In the

Supreme Court of the United States

RICHARD AUSTIN GREENE,

Petitioner,

Vs

No. 76-5617

RAYMOND D. MASSEY, SUPERINTENDENT, UNION CORRECTIONAL INSTITUTION,

Respondent.

Washington, D. C.
November 28, 1977

Pages 1 thru 49

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v.	:	No. 76-6617
RAYMOND D. MASSEY, SUPERINTENDENT, UNION CORRECTIONAL INSTITUTION, Respondent.	:	

Washington, D. C.

Monday, November 28, 1977

The above-entitled matter came on for argument at 11:35 o'clock, a.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:

JOHN T. CHANDLER, ESQ., Florida Legal Service, Inc., Prison Project, 2614 S.W. 34th Street, Gainesville, Florida 32608, for the Petitioner.

HARRY M. HIPLER, ESQ., Assistant Attorney General of Florida, 225 Pan American Building, West Palm Beach, Florida 33401, 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 76-6617, Green against Massey.

Mr. Chandler.

ORAL ARGUMENT OF JOHN T. CHANDLER, ESQ.,

ON BEHALF OF THE PETITIONER

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

I am John Chandler, Attorney for the Petitioner, Richard Greene, addmitted pro ad vitae in Case No. 76-6617. This case arises upon the petition for writ of certiorari to review the decision of the U. S. Court of Appeals for the Fifth Circuit which affirmed the denial of habeas corpus relief by the United States District Court for the Middle District of Florida.

The issues presented in this case are two-fold, one brought forth by the Petitioner and one brought forth by the Respondent, Raymond Massey. The first issue is whether the Double Jeopardy Clause of the Fifth Amendment bars re-trial of the defendant for the same offense when Appellate Court reverses a conviction because the evidence was insufficient to prove the charged crime. The secondary issue, and one which Respondent would have as threshold, is whether Federal habeas corpus review of the double jeopardy claim is precluded after consideration of that claim by the state court.

The case briefly -- and it's a case which arises some 13 years ago, or almost 13 years ago. In 1965, Richard Greene and Jose Manuel Sosa were found guilty of first degree murder. They had a trial by jury. They made both a motion for a directed verdict of acquittal and a motion for a new trial. It is noteworthy that the motion for a new trial was stricken and never was offered. On November 1968, the Florida Supreme Court, on appeal of this death penalty case, reversed the conviction and remanded for a new trial, due to the insufficiency of the evidence. This was a per curiam decision and was unequivocal after the reason for reversal. Upon remand of this reversal by the Supreme Court of Florida, there was a change of venue. The Defendant was tried then in Orange County, Florida, instead of in Hillsborough County, Florida. In the trial court at that time, Defendant made a motion to dismiss on double jeopardy grounds. Alternatively, he asked that the case be transfered to the Criminal Court of Record because in Florida the Criminal Court of Record would then have jurisdiction, since we would no longer be operating in a first degree murder situation. That motion was denied. At that time, the Defendant applied to the Second District Court of Appeals with a suggestion for writ of prohibition to prevent, again on double jeopardy grounds, his re-trial for that same offense. This was denied by the Second District Court of Appeals. On January 15, 1972, after Defendant was re-tried, again for first-

degree murder, he was convicted, and the prosecution at that time presented new witnesses and the Defendant, after the trial, was sentenced to life imprisonment this time, rather than the death penalty, upon a jury verdict recommending mercy.

QUESTION: Mr. Chandler, the first opinion of the Supreme Court of Florida, is that in the record here?

MR. CHANDLER: It is not contained in the Appendix of this case.

QUESTION: You quote from one paragraph of it on Appendix Page 3, I believe.

QUESTION: But the whole thing is not here.

MR. CHANDLER: That's correct.

QUESTION: We can get it. That's all right.

MR. CHANDLER: After the re-trial and after he was again convicted, the Defendant then appealed to the Fourth District Court of Appeals of Florida which affirmed the conviction. That court recognized that the issue was an intriguing one, intellectually, but felt for some reason not apparent in Florida law, that they could not define the double jeopardy claim because of the Second District Court's opinion which had said that the re-trial did not violate double jeopardy. They said that the issue was raised judicata, and therefore they could not decide it.

QUESTION: Well, might they not have found -- have

felt themselves bound by the earlier opinion of the Supreme Court of Florida, too, which said the evidence did not meet the reasonable doubt standard, and went on to say the interests of justice require a new trial?

MR. CHANDLER: Mr. Justice Rehnquist, I don't believe the Fourth District Court of Appeals was at all motivated by that. It was motivated only by the Second District Court of Appeals' opinion which had denied the writ of prohibition. The Second District Court of Appeals had, for some reason, recognized a standard of proof which they said that the Supreme Court did not reverse because of the insufficiency of the evidence, but that certainly isn't apparent from the Supreme Court's opinion, and it also was not required by the Second District Court of Appeals to recognize that type of legal proposition.

QUESTION: It certainly is apparent from the Supreme Court of Florida opinion, though, that the Supreme Court of Florida intended that there be another trial.

MR. CHANDLER: Absolutely. That is correct.

In 1975, this Court denied a writ of certiorari on this issue and in 1976 the U.S. District Court of the Middle District of Florida denied a petition for writ of habeas corpus, recognizing also the interesting nature of the issue, and saying that it would have been inclined to grant the writ had the matter been a matter of first impression in the United States

Court of Appeals for the Fifth Circuit, but that because there was prior precedent and because the prior precedent of the Fifth Circuit would allow re-trial, he had to deny the writ.

The U.S. Court of Appeals in January 1977 affirmed the Fifth Circuit Court opinion, on the basis of the precedent that the District Court had recognized, namely, United States v. Bass and Musquiz v. United States.

It is the Petitioner's proposition and position that the Florida Supreme Court held the evidence to be insufficient as a matter of law. Both the U.S. District Court and the Court of Appeals for the Fifth Circuit recognized that this was the case. If the trial judge had directed acquittal when the original motion for a directed verdict had been made, obviously, there could be no re-trial under double jeopardy principles because at that time the man had been convicted.

The Florida Supreme Court's holding indicates that the trial judge erred in not acquitting because this is as much a function of the trial judge to direct a verdict of acquittal on proper motion made as it is for the Appellate Court to reverse on insufficiency of the evidence. Then why should not the Appellate finding of insufficient evidence not entitle a defendant to a directed verdict of acquittal?

