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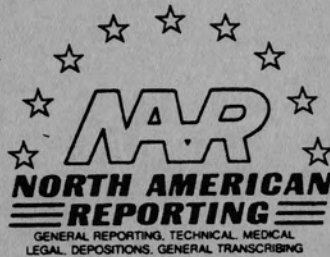
# Supreme Court of the United States

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|--------------------|---|-------------|
| ROBERT BULLINGTON, | ) |             |
|                    | ) |             |
| PETITIONER,        | ) |             |
|                    | ) |             |
| V.                 | ) | No. 79-6740 |
|                    | ) |             |
| STATE OF MISSOURI, | ) |             |
|                    | ) |             |
| RESPONDENT.        | ) |             |

Washington, D.C.  
January 14, 1981

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# ORIGINAL



1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :  
3 ROBERT BULLINGTON, :

4 Petitioner, :

5 v. :

No. 79-6740

6 STATE OF MISSOURI, :

7 Respondent. :

8 - - - - - :

9 Washington, D. C.

10 Wednesday, January 14, 1981

11 The above-entitled matter came on for oral ar-  
12 gument before the Supreme Court of the United States  
13 at 10:01 o'clock a.m.

14 APPEARANCES:

15 RICHARD H. SINDEL, ESQ., Sindel, Sindel & Sindel,  
16 15A N. Meramec, Suite 200, Clayton, Missouri  
17 63105; on behalf of the Petitioner.

18 JAMES COOK, ESQ., Assistant Prosecuting Attorney,  
19 St. Louis County, Missouri, 7900 Carondelet,  
Clayton, Missouri 63105; on behalf of the Respondent.

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22  
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P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: We'll hear first this  
3 morning Bullington v. Missouri. Mr. Sindel, you may proceed  
4 whenever you are ready.

5 ORAL ARGUMENT OF RICHARD H. SINDEL, ESQ.,

6 ON BEHALF OF THE PETITIONER

7 MR. SINDEL: Mr. Chief Justice, and may it please  
8 the Court:

9 In July of 1978 Robert Bullington filed a motion to  
10 quash the jury panel to be commenced against him under this  
11 Court's decision in Taylor v. Louisiana. It was contended  
12 at that time that the statutes constructed in Jackson County  
13 violated those provisions in that case in that they excluded  
14 women unconstitutionally from the jury.

15 Five months later he proceeded to trial for his  
16 life, at which time the jury came back with a verdict of  
17 guilty, the guilt phase of the trial, and rendered a sen-  
18 tence of life imprisonment.

19 The question now before this Court is whether or  
20 not the State of Missouri can seize upon the opportunity to  
21 take the reversal of that decision of guilt pursuant to this  
22 Court's decision in Duren v. Missouri and resubject and resen-  
23 tence this individual to a trial for his life.

24 Throughout the proceedings counsel for the defendant  
25 and the defendant persisted in claiming that to proceed to



1 trial with the jury panel so composed violated his constitu-  
2 tional rights. The trial court, following the mandates of the  
3 Missouri Supreme Court, denied these motions. He proceeded to  
4 the trial. Subsequent to the trial his motion for a new trial  
5 was sustained and a new trial was ordered. The State filed  
6 a notice of aggravation of circumstances pursuant to Missouri  
7 statutory guidelines. At that time the petitioner filed a  
8 notice to quash those aggravating circumstances, contending  
9 that he was subject to the Double Jeopardy Clause and that  
10 any retrial or relitigation of an issue that had already been  
11 determined by a jury was precluded by that clause. He also at  
12 that time contended that it would unnecessarily and needlessly  
13 chill his rights to a jury trial, that it would be -- that any  
14 sentence of death at the second proceeding would be excessive  
15 and disproportionate to any sentence, the sentence of life at  
16 the first proceeding, and that the statutory provisions under  
17 which the State intended to proceed were vague and overbroad  
18 under the Fourteenth Amendment to the Constitution.

19 QUESTION: Mr. Sindel, what if your client had been  
20 convicted by the jury or the judge and sentenced to the death  
21 penalty in the first proceeding and it was set aside on the  
22 Duren ground?

