why is that such a complicated case?

MR. EASTERBROOK: The decision of the judge may be -- I think you were phrasing them as alternatives -- I believe the judge often does both at once. He says you prove two conspiracies, not one.

QUESTION: But if he is charged with one and the one charge has not been proved, why should not the man go free simply because an additional error was committed. Isn't that what you are saying?

MR. EASTERBROOK: The judge's responsibility in that case may be to grant a judgment of acquittal, but suppose he doesn't? The question is then what happens?

QUESTION: The hypothesis in all of your hypothetical cases, I assume that the trial judge whatever he should have done, didn't do it, and it was up to the jury and there was a conviction and now we are on appeal. Those are your

hypotheticals.

MR. EASTERBROOK: Those are all my hypotheticals.

QUESTION: Nothing would happen in that trial court except a conviction. On appeal, the appellate court was able to identify the error it has decided required reversal. And if it identified it as a failure of proof, one could say without terrible difficulty, that requires acquittal. If he determines that it was prejudice, because other conspiracies are proved, it would follow a new trial. It is just a matter of deciding the issues.

MR. EASTERBROOK: I think somtimes it is hard to say whether it requires an acquittal. Perhaps the appellate court could conclude with equal accuracy there was really a defect in the framing of the indictment and that what should have happened is the judge should have mistried the case, rather than acquit him.

QUESTION: Then you have the Ball case. That fits right into a neat category, too, doesn't it?

MR. EASTERBROOK: Sometimes it is hard to fit them into neat categories.

QUESTION: A lot of appellate decisions are very, very difficult, but that doesn't mean we dispense with rules, does it?

MR. EASTERBROOK: I am not suggesting we dispense with rules. I think we have suggested one. But let me try

once more with the Forman case. One that fits in fairly clearly to your hypothetical, with the added wrinkle that the district judge was wrong. Defendant is charged with income tax ivasion, was charged about six years after the return was due to be filed. His contention is that he can't be convicted unless the prosecution proves a subsidiary conspiracy to conceal, because that is the only thing within the statute of limitation. The district judge agrees with him wholeheartedly and charges the jury on a subsidiary conspiracy to conceal argument, a charge that this Court determined in Gruenwald was erroneous. There was, it turns out, absolutely no evidence to support that charge. If the judge had believed his own legal conclusion, he should have acquitted. If the jury had believed the judge's charge, it should have acquitted. Neither happened. The jury convicted. The Court of Appeals then sent the case back for a new trial under the proper instructions. The Defendant's argument was that his right to be acquitted matured at trial and he should have been acquitted. And this Court's answer was that it didn't make any difference what should have happened at trial, the fact is that he wasn't acquitted. He was convicted. So his interest in preserving acquittal which never took place simply never came into being.

QUESTION: With a sufficiency of evidence case, isn't there a fundamental distinction between reviewing on sufficiency of the evidence and reviewing for all other

purposes?

MR. EASTERBROOK: Mr. Chief Justice, I think there is an important distinction. The distinction arises because the Double Jeopardy Clause was designed in part to prevent the prosecutor from making repeated attempts to assemble and introduce enough evidence to convict a defendant. Defendant has an important interest in avoiding multiple trials where the only difference between one trial and another is the ability or willingness of the prosecutor to introduce probative evidence. But we have submitted that that interest is not enough to prevent a second trial in every event where you might characterize the defect in the first trial as insufficient evidence. Petitioner here, after all, was not acquitted or deprived of his opportunity to be acquitted. He was convicted.

Allowing second trials does not provide an incentive for prosecutorial misconduct or overreaching. It would be an exceptional, foolhardy prosecutor who intentionally failed to introduce enough evidence at the first trial, hoping that in the teeth of the lack of evidence the jury would convict, the Court of Appeals would reverse, and he would have the opportunity to vex the defendant with a second trial. It would be extraordinary. It doesn't happen.

The legitimate interests of the defendant do deserve recognition. But they were properly recognized here by the nature of the Court of Appeals remand. This case was not

remanded mechanically to hold a second trial. It was remanded to determine why the evidence was insufficient in the first trial. To determine, that is, whether this was a simple failure of the prosecutor to put on evidence that he had, or a simple inability to assemble the evidence, or whether it wasn't, instead, something more.

We think the ends of public justice in a particular case should be the guiding star, whether under the Double Jeopardy Clause or under Section 2106. A second trial is just and appropriate if the first trial was defective because of a mistake of law, whether or not that mistake ultimately displayed itself in the insufficiency of the evidence. Mistakes of law are too common to permit them to immunize defendants from prosecution, and the interest in accurate resolution of criminal charges outweighs the defendant's interest in uniformly avoiding a second trial.

When the evidence is truly insufficient because of prosecutorial neglect or inability to prove the offense, we think that the presumption should be against a second trial. A second trial would be appropriate if, first, it appears that the evidence can be supplied at a second trial.

QUESTION: Are you speaking of just that the Federal Rule should be under the statute or are you talking about a constitutional rule?

MR. EASTERBROOK: We believe that the statutory rule

and the constitutional rule should not be any different, Your Honor. That's in part because the Court has said in Jorn and Tateo that the interests of justice determine the constitutional propriety of the second trial, that it's really often a balancing test.

QUESTION: So that the constitutional rule should be that if the Appellate Court finds that the evidence was insufficient and there doesn't appear to be any real excuse for it, that the Constitution requires an acquittal.