The reason, which results in what I believe is an anomaly, lies, I think, in the history of the double jeopardy cases before this Court.

QUESTION: The Supreme Court of Florida could have said that in view of the fact that the judge should have granted it, we hereby grant it. Acquit him and turn him loose.

MR. CHANDLER: They could have done so, Mr. Justice Marshall, but --

QUESTION: But they didn't.

MR. CHANDLER: They did not.

QUESTION: And that's your problem.

MR. CHANDLER: That would be my problem. It is my problem here but that is not -- The law of Florida is that when a court reverses on insufficiency of the evidence, they may reverse and remand for a new trial. And so the question does not arise as to whether they could have said what the trial judge's actual duty is. In fact, --

QUESTION: My brother, Rehnquist, raises the point that he emphasized, the fact that "What I'm actually doing, in the interest of justice, I am saying you get a new trial."

MR. CHANDLER: That is correct.

QUESTION: That is the whole gravamen of what he said.

MR. CHANDLER: That is correct. That is what the court is saying, "You get a new trial," rather than saying, "In the interest of justice, a new trial is not the proper vehicle, in fact, the directed verdict -- "

QUESTION: But suppose the court had said to counsel,

"I will give you a new trial or I will let you stay."

What would counsel say?

MR. CHANDLER: With a choice like that, there really is no choice.

QUESTION: Right.

MR. CHANDLER: And, as I say, the reason for the treatment of double jeopardy and re-trial in situations like this comes from the line of cases from this Court, the earliest being United States v. Ball. In the Ball case, the reversal was based upon an insufficient indictment. In that situation, we do not quibble and we do not argue that re-trial would not be proper.

The first case and the real troubling case and the case that troubles all of the Circuit Courts of the United States and many of the State Courts is Bryan v. United States, where this Court said that re-trial after a finding of insufficient evidence did not violate the double jeopardy principle, apparently because of the notion that by appealing the defendant waived the double jeopardy argument. At that time, the possibility that there may be a reason to delineate reversals for insufficient evidence and reversals for other trial error was not apparent to the Court. But in Sapir v. United States, this Court reversed a Circuit Court, United States Circuit Court opinion of the Tenth Circuit which had first reversed a conviction and directed acquittal, and then on rehearing, under

its power under 28 U.S.C. Section 2106, decided that it would remand for a new trial. This Court reversed the Circuit Court's opinion, per curiam, without opinion, and in a concurring opinion by Mr. Justice Douglas it was stated that the reason for this was that a finding of insufficiency of the evidence was entitled to the same treatment as if the trial judge had directed a verdict of acquittal. And for that reason, Mr. Justice Douglas said, they must reinstate the initial reversal so that the man could not be re-tried.

QUESTION: Was that the case in which Mr. Justice Douglas' separate opinion made a distinction between cases where a motion for acquittal had been made and cases where no such motion had been made but only the motion for a new trial?

MR. CHANDLER: That is correct. And then this Court seemed to accept his proposition on that.

QUESTION: Well, this Court was simply silent. It was per curiam.

MR. CHANDLER: It was in that case, but in Forman v. United States this matter was, in dictum, at least, seemed to be settled and as Justice Douglas said it should be treated. However, the Forman case was not an insufficiency of evidence case. In fact, the problem there was bad jury instruction. It was reversed for that reason and, again, we would not quibble with re-trial in that situation.

Motion for a new trial, however, is really not a

valid criterion. It doesn't relate logically to the insufficiency of the evidence.

QUESTION: Does Florida have a ground for re-trial whereby the trial judge sits, in effect -- and I am thinking of the practice in my own State of Arizona -- as a thirteenth juror and says there may have been sufficient evidence to warrant submitting the case to the jury, but I think justice requires they get another shot at it, so I'm going to grant a new trial?

MR. CHANDLER: No, Your Honor, the trial judge does not have that power.

QUESTION: All he can do on the evidentiary grounds on a -- He just has no authority then to grant a new trial on the basis of insufficiency of the evidence.

MR. CHANDLER: Oh, yes. Insufficiency of the evidence, yes.

QUESTION: Well, on the grounds that he shouldn't have submitted the case to the jury in the first place.

MR. CHANDLER: Yes, you can make both a directed verdict of acquittal and a motion for a new trial on the same grounds in the State of Florida.

QUESTION: But if you make a motion for a new trial on the grounds that there was insufficient evidence to have submitted the case to the jury, I take it you get a new trial and not a dismissal.

QUESTION: Does that constitute a waiver?

MR. CHANDLER: I don't believe so, Your Honor, because --

QUESTION: Well, what's the law of Florida on that score?

MR. CHANDLER: The law of Florida is that you may appeal both a directed verdict, you may appeal your denial of a directed verdict of acquittal and the denial of a motion for a new trial. It was formerly thought in Florida --

QUESTION: But could the judge deny the motion for acquittal and grant the motion for a new trial on the ground that -- the state of the evidence?

MR. CHANDLER: I think it's not settled in Florida whether that could be done or not. I believe it could be done. At that time, though, the defendant could appeal the denial of the directed verdict of acquittal. So that, what I am really saying here is that it is not settled, it is unclear, logically, I think, in the State of Florida, just, I think, as it is unclear in the circuit courts of the United States --

QUESTION: I don't see why it is so illogical to connect motion for new trial with the state of the evidence when in an awful lot of places around the crountry, as Brother Rehnquist says, new trials are granted on the grounds that the evidence isn't very convincing to the judge.

MR. CHANDLER: That may be. Only in Florida, if it is unconvincing, there must not be sufficient evidence on an element of the crime.

QUESTION: He just has doubt enough that he grants a new trial.

MR. CHANDLER: Yes, I think --

QUESTION: But doesn't say the evidence is insufficient. He doesn't grant the motion to acquit.

MR. CHANDLER: I think it is done.

QUESTION: As you say it is in Florida, how does a trial judge decide whether to grant a new trial or a judgment N.O.V. on the basis of insufficiency of the evidence?

MR. CHANDLER: How did the trial judge decide that? I am not sure how he would ever decide that issue, but I think logically if the evidence presented before the jury was not sufficient to convict then the defendant is entitled in Florida as he is in a lot of other states to a directed verdict of acquittal. So that a motion for a new trial can be made on other grounds.