23 MR. SINDEL: I think that at that particular time  
24 since there had been no determination by the jury of an ac-  
25 quittal or that death was not the appropriate sentence in this

1 particular case, and a jury is specifically instructed in  
2 Missouri as to what they need to find. They need to find the  
3 existence of an aggravating circumstance beyond a reasonable  
4 doubt, and that that aggravating circumstance is not out-  
5 weighed by any mitigating circumstances that are presented,  
6 either statutory or non-statutory. If at that time the jury  
7 had obviously determined that in fact an aggravating circum-  
8 stance did exist, then I think the State would not be pre-  
9 cluded, because it would not be tantamount or substantially  
10 equivalent to a verdict of acquittal.

11 In this particular case the State had one full fair  
12 opportunity to present to the jury their version and why this  
13 defendant should suffer with his life. And at this, they  
14 presented all the evidence they wanted to, they presented all  
15 the evidence that they had. In fact, they have conceded that  
16 they have no additional evidence.

17 QUESTION: Does that make any difference? Suppose  
18 they did not make that concession, would you be arguing the  
19 same way here today?

20 MR. SINDEL: Yes, I would. I think that the verdict  
21 of acquittal -- I don't believe that the State can seize upon  
22 the opportunity because of the trial court's necessary action  
23 considering the Missouri Supreme Court's refusal to recognize  
24 the decision in Taylor, the trial court's necessary action in  
25 putting this defendant to a trial, I do not think that they

1 can seize upon that opportunity to muster additional evidence.

2 But I don't think that necessarily it makes any  
3 difference whether or not there is additional evidence or  
4 there is not, to the issue of double jeopardy. The question  
5 is whether or not this defendant was placed in jeopardy, whe-  
6 ther or not he went through the ordeal, the anguish of a trial,  
7 and whether or not he should be subjected to that same ordeal,  
8 that same anguish, a second time when a jury, unobjected to  
9 by the State, a jury composed, in their opinion, I assume,  
10 properly, can then render a verdict of acquittal.

11 There's no question in Missouri that the sentencing  
12 phase is functionally equivalent to a trial. There is no  
13 difference in a trial in the functioning phase except for the  
14 evidence that may be introduced.

15 QUESTION: Mr. Sindel, let me ask you one question,  
16 if I may. At the sentencing phase, the jury returned what  
17 was like a general verdict of, saying life imprisonment rather  
18 than death.

19 MR. SINDEL: That is correct, Your Honor.

20 QUESTION: Supposing your procedure required the  
21 jury to make special verdicts, and they had found that pur-  
22 suant to Instruction No. 38 even though the mitigating circum-  
23 stances do not outweigh the aggravating circumstances, as a  
24 matter of leniency we will not impose the death penalty.

25 MR. SINDEL: I believe that's -- excuse me.



1 QUESTION: Had that been done expressly, would you  
2 then have the same position here?

3 MR. SINDEL: I would. First, I would like to point  
4 out to the Court that that instruction does not have anything  
5 concerning leniency.

6 QUESTION: Well, I know, but it says they are not  
7 obligated to impose the death penalty even if they find in  
8 aggravating circumstance and also that the aggravating cir-  
9 cumstance is not outweighed by the mitigating circumstance.

10 MR. SINDEL: And I believe that that instruction is  
11 consistent with this Court's decision in Lockett, wherein they  
12 say that there has to be allowance of a broad scope to the  
13 defendant.

14 QUESTION: There's no problem with the instruction.  
15 My question is, what is your position if the jury had made it,  
16 articulated a basis for a decision that it was pursuant to  
17 this instruction rather than to any deficiency in the prosecu-  
18 tor's proof?

19 MR. SINDEL: But I think that that instruction does  
20 cover nonstatutory mitigating circumstances. As I read that  
21 instruction, and as it is given to the jury, it allows them to  
22 determine from all the facts in the case, not those specific  
23 facts of aggravating circumstances or mitigating circumstances  
24 but all the facts as to whether or not death is the appropriate  
25 sentence.