MR. EASTERBROOK: I believe that that is the correct constitutional rule.

QUESTION: Whereabout is this ultimate determination made? When the man is brought for trial the second time in the district court or the superior court,or whatever the next highest court is?

MR. EASTERBROOK: We have not expressed an opinion on that, in part because that's probably most appropriately determined by the Courts of Appeals in the exercise of their supervisory power to determine where it is most appropriately --

QUESTION: Well, what about the 50 state jurisdictions that are going to be affected by your argument?

MR. EASTERBROOK: I think, too, that those states should have the authority to determine where this kind of determination ought to be made.

QUESTION: But at any rate you are turning some thousands of nisi pious judges loose to make this ad hoc determination that -- balancing of factors that come out one way in one case and another way, presumably, in a very, very similar case.

MR. EASTERBROOK: Mr. Justice Rehnquist, we hope it is not entirely ad hoc. It is certainly no more ad hoc than finding when, after a mistrial has been declared, there was manifest necessity to do so.

QUESTION: Well, why compound one sin with another?

MR. EASTERBROOK: We haven't taken the view that one of those manifest necessity arguments was a sin.

QUESTION: Mr. Easterbrook, the Court of Appeals of the Sixth Circuit, in this case, ended up by adopting the standards and procedure prescribed by the Fifth Circuit in Bass in its concise statement of those standards in its opinion. Are those standards acceptable to and compatible with the position you are arguing here today?

MR. EASTERBROOK: We believe that they are, Your Honor.

QUESTION: It would seem to me that what you've said on pages 37 and 38 of your brief was somewhat more complex. Two basic inquires would be made by the District Court on remand under the Bass standard. First of all, was there additional evidence that would be relevant to a verdict? And,

secondly, whether or not there had been some prosecutorial default in not having presented that evidence at the appropriate time. Now, those two standards would not be too difficult, in my view, for lower courts to apply. I am thinking of the question that Mr. Justice Rehnquist has asked you.

MR. EASTERBROOK: Your Honor, we don't believe they would be too difficult to apply. I think we were attempting in our brief to take very much the same position and to restate it. The position we stated was whether there was some reason why it didn't come in at the first trial. That's very much the same as asking whether it was prosecutorial neglect or default, or whether it had some other cause, perhaps a misunderstanding of law or something other than simple default. I think the standards we have outlined in our brief are the same as the Bass standards. I think they are the same --

QUESTION: Is that the Bass case in 490 Federal Second?

MR. EASTERBROOK: Yes.

QUESTION: That's in the Fifth Circuit.

MR. EASTERBROOK: Right. The standards that were adopted here.

The Court of Appeals remanded this case to allow the District Court to make those inquiries. Petitioner will not be tried a second time unless the prosecutor can persuade the District Court that he has the evidence the Court of Appeals

found wanting and that the reason it was not offered was something other than prosecutorial neglect or default. There is no reason to forbid the district court from making those inquiries.

QUESTION: Does that not open a whole new area of appellate review up to now avoided by appellate courts everywhere?

MR. EASTERBROOK: I don't think it does, Your Honor. Appellate courts now are by and large making the decision whether to send it back for a new trial, whether to acquit outright or whether to ask the district court to make that decision. Under 2106, the court of appeals has the undoubted power simply to order the defendant acquitted and to stop it there. Since it has that power, it must have some grounds for deciding when to do that and when to do something else. It asks that question now in every case. And we think that the standards we have suggested for asking that question are more helpful to the courts and certainly do not require it to embark on any inquiry that they are not now making.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Do you have anything further, counselor?

REBUTTAL ORAL ARGUMENT OF BART C. DURHAM, III, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DURHAM: Mr. Chief Justice, and may it please

the Court:

I want to give Mr. Chief Justice a better answer to the last question that he asked me. The question was did I see any alternative between an acquittal and a new trial. I suppose that I would not argue for an absolute rule here. I think you might find exceptions. The Solicitor General has pointed out some with which I might agree. Some he has pointed out have been where the defendant, himself, prevented the Government from going forward. For example, in the Smith One case, in 1968 in the Sixth Circuit, the defendant in mid-trial interposed insanity defense but he wouldn't take it himself and he wouldn't allow a recess, wouldn't submit to an examination, and the Sixth Circuit said that was his own fault and he shouldn't profit. Of course, that's a well known principle of law.

Counsel for the United States brought up another exception, a changing presumption or inference that district court might not be aware of, or variance between pleading and the proof. In some of those, this Court, I don't think, is absolutely required in order to decide this case to render such an absolutist opinion. The contours of this decision might well be left to a later date. But the facts of this case, I think, are such that we are not going anywhere near the limits that he urges.

Lastly, Mr. Justice Powell mentioned the Bass rule

and I've mentioned the Smith in the Sixth Circuit. Strangely enough, the Sixth Circuit in this case adopted the Bass rule in the Fifth Circuit. But now, as I read the Bass case, that sends it back for a vague balancing of the equities, but the language Bass used is "see if the Government's got any more evidence they want to use." Well, we don't want that. We want what they did in 1968 in the Sixth Circuit. What the Sixth Circuit has done before is see if the Government's got a good reason why they didn't use the evidence, not only if they've just got more evidence, but A, if they've got more evidence and B, is there is some good reason why they didn't do that. So, we certainly don't agree with the Bass decision at all.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:32 o'clock, p.m, the case in the above-entitled matter was submitted.)