QUESTION: But it cannot be made on the grounds of insufficiency of the evidence?

MR. CHANDLER: It can --

QUESTION: What criteria does the trial judge apply in deciding that motion?

MR. CHANDLER: I don't believe there is any criteria.

I couldn't delineate what the criteria is.

QUESTION: In this case, you made a motion for a new trial and a motion for a directed verdict of acquittal.

MR. CHANDLER: That's correct.

QUESTION: And both were denied. Both were denied by thetrial court.

MR. CHANDLER: The motion for a new trial was denied. Actually, it was never heard. It was stricken because an appeal had already been filed, and in Florida trial court it was without jurisdiction to hear the motion for a new trial.

QUESTION: I am just looking at your statement of the case in your brief.

MR. CHANDLER: That's correct. Both were made and both were denied.

QUESTION: That's what you say. And were both made on the insufficiency of the evidence?

MR. CHANDLER: The motion for a new trial, I believe, was granted on several different errors, one of which may or may not have been --

QUESTION: Including, probably, the insufficiency of the evidence.

MR. CHANDLER: Very well could have been. The reason for that is --

QUESTION: It is pretty hard to find a form book that doesn't have it in there.

MR. CHANDLER: The reason for that, Mr. Justice Stewart, is that in Florida the law was very unclear as to whether you had to make a motion for a new trial in order to appeal the sufficiency of the evidence. It wasn't until after this case was decided that in other than death penalty cases, and this was one of those, whether you had to make such a motion or not. Later it was determined that no, indeed, you could appeal the denial of the directed verdict of acquittal. That law was very confusing and so the counsel really had no choice if he wanted to cover the --

QUESTION: If he wanted to protect his client fully.

MR. CHANDLER: Yes.

QUESTION: The state of the law was, I suppose, that if the motion for a new trial was made and a motion for a directed verdict of acquittal was made along with it, each grounded on the proposition that there was insufficient evidence to convict, it was within the discretion of the trial court whether to grant one motion, or either motion, or both, or neither. Is that about right?

MR. CHANDLER: That's about right. It would have to be. And I say that's because there is no previous delineation of what is the correct procedure.

QUESTION: And the judge could avoid any possible double jeopardy question by granting the motion for a new trial on the basis of some trial error, could he not?

MR. CHANDLER: That's true. And still, the defendant could appeal the denial of the directed verdict of acquittal motion. So that he still has a chance of raising that issue and reversing the trial judge on the denial of that motion. And in this case --

QUESTION: The trial judge is concerned about double jeopardy problem and the consequences of granting on the insufficiency of the evidence. He certainly would grant the new trial then on trial error, wouldn't he? Presumably.

MR. CHANDLER: I am not sure I understand, but --

QUESTION: Well, there is no double jeopardy problem arises if he grants the new trial for trial error, rather than sufficiency of the evidence.

MR. CHANDLER: That is true, if there is error, but I would assume the judge would do his duty as he saw it and would reverse for the proper reasons. I am not sure I am responding to the question.

QUESTION: If he was in doubt. Suppose the dual motion was made, as here.

MR. CHANDLER: If he was in doubt, yes.

QUESTION: He had some doubt about the sufficiency of the evidence and he had some doubt about the trial error. I repeat my question. If he were cautious and wanted to avoid any problems of double jeopardy, he would then grant the new trial for the specific trial error, would he not?

MR. CHANDLER: Yes, I am sure he would.

QUESTION: And avoid all these problems.

MR. CHANDLER: Rather than face the issue, if that was his purpose, I guess that's what he would do.

QUESTION: What would happen if the appeal asked for a new trial?

MR. CHANDLER: I suppose we could say that he could waive it if he asked for a new trial, but --

QUESTION: We really don't know what happened in the court down there, do we?

MR. CHANDLER: Well, I believe we do, Your Honor, Mr. Justice Marshall, from the decision in the case, which is cited in the opinion of the Fifth Circuit which is printed --

QUESTION: But do I know that defense counsel did not ask for a new trial? Do I know that?

MR. CHANDLER: The defense counsel did not -- He did ask for a new trial.

QUESTION: In the trial court.

MR. CHANDLER: In the trial court, yes.

QUESTION: I am talking about in the Supreme Court.

MR. CHANDLER: Yes, in reversal for certain errors he would be asking for a new trial. That would be re-trial for errors other than the insufficiency of the evidence.

QUESTION: What did he ask for?

MR. CHANDLER: He asked --

QUESTION: We don't know, do we?

MR. CHANDLER: No, we don't.

QUESTION: We will have to get that, won't we?

The trouble is, how do you differentiate between the right of the trial judge to make the distinction and deny that right to the appellate court?

MR. CHANDLER: We don't deny the right, Mr. Justice Marshall, we say that if the court reverses on the insufficiency of the evidence the man could not be re-tried. If it reverses on the other grounds, then he could be re-tried. But if the evidence is insufficient, there should be no difference between the trial judge's finding ardan appellate court finding and, therefore, either case, he would have, having been entitled to a directed verdict of acquittal, he would have been subjected to multiple trials, which is the real test for double jeopardy, I believe, in the cases before this Court.

QUESTION: In the case you are talking about, he used that magic word, "acquittal."

MR. CHANDLER: Yes.

QUESTION: Which you don't have the benefit of.

MR. CHANDLER: No. We do not have a final acquittal, but we have - -

QUESTION: You don't have any acquittal.

MR. CHANDLER: We do not. We have the Supreme Court saying that the trial judge erred in -- they said the

evidence is insufficient to convict, meaning the jury did not have sufficient evidence before them to convict this man, and therefore he was entitled to an acquittal if that was the state of the law. I believe that after Forman and Sapir that it probably is the state of the law and definitely should be the state of the law.

QUESTION: In all the other cases I know, the word "acquittal" is in there. He is acquitted of one offense and held guilty on the other one.

MR. CHANDLER: Absolutely, no doubt, Your Honor. And this was a little different from that because we are talking about --

QUESTION: You just don't have the magic word.

MR. CHANDLER: That's right. We are talking about an entitlement to it. In Florida you will not get --

QUESTION: You say you have everything but the actual word.