1 And I think that under that instruction, if they  
2 were in fact to return a verdict, special or otherwise -- in  
3 other words, if they returned a verdict saying, we just didn't  
4 find any aggravating circumstances, I think that obviously  
5 that would be without question an acquittal. If they returned  
6 a verdict and they said, the mitigating circumstances as sub-  
7 mitted were such that we determined that they outweighed the  
8 aggravating circumstances, again that would be the functional  
9 equivalent of acquittal. If they find --

10 QUESTION: Mr. Sindel, isn't your position really --  
11 why, for whatever reason the jury may have done it, they did  
12 not impose the death penalty, they imposed only a life sen-  
13 tence, and that act operates as an implied acquittal of the  
14 death sentence?

15 MR. SINDEL: Absolutely.

16 QUESTION: In other words, I gather, this would be  
17 an extension of Green, wouldn't it, if we were to agree with  
18 you?

19 MR. SINDEL: Yes, I believe it would be. Although,  
20 in Green they talked of an implied acquittal, and I don't be-  
21 lieve there is anything implied in this acquittal.

22 QUESTION: Would you say that it's an actual ac-  
23 quittal?

24 MR. SINDEL: It's an express acquittal. They had  
25 that choice and they came back with it. And they came back

1 and they said, we find that the State has failed to prove  
2 their case. So that in terms of distinguishing on that  
3 grounds, I think that it has more strength, even.

4 QUESTION: Well, it is possible, isn't it, that a  
5 jury, irrespective of the evidence, irrespective of instruc-  
6 tions, for whatever reason, they decide not to impose the  
7 death penalty?

8 MR. SINDEL: That is correct, Your Honor. The jury  
9 has complete power under the Constitution of the United States.  
10 They have the complete power to render any decisions that they  
11 wish and that cannot be attacked. It cannot be dissected. It  
12 cannot be circumscribed in such a way as to try and glean or  
13 pull from that decision why it came about. In this particular  
14 situation it's obvious that no matter where the determination  
15 came from it came down, and they said, death is not the appro-  
16 priate punishment, life is appropriate in this particular  
17 case, with this particular defendant.

18 And in the same way, by examining these factors and  
19 by determining that life in fact is the appropriate sentence,  
20 any other sentence under this Court's decision wouldn't  
21 necessarily be excessive and disproportionate; another part of  
22 our argument.

23 QUESTION: Mr. Sindel, in your answer to Justice  
24 Brennan's question a moment ago you said the jury expressly  
25 found that death would be an inappropriate sentence in



1 this case. Was there a written interrogatory or written  
2 special verdict to that effect, or are you simply relying on  
3 the fact that they came in with a life sentence rather than  
4 the death sentence?

5 MR. SINDEL: There is no special interrogatory or  
6 special verdict form that's allowed in the State of Missouri.  
7 However, I think that it's clear that if a jury comes back  
8 with a life imprisonment sentence, that they must have found  
9 that death was in fact inappropriate. There is very little  
10 that they could have otherwise found. The jury was death-  
11 qualified pursuant to Witherspoon, so there's obviously no  
12 people that are sitting on the jury that are so constituted  
13 that they could not impose the death penalty. These are indi-  
14 viduals who indicated under questioning that they could in  
15 fact impose the death penalty in the proper case under the  
16 proper circumstances. The only thing that can be concluded is  
17 that in fact this was not the proper case or the proper circum-  
18 stances.

19 Now, we would also contend that any sentence other  
20 than the sentence of life would have to be excessive and dis-  
21 proportionate under the Court's earlier decisions. There's  
22 no question that the jury had the opportunity to weigh this  
23 particular defendant and in the vital interest of the community  
24 and the vital interest of the defendant, they determined that  
25 the only appropriate sentence was life. So under those

1 circumstances a retrial and allowing another jury to deter-  
2 mine if the first jury was correct, and the Supreme Court of  
3 Missouri dealt with this by saying, we can't say whether or  
4 not the jury below was a maverick jury. You don't really know.  
5 But if you allow, if you allow the Supreme Court of  
6 Missouri to say that, then every time a life sentence comes  
7 down, they can say, that could have been the result of a  
8 maverick jury, and then the comparison test that is so vital  
9 to this Court's decisions in the holding that Georgia's  
10 statutes in Gregg, where they'd said that this appellate  
11 review is one of the vital elements that's necessary under the  
12 Eighth Amendment to insure and to guarantee both to the  
13 community and to the defendant that his rights under that  
14 amendment will be respected, will be lost.