MR. CHANDLER: That's right. And you will never get, I believe, in Florida, those magic words. You will always get a re-trial, even if the court says the trial judge erred in not finding the evidence sufficient, or insufficient, and they will remand for a new trial.

QUESTION: Well, what if in the trial court the defendant's counsel moved only for a directed judgment of acquittal and rested on that, and that was denied at the trial

court? And then it was appealed and the only ground for appeal was that the trial court erred in not directing an acquittal because the evidence was insufficient. And if the Supreme Court of Florida held "Yes, Mr. Defendant, Appellant, you are correct," now, surely, the court would then -- Could the court then grant a new trial?

MR. CHANDLER: Under law established by this Court under Forman, I believe --

QUESTION: No, no. I am talking about in Florida.

MR. CHANDLER: In Florida, yes, he could.

QUESTION: Even though the only error alleged and sustained was that the trial court erred in not directing an acquittal because of the insufficiency of the evidence. Perhaps that case has never arisen. I suppose the lawyer always makes a double motion.

MR. CHANDLER: That language has never arisen. That situation, in effect, has arisen and arisen very recently in Florida in a case that was cited in our reply brief, McArthur v. State. In fact, they said the evidence was insufficient and in the interest of justice we remand for new trial under Florida's Appellate Rule which the Fifth Circuit says is coextensive with the 28 U.S.C. 2106 in the Federal Court.

QUESTION: And was that a case in which the only motion was a motion for a directed verdict of acquittal grounded

upon the insufficiency of the evidence?

MR. CHANDLER: No, it was not. What I am saying is that that case is so strong that it would show that the result would be the same in Florida, indeed, would be the same in some other states.

QUESTION: And what's that case? Is it in the --

MR. CHANDLER: Yes, it's in the reply brief.

QUESTION: I don't seem to have your reply brief.

MR. CHANDLER: The reply brief was filed last week.

QUESTION: I don't have it.

MR. CHANDLER: The opinion was decided by the Florida Supreme Court on September 30th of this year. It is Case No. 49-526. I can supply a copy of the case.

QUESTION: And what's the name of it, again?

MR. CHANDLER: McArthur v. State.

Our whole position is grounded on Greene v. United States which was incorporated in Wilson and Jenkins, and that the underlying principle of double jeopardy --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Chandler.

(Whereupon, at 12:00 o'clock, noon, the Court recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Chandler.

ORAL ARGUMENT OF JOHN T. CHANDLER, ESQ., (Resumed)

ON BEHALF OF THE PETITIONER

MR. CHANDLER: Our position, succinctly stated, is that a finding of insufficiency of the evidence on appeal should have the same remedy as the directed verdict of acquittal if the trial judge had rendered it, had ordered it. In either case, double jeopardy prevents re-trial. This is based upon the underlying principle of double jeopardy. It would be the prevention of the expense, ordeal and harassment of defendants by subjecting to multiple trials defendants, so that even one who is innocent stands a greater chance of being found guilty.

The effect of deciding in Petitioner's favor today would be that the appellate courts may direct entry of a judgment for a lesser included offense if the evidence is adequate on the record.

QUESTION: Mr. Chandler, do the Florida appellate courts have that power? I noticed, reading this per curiam, that it can be read as saying that the evidence was insufficient to establish, beyond a reasonable doubt, that the defendants committed murder in the first degree. If you put the emphasis on the last phrase, it might be implicit that there was plenty

of evidence to convict them of second degree murder, or perhaps of manslaughter.

Some state appellate courts have the power to forthwith enter a verdict of guilty of a lesser included offense, and in some states, I think, the appellate courts do not have that power. Do the Florida appellate courts have that power?

MR. CHANDLER: Yes, Respondent has cited that as one of -- in his brief -- as one of the alternatives the Court has. And we would also say the appellate court, of course, could direct an acquittal of all the included offenses as well.

QUESTION: They clearly could have directed a -- have converted the conviction to one for, say, second degree murder.

MR. CHANDLER: Yes, they could do so.

QUESTION: Finally.

QUESTION: Without it barring your client's right to jury trial.

MR. CHANDLER: That's true.

Re-trial after mistrial and all of the other situations previously before this Court in double jeopardy situations, upon reversal for other trial error, other than insufficient evidence, are not affected by the result that we seek today.

I'll reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Hipler.

ORAL ARGUMENT OF HARRY M. HIPLER, ESQ.,

FOR THE RESPONDENT

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

I have raised two issues in my brief, the Stone issue, Point A, and my Point B, the double jeopardy claim. I want to argue the Stone issue in the latter part of my argument, if Your Honors please. So I will reserve several minutes.

We feel, Your Honors, there is no double jeopardy violation when an appellate court reverses on an insufficiency of evidence grounds, as well as others. We feel that the Federal statutes, one is 2106, as well as Florida Appellate Rule 6.16(b) in Florida, as well as some thirty state statutes, allow an appellate court to reverse on sufficiency of evidence grounds, as well as reversible error grounds. We feel that in our situation, the case at bar, where the appellate court felt that it was appropriate and just, using the words, "in the interest of justice," the trial would be proper upon remand. It was within their power and discretion, despite the sufficiency of the evidence in the case at bar.

We feel also, if Your Honors please, basically, that the case law enunciated by this Honorable Court through the years has permitted what the Florida Supreme Court did in the first reversal back in 1968. The Bryan case reversed where the

state, rather the Government, there failed to make it a prima facie case, prima facie evidence case, according to the position taken by the Petitioner there. The Yates case, where this Court reversed and ordered a new trial and discharged other defendants and went ahead and said that there had been some evidence as to a conspiracy in the 1957 case. I think the words used were "probably insufficient as to some," and there was some evidence where the jury could have, indeed, convicted as to others. So it was a reversal for a new trial as a sum, clearly within the Court's discretion, rather than review the history, going back to U.S. v. Ball and more recent cases of Sapir and Forman which do indicate that in appellate court, if Your Honors please, do have that power to reverse for a new trial.

We also feel, if Your Honors please, that there is nothing inconsistent with the Double Jeopardy Clause that would preclude an appellate court to reverse for a new trial, that the public policy reasons clearly favor the Government or the prosecution at the case at bar. We don't say that in all situations that an appellate court can go ahead and reverse for a new trial or Government may take an appeal. For example, if a jury comes back not guilty or if a trial judge enters a judgment of acquittal then it is clear that the Government can't take an appeal. Also if there is prosecutorial overreaching, in a sense, as U.S. v. Jorn, where discharge of the jury

occurred without the defendant's behest, without his request, and it did not fall into what has been termed adamant necessity or absolute necessity, going back to U.S. v. Perez. We feel in those situations the law is clear.

QUESTION: Mr. Hipler, could I interrupt with a question.

Do I correctly understand, as a matter of Florida law, when the evidence is insufficient, the appellate court may either direct that a new trial be had or that a judgment of acquittal be entered?

MR. HIPLER: Your Honor, the Florida law does permit that, but I think the words are used that the defendant would be discharged, rather than going ahead and entering a judgment of acquittal.

QUESTION: Is there anything in Florida law that tells us which of those two alternatives should be granted by a judge in any one kind of case? How does the appellate court decide which alternative to impose?

MR. HIPLER: One alternative, or one possibility, would clearly be if the prosecution could not further educe any evidence at a subsequent trial. Then, of course, it would be senseless --

QUESTION: Anything other than what was already in the record.

MR. HIPLER. Right. For example, a possession of

drugs case which are very common, where the Florida Supreme Court has discharged a defendant because -- and constructive possession cases, of course, a proof did not show the answer or knowledge of the defendant. That would be one situation where there would be no further proof.

QUESTION: Does that mean, Mr. Hipler, that we read the interest of justice language to mean that where the prosecutor represents that if he is given a second try he can come forward with more evidence than he had the first time?

MR. HIPLER: No, Your Honor. I think the cases decided by this Court would not permit that. The interest of justice does indicate, as well as the concurring opinion as attributed by the remainder of the justices, that under Florida Appellate Rule 6.16(b), in light of the fact that it was a murder conviction and a death penalty case, and in light of the fact that the weight of the evidence was weak, then the appellate court can go ahead and reverse for a new trial.

QUESTION: I thought you told me that the only reason for a new trial would be the supposition that the prosecutor had new evidence.

MR. HIPLER: No, Your Honor, that was one of the -- No, No, I said that the prosecutor could not further educe any evidence, then it would be senseless to go ahead and order a new trial. If all the evidence is in the court's records, it would be senseless to reverse for a new trial for failure to

produce any further evidence. Then there would be no re-trial.

QUESTION: Are your answers to Justice Stevens' questions based on statements made by the Supreme Court of Florida or by your own observations as to what would be a good legal system?

MR. HIPLER: I would, by my observations, as to the way the Florida Supreme Court has been operating -- I have a sufficiency of the evidence case. I didn't think it would be required to show this Honorable Court that where there is no further proof that could be educed at a subsequent trial, as to possession of drugs, then the defendant was, indeed, discharged. That has occurred in Florida.

By the same token, I would ask this Court to take notice of the 6.16(b) which goes ahead and reviews the sufficiency of the evidence in favor of the defendant, regardless of the fact of whether or not the defendant raised that on appeal. In other words, he may not even raise it, and the Supreme Court goes ahead and does it, and I would think that that would even be going beyond anything, of course, that the -- the Double Jeopardy Clause or anything the Constitution would require; to go ahead and do that, even despite --

QUESTION: Mr. Hipler, am I correct in assuming that more evidence was produced at the second trial?

MR. HIPLER: Your Honor, I don't know where Mr. Chandler, Petitioner's attorney, got that. I don't --

The record is, of course, devoid of what was produced in the second --

QUESTION: Well, would you be arguing if the exact same testimony was in both trials? Would you be arguing no double jeopardy?

MR. HIPLER: Your Honor, I would be arguing that if the exact same testimony would be produced that it would not be double jeopardy.

QUESTION: Why not?

MR. HIPLER: Your Honor, the fact remains that in a sufficiency of evidence --

QUESTION: That the state is entitled to two different juries?

MR. HIPLER: No, that the defendant is entitled to two different juries, where the weight is weak. That's the point, Your Honor.

QUESTION: If the Supreme Court said that this is not enough evidence to convict a man of first degree murder, and then he is tried with the exact same evidence, that wouldn't be double jeopardy?

MR. HIPLER: Your Honor, I take issue --

QUESTION: Don't you have to get a little more evidence?

MR. HIPLER: Your Honor, there are cases which are close, where the death penalty has been invoked, where it would

seem proper and just to remand for a new trial to give another jury an opportunity to consider the same evidence, or whatever evidence they could produce. That's what happened in this case. That's what I am saying. There is nothing improper about that, despite the insufficiency of the evidence. I've relied, if Your Honors please, on a concurring opinion by the Justices which indicates that the reason for the reversal, whatever the words that were used by the per curiam which indicates that the real reason had to do with an improper admission of hearsay evidence. Hearsay is not substantive evidence in Florida, unless it would fall into an exception, and it did not fall into an exception here. So there had been more of a procedural error than a substantive, Your Honor.

QUESTION: What you are arguing is that it wasn't just the insufficiency of evidence. There was also an error involved.

MR. HIPLER: Yes, Your Honor, that's what I am suggesting. In reading the opinion, it goes ahead and elaborates on the point.

QUESTION: Would your position remain the same if the appellate court had said -- not only said what it said, that the evidence was insufficient to prove guilty on a reasonable doubt, but they went right ahead and said the motion for acquittal should have been granted, but nevertheless we will order a new trial?

As far as double jeopardy is concerned, you would make the same argument?

MR. HIPLER: I would argue that, but I think that if they said that the judgment of acquittal should have been granted, that would certainly weaken the prosecution's case.

QUESTION: They said all but that.

MR. HIPLER: Your Honor, I don't concede that they said all but that. They said that the interests of justice require a new trial, despite the sufficiency of the evidence. That's what they said, if Your Honor please.

Cases in Florida do discharge defendant. I certainly could have cited some, and I could if Your Honors would desire me to. But in murder convictions, as in this case, it seems to me that a defendant, indeed, gets two cracks, as he did here, if Your Honors please. That's what I am suggesting.

QUESTION: Is this what the Florida court said: "We are of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree"?

MR. HIPLER: Yes, sir. Technically, that's what they said, yes.

QUESTION: Technically and actually and every other way. That's what they said,and does it follow from that that the motion for acquittal should have been granted?