15 I think it's important to point out in terms of the  
16 double jeopardy argument and in terms of every argument  
17 throughout this case that it is a death penalty case, and  
18 there's no question as to how unique it is. This is why per-  
19 haps Stroud and Pearce and Chaffin need to be reconsidered.  
20 They did not provide in those cases for the strict statutory  
21 guidelines for the sentencer's discretion. These guidelines  
22 are to focus the sentencer on the particular circumstances of  
23 the case in such a way that we can assure ourselves, assure  
24 society, and assure the defendant that he is getting the  
25 benefit of all the constitutional rights, because it is a

1 unique penalty.

2 QUESTION: So you're -- what about in non-death  
3 cases, where, in jury sentencing, and the jury comes in with  
4 a sentence of ten years and on retrial the other jury comes  
5 in with a sentence of 20 years?

6 MR. SINDEL: I think that there's no question under  
7 the Chaffin decision that that would be proper.

8 QUESTION: Well, I know, but your argument seems to  
9 me to require overruling those -- .

10 MR. SINDEL: I don't believe so. I think there's  
11 two distinguishing important questions. First, this Court  
12 recognized in distinguishing -- in the Gardner case they dis-  
13 tinguished Williams v. New York, a death penalty case, and  
14 they say, well, we think that due process requires that there  
15 be an adversarial proceeding and that the lawyer be disclosed  
16 the contents of a presentence investigation.

17 Now, there was no overruling of the Williams case  
18 because in U.S. v. Grayson that case was again upheld, and  
19 they said, the court can determine from the defendant's testi-  
20 mony if they believe that he was committing perjury, and they  
21 can use that, in fact, in sentencing. So there's no question  
22 that you do not have to overrule.

23 But it is perhaps necessary to reconsider the deci-  
24 sions in those cases for two reasons. One, those cases took  
25 place prior to this Court's decision in Gregg, recognizing



1 how unique and irrevocable and final the sentence of death is,  
2 and two, the idea that the sentencing phase of this trial is  
3 exactly like a trial. There are opening statements. There is  
4 the introduction of evidence, and the taking of testimony.  
5 There are instructions to the jury, there are arguments of  
6 counsel, there is then deliberation by that jury, and a ver-  
7 dict. This is the functional equivalent of an acquittal.  
8 If it walks, talks, and looks like a duck, it's a duck.

9           There can be no question that this defendant had to  
10 undergo the ordeals and the anxiety and the pressures that  
11 exist at trial. Now, this Court in Breed recognized the  
12 existence of those pressures and that ordeal in a juvenile  
13 court case and they said, well, then, it doesn't have perhaps  
14 as many pressures as a situation where you're on trial in a  
15 felony case, but it's still enough, and we recognize that  
16 the defendant has a right to be protected for having to undergo  
17 those ordeals again.

18           There can be no question, the magnitude of the ordeal  
19 when you are being tried for your life, and there can be no  
20 question that this needs to be protected, that the defendant  
21 needs to have the protection from this Court of having to un-  
22 dergo that experience again, and that the Double Jeopardy  
23 Clause guarantees it to him.

24           In this Court's decision in Di Francesco there was  
25 remarks concerning the finality of judgments, and we are here

1 talking about the finality of judgments, for that jury did  
2 render a final decision, a final verdict, and the State had  
3 their opportunity to make their case for death. And the  
4 defendant in that case, unlike the defendant in Di Francesco,  
5 had a right and was entitled to expect the finality and the  
6 repose that is guaranteed to him under the Double Jeopardy  
7 Clause.

8 And unless he is accorded that, there is no question  
9 that the State can seize upon the opportunity again and again  
10 and again.

11 QUESTION: Well, why should you rely on, be entitled  
12 to rely on what this jury did, when you say that jury was  
13 unconstitutionally constituted to render a decent verdict?