MR. HIPLER: No, Your Honor. If it would have been

granted or should have been granted, I am confident if the state had not made out a prima facie case of guilt, that it probably would have been granted. The words used, for example, if I could just go off on aside, in a contract action, you look to the intent of the parties, not necessarily what the words are. You look behind the scenes and that's what I've done in this situation, as well as the Fifth Circuit and U.S. District Court. For example, U. S. v. Wiley suggests that no matter what the words used by an appellate court it would not be improper to re-try the defendant and not be a violation of double jeopardy if the weight of the evidence was weak.

I would suggest that that is what the Florida Supreme Court said here.

QUESTION: I thought they said it was insufficient to prove guilt beyond a reasonable doubt.

MR. HIPLER: Yes, sir, that's what the words that were used by the Florida Supreme Court said.

QUESTION: Could the court, on its own, enter a judgment of guilt for second degree, as a lesser included offense?

MR. HIPLER: Your Honor, there is a statute that provides for that in Florida, that does go ahead and do that.

QUESTION: That would be fine if they were going to re-try him for second degree murder. They would be trying him for first degree.

QUESTION: No, no. The question was whether the appellate court, on its own, could convert the conviction into one for second degree murder, finally, with no new trial or anything else.

MR. HIPLER: Enter a judgment for second degree murder. Yes, there is a Florida statute that allows that, 924.30.

QUESTION: Failure to do so here should lead to what analysis?

MR. HIPLER: Your Honor, failure to do so here, the conclusion is that they felt that the weight of the evidence was weak and that the state --

QUESTION: Weak on first degree murder.

MR. HIPLER: Enough to get by a jury, but because of the death penalty being invoked and because of the conviction for murder in the first degree, that the interests of justice required a new trial. I would suggest that Wiley v. U.S. would favor our position and the Government has relied upon that in its brief.

QUESTION: Mr. Hipler, do you take the view that Florida has a category of cases in which the evidence is insufficient to prove guilt beyond a reasonable doubt, unless 24 jurors unanimously agree that it is not? Is that the rule?

MR. HIPLER: No, Your Honor, I do not. I take the view that where evidence is technically sufficient to get to

a jury --

QUESTION: And 12 jurors convict.

MR. HIPLER: Yes, sir.

QUESTION: That's not enough, but if 24 jurors convict on the same evidence, then it is enough.

MR. HIPLER: Your Honor, what I am suggesting is that where the evidence, as in this situation, was enough to get by a motion for judgment of acquittal and a motion for a new trial, that the Florida Supreme Court, for the three, said, "We are going to give this defendant another chance, and if the state produced the same evidence and the jury comes back guilty, then, indeed, the defendants were guilty." That's what I am suggesting.

Now, I also submit and vigorously argue that there is nothing inconsistent with the Double Jeopardy Clause to preclude that, to give a defendant, so-called, two times.

QUESTION: Just what the Double Jeopardy Clause prohibits, doesn't it?

MR. HIPLER: That's correct, unless, of course --

QUESTION: It depends on one's point of view at what stage one might want two cracks, but at a later stage he might insist, as he does now, on only one.

MR. HIPLER: Well --

QUESTION: Well, it prohibits the state from having two cracks, not the defendant from having two cracks.

MR. HIPLER: Right. Okay, that's the point also.

QUESTION: He doesn't want two cracks had at him.

MR. HIPLER: Yes, sir, right.

QUESTION: That's what the Double Jeopardy Clause is about, isn't it?

MR. HIPLER: Right. Of course, it says no person shall be tried for --

QUESTION: I don't agree that the defendant gets two cracks. He has not had a crack.

MR. HIPLER: That's true, but -- If, indeed.

QUESTION: What's your hypothesis as to why the court did not enter, on its own motion, a judgment of murder in the second degree, given their statements that have been read to you?

MR. HIPLER: Because it felt that if it had entered a judgment for murder in the second degree, I would think, first of all, that would have been the end of the case and, of course --

QUESTION: I am asking you: What's your hypothesis as to why they did not do that?

MR. HIPLER: They felt that the, a new trial --

QUESTION: They knew he was guilty of first degree?

MR. HIPLER: Yes. Yes, sir. And not just maybe but that the jury had come back guilty and motion for new trial was submitted to the trial court and --

QUESTION: Isn't it entirely possible that the defense theory was that it was some other person entirely. There was an alibi, or something like that, so either he was guilty of first degree murder or nothing.

MR. HIPLER: Well, Your Honor, that may be the case, but there is nothing in this record to show that.

QUESTION: There is nothing in the record to show that it would have been appropriate to enter a second degree murder conviction, is there?

MR. HIPLER: Well, Your Honor, that may be true, but it is not the duty of the Appellee to make all this record part of the court. We were never ordered --

QUESTION: But we cannot decide the case on the assumption that the record would support a second degree murder conviction, can we? Because the record simply does not tell us.

MR. HIPLER: Yes, sir, the court went ahead and reversed, basically, on a murder in the first degree conviction.

I would submit that Your Honors, please, to go on, that a case that is even more compelling where the state or the prosecution did go ahead and have one opportunity to test this case in front of a trial jury, U.S. v. Sanford and Perez, and in those situations, the jury, indeed, came back with nothing. If the logic the Petitioner wants applied by this Court would apply, and this Court would adopt it, it would seem

to me in those situations where the prosecution had one opportunity, that the jury came back not guilty. Here the jury went ahead and came back guilty. So I would think it is more compelling to go ahead and preclude the prosecution from re-trying where a jury doesn't come back at all. That, again, is one factor this Court should consider. And, indeed, when the jury does come back guilty, there is nothing typical in appellate court to go ahead and reverse.

I have argued that, from the totality of the evidence, we feel that there is nothing improper about going ahead and reversing for a new trial. Also, we feel that the policy arguments, as in this situation, where there is intertwined a legal and factual issue, use of the hearsay in Florida, the Van Gallan case which is cited by the concurring opinion, by the Florida Supreme Court Justice Irvin, where the questions of law and fact are mixed. And those situations, it would seem to me that it would not be improper in such situations to go ahead and grant the re-trial. For example, the hearsay, being considered as substantive, rather than for impeachment purposes only. So, it is not really easy to come down with a hard and fast rule.

I would also submit as a policy reason for this Court to consider that if, indeed, this Court feels that there is a hard and fast rule, an either-or proposition, while I have no evidence to back me up, and I don't think anyone does, if

an appellate court, as in this situation, feels that the evidence is technically sufficient to go ahead and affirm, if this Court does, indeed, hold that insufficient evidence means what it says without going behind the scenes, then I would think that in close cases where the defendant would be benefited by re-trial what would happen is that the appellate court may, indeed, take the way out and say leave this to the province of the jury, rather than going ahead and giving the defendant a new trial.

QUESTION: Do you think we should look at this decision of the state court as saying, "If we had to affirm or reverse this conviction, we would affirm, but we prefer to order a new trial"?

MR. HIPLER: Yes, Your Honor. I would suggest that, that the court could have affirmed and, indeed, three justices would have gone ahead. But, again, in capital cases or in death penalty cases, Florida does go ahead and give the defendant another opportunity to test the state's case.

QUESTION: To adopt your theory, is it not almost necessary to carve out a new category of case where the evidence is too strong to let the man off, so an appellate court thinks, but not quite strong enough to affirm the conviction, falling between the two alternatives Justice White posed?

MR. HIPLER: Your Honor, I would suggest that there

are times when there is more than enough evidence for a jury to convict and the appellate court could go ahead and affirm, but it feels that because the weight is weak that, indeed, the defendant may very well be able to have the opportunity to test the prosecution's case again, that there are times where it has been proven beyond a reasonable doubt. But, in such situations, the interests of justice do, indeed, require or permit the appellate court to --

QUESTION: Why do you say the interests of justice require that? If there is enough evidence to support the conviction, why is it not the duty of the appellate court to affirm? Why is it acting lawlessly when it says, well, it's a close case, I think maybe it's a nice defendant, or something, I think I'll give him another trial? Why should an appellate court ever do that?

MR. HIPLER: Because, Your Honor, there is a certain amount of discretion invested in appellate courts that --

QUESTION: Discretion of that kind? Where do you find any opinion saying there is discretion of that kind in an appellate court?

MR. HIPLER: The fact remains that many appellate courts have used the Federal Statute 2106 to go ahead and remand for the trial court and, on the other hand, other appellate courts have gone ahead and affirmed.

QUESTION: That isn't my question. Do you know of

any opinion of an appellate court saying that even though we think the evidence was sufficient to go to the jury, nevertheless, in the interests of justice, we will order a new trial because we think maybe the defendant will win the second trial? That's really what you are arguing and that, it seems to me, you are arguing for lawless behavior by an appellate court.

MR. HIPLER: I would submit, Your Honor, it would be, you know, lawless behavior if there is some type of hard and fast rule. Again, there is just not anything improper, it seems to me, with allowing an appellate court to go ahead and reverse on such grounds.

QUESTION: Do you agree with your opposing counsel that a trial judge in Florida is faced with very much that inquiry every time he is confronted with a motion for a new trial and a motion for judgment, N.O.V., after the jury has brought in a verdict of guilty?

MR. HIPLER: According to the Criminal Rule 3.600, Grounds for a New Trial, one of them is, indeed, that the verdict is contrary to the law, so that is one of the considerations by the trial judge. Yes, sir.

QUESTION: Well, suppose the Supreme Court of State X says that "We have examined this record in this case very carefully and we find that the state has just failed to meet its burden of proving this man guilty this time around. So we will give him another chance."

You keep talking about giving the defendant another chance. Their giving the state another chance here. They say this man was not legally convicted solely because of the failure of the state to prove him guilty. So we'll give the state another chance to prove it legally.

MR. HIPLER: No, Your Honor, that's not what I am saying. If there had been a failure --

QUESTION: Well, that's what the court did here.

MR. HIPLER: Your Honor, I take issue with Your Honor's construction as to what the court did here. I would say, though, that if, indeed, it had been beyond the burden of proof, it would be encumbent, if a failure by the state or the prosecution to make a prima facie case, then, indeed, in those situations that it would be the duty of the appellate court to go ahead and reverse.

QUESTION: But he said insufficiency of the evidence. That's what he said, didn't he?

MR. HIPLER: That's what the court said with the concurring opinion joined in by the justices.

QUESTION: The court that gave the new trial said insufficiency of the evidence, which I understand to mean the state did not prove the man guilty, period. Isn't that what it meant?

MR. HIPLER: No, Your Honor, I am saying it didn't. That's what the Supreme Court said, but that's not necessarily

all the considerations that went into play. Again, I vigorously argue that, Your Honor, in this Honorable Court, that you can go behind what a court uses, for example, like in a contract claim or contract issue. I vigorously argue that to this Court, there is nothing improper or unconstitutional in such a situation. Even the most liberal court, or one of the more liberal ones, going toward a trend, U.S. v. Wiley even permitted that where they say there is nothing to preclude an appellate court's reverse where the weight is weak, and I've cited that in my brief. There is no appellate mandate of acquittal there. Whereas, in a failure to make a prima facie case, there may well be an appellate mandate of acquittal.

I've argued that and I've maintained that here and I feel and the state feels that it falls at a minimum --

QUESTION: Please help me on this. Failure of having a prima facie case and insufficiency of the evidence. And the difference is just what?

MR. HIPLER: Your Honor, failure to make out a --

QUESTION: Can you have a sufficient case with insufficient prima facie evidence?

MR. HIPLER: If the state fails to prove one of the elements of a crime, then the trial judge would go ahead and enter a judgment of acquittal.

QUESTION: Would that be insufficiency or no prima facie?

MR. HIPLER: Prima facie. That would be lack of a prima facie case.

QUESTION: Well, what was it in this case?

MR. HIPLER: It was --

QUESTION: Insufficiency.

MR. HIPLER: Yes, which means weight of the evidence, I would submit. Or even if the Court or Your Honors don't like the word "insufficiency" I think weight of the evidence would have been a better word.

QUESTION: I didn't say I didn't like the word. I might like it. I am saying let the word be used. That's what I'm stuck with. I don't know whether you are, but that's what I'm stuck with.