14 MR. SINDEL: There was one verdict that jury --

15 QUESTION: Apparently, you think it was enough of a  
16 jury for you to hang your hat on for an acquittal?

17 MR. SINDEL: Absolutely, because there is no ques-  
18 tion that that jury was empowered to acquit. If that jury --

19 QUESTION: Your position was that jury was a nullity.

20 MR. SINDEL: Excuse me?

21 QUESTION: Your position when you asked for a new  
22 trial was that in effect the jury was not a jury.

23 MR. SINDEL: Our position was that the jury was  
24 unconstitutionally composed.

25 QUESTION: So, then, it wasn't a jury, was it?

1 MR. SINDEL: Would there be any question in this  
2 Court if we had filed our motion, in that case, if they had  
3 returned a verdict of not guilty of murder, and perhaps guilty  
4 of one of the other offenses, that he could then be retried  
5 because we were able to obtain a reversal on that conviction?  
6 I think that Green talks specifically in terms of that kind  
7 of forfeiture. This is not a question of a waiver of rights,  
8 this is a question, then, does he forfeit the protections  
9 guaranteed to him under the Double Jeopardy Clause? And Green  
10 talks specifically in terms of forfeiture, and that he is not  
11 to lose his right to a constitutionally composed jury in ex-  
12 change for a valid plea of formal acquittal.

13 I think there can be no question in this case that  
14 that jury was constitutionally composed only to render a ver-  
15 dict of acquittal but they could unquestionably render that  
16 verdict.

17 QUESTION: I take it you anticipate a more  
18 sympathetic jury the second go-around?

19 MR. SINDEL: I certainly hope for a more sympathe-  
20 tic jury.

21 QUESTION: Even though a harder-nosed jury didn't  
22 give your man the death penalty?

23 MR. SINDEL: That's correct. I would -- I obviously  
24 have no idea what the jury's going to be like the second time  
25 around. I obviously hope that it's a sympathetic jury.



1 I obviously hope that it's a constitutionally composed jury.

2 QUESTION: Well, you'd like a second bite at the  
3 apple, wouldn't you?

4 MR. SINDEL: Well, I would like a second bite at  
5 the apple, but then there is no constitutional provision that  
6 forbids that second bite to me, but there is a Fifth Amendment  
7 provision that forbids that bite to the prosecuting attorney.

8 QUESTION: Well, it's just -- maybe it's just an  
9 accident that the flaw you found in your case was related to  
10 the jury. You might have gotten a reversal on some other  
11 ground that, in some other case, which wouldn't involve any  
12 attack on the jury?

13 MR. SINDEL: That's correct.

14 QUESTION: Then your issue would be cleaner now?

15 MR. SINDEL: I don't think that the issue would be  
16 any cleaner. I think that it would be identical.

17 QUESTION: Well, I know you don't, and you must not  
18 think so.

19 QUESTION: Well, what if the original conviction had  
20 been reversed for failure to suppress testimony secured in  
21 violation of Miranda? Would you say that the double jeopardy  
22 provision barred retrial with the possibility of the death  
23 penalty?

24 MR. SINDEL: Yes, sir. Absolutely.

25 QUESTION: How do you reconcile that with our

1 decision in United States v. Scott?

2 MR. SINDEL: Well, I -- well, my understanding is  
3 that if there was an acquittal of any offense.

4 QUESTION: Well, the jury convicts, an appellate  
5 court reverses, because there was improperly admitted evidence  
6 in violation of Miranda?

7 MR. SINDEL: But we are not asking the Court to set  
8 aside a verdict of conviction. We are asking the Court to  
9 recognize a verdict of acquittal, and that is a distinct  
10 difference. In Scott they did not talk in terms of whether --  
11 they did talk in terms but found that that was not an acquit-  
12 tal. But in this particular case it has no other coloring.  
13 It is an acquittal. There is no question that the jury was  
14 there and could acquit, that they had the evidence in front  
15 of them; the State has in the beginning conceded that there is  
16 no additional evidence. So it's obvious that whatever evidence  
17 they're going to present at the second trial, it's identical  
18 to the evidence that they presented at the first trial, and  
19 there is no reason that the defendant should have to undergo  
20 that ordeal. In fact, there's specific reason in the Consti-  
21 tution why he shouldn't have to undergo that ordeal. And  
22 there's no reason why the prosecution should have a second  
23 bite at the apple when what we have is an acquittal.

24 We do not have the -- setting aside the conviction  
25 because of preindictment delay, or because of motions to

1 suppress, or other motions that do not go to the determination  