MR. HIPLER: Yes, sir, but I am saying that where the weight of the evidence is weak, there is nothing to preclude a re-trial. That's basically what our position is, and, of course, the legal and factual issues, there should be no hard and fast rule. Also, if Your Honors please, I would say that where defendant goes ahead and moves for a new trial, where he maintains control of the situation as the defense counsel did in the trial court here, where he went ahead and moved for a new trial, in such a situation where I've analogized that not exactly to motion for a mistrial, rather in a sense where he requests a particular relief. And I would submit that in a sense U.S. v. Dinitz and U.S. v. Lee do, indeed, support

the contention that where defense requests a certain relief, as defense counsel did in the trial court here, there is nothing to preclude an appellate court or a trial court to go ahead and grant the defendant exactly what he requested. That's also what I am saying and there are, of course, good policy reasons for that which is that the burden is on defense counsel to go ahead and request certain types of relief, as again, a motion for mistrial and examples of that nature.

If Your Honors please, that's basically the state's position as supplemented by the briefs.

If I have a few minutes, I'd like to basically just argue our Stone proposition. There was no petition for certiorari, or whatever, filed by the state but this Court, I believe, does have power to go ahead and look at the issue. After Swain v. Pressley, the District of Columbia Statute goes ahead and holds that it's no suspension of so-called writ of habeas corpus to go ahead and preclude a defendant from having his sentence and judgment reviewed ultimately by an appellate court and the Constitution, of course, does not mandate more than one appeal. Indeed, it doesn't even mandate one appeal, according to some of the recent indications by this Honorable Court.

I would also submit that 2254(d) requires Petitioner to go ahead and allege that there is some kind of deficiency in the state proceedings. That was not done in the case at bar.

I would submit that there is, obviously, a presumption of correctness.

Also, 2254(e) says that where the evidence is ample, that the burden and the duty is on the applicant to go ahead and submit the transcripts and the trial proceedings. That wasn't done here. And, again, it is not the duty of the Appellee, if Your Honors please, to go ahead and submit this material to the trial court, or whatever. That's as to the Stone issue.

If Your Honors have any questions, I'll be pleased to answer them. Otherwise, I would say that the Double Jeopardy Clause has invaluably been read by this Court to be a balancing of the equities in situations.

I would submit, if Your Honors please, that the policy arguments that I've argued here and in my brief do allow an appellate court in the interests of justice to go ahead and reverse for a new trial.

QUESTION: On page 29 of your brief, you cite a good many statutes from various states as seeming to authorize re-trial after a finding by an appellate court if the evidence is insufficient.

MR. HIPLER: They use the exact same words, almost the exact same words, as the Federal Statute 2106. Many of them say that the appellate court is vested with a discretion. One or two --

QUESTION: Yes, but they don't expressly say that the court may grant a new trial when they find the evidence insufficient to establish guilt.

MR. HIPLER: There is no word of sufficiency of the evidence used, except for several of them. I think one of two of the Southern states that I've cited in there. I can't recall which ones say that the sufficiency of the evidence will go ahead and be considered, but none of them do. But in looking, rather than me going ahead and picking some of the cases, I decided to go ahead and submit the statutes, at least the ones that I could find --

QUESTION: Well, if these statutes don't say that, I don't know why you cited them.

MR. HIPLER: Your Honor, I cited because --

QUESTION: Without showing that there are some cases under the statutes applying them that way.

MR. HIPLER: Because in a similar vein, the Federal Statute allows it and has repeatedly allowed it, so I would think it would necessarily follow that the states would be able to do that also. That's why I cited, Your Honor.

If there are no other questions, I would ask Your Honors to affirm the judgment and conviction and the judgment of the Fifth Circuit.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Do you have anything

further, Mr. Chandler?

REBUTTAL ORAL ARGUMENT OF JOHN T. CHANDLER, ESQ.,

ON BEHALF OF THE PETITIONER

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

On the last point, about the similar state rules and statutes, it is very clear, you can look at some of those on the list and you will find Arizona, New Mexico and North Carolina listed among them. Those states have case law to the contrary that you cannot re-try a man if the appellate court finds the evidence insufficient. Those cases, I believe, are cited in my brief.

The state's conclusion that there is a possibility that the evidence is technically sufficient but the weight of the evidence requires a new trial, this proposition is not allowed in Florida, the weight of the evidence is the province of the jury.

QUESTION: How about the trial court? You can urge the weight of the evidence on the trial court in a motion for a new trial, can't you?

MR. CHANDLER: Yes, you could urge the weight of the evidence. You can do that at either level, but it is the entire weight of the evidence and goes to whether there is proof beyond a reasonable doubt.

QUESTION: I am distinctly confused because -- and

I suspect, perhaps, I'm not the only one -- I thought both you and your opponent agreed that a Florida trial judge, after a jury has brought in a verdict of guilty in a criminal case, could have presented to him a motion for judgment, N.O.V., which would mean he enters a judgment of acquittal, or a motion for mistrial, one of the grounds for which would be against the weight of the evidence --

MR. CHANDLER: Motion for a new trial.

QUESTION: -- and all he can do if he grants that motion is to grant a new trial. Then there are two separate concepts involved, aren't there? One is against the weight of the evidence and the other is total insufficiency of the evidence.

MR. CHANDLER: There may be inherent in this whole idea two separate concepts of the evidence, but what we have here is the Florida Supreme Court saying that an appellate court, for instance, which is ruling on what the trial court did, in State v. Smith, 249 Southern Second 16, saying the position that the state is arguing here doesn't exist in Florida, that the jury, if the evidence is sufficient, that the appellate court must affirm, and that the only time that the appellate court does not affirm is when the evidence is not sufficient as a matter of law to prove the crime charged, beyond a reasonable doubt. And they reversed. The same DCA, in fact, which was involved in the lower, in the opinion that -- the one

that did not grant the writ of prohibition in this case, used this rule of law to decide not to grant the writ of prohibition and the Florida Supreme Court says no, that kind of law does not exist, that's State v. Smith, 249 Southern Second 16.

QUESTION: Is a trial court refusal to grant a motion for a new trial appealable under Florida law?

MR. CHANDLER: Your Honor, I can only say I believe it is.

QUESTION: What grounds does the appellate court use for reviewing that?

MR. CHANDLER: Whether the judge abuses discretion, I would broadly state it.

QUESTION: Well, let's suppose the Florida court had said the evidence is technically sufficient to affirm but it's weak and we are going to grant a new trial. Would you be making the same argument? Is it your argument that the Double Jeopardy Clause requires the court either to affirm or reverse?

MR. CHANDLER: Yes.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:37 o'clock, p.m., the case in the above-entitled matter was submitted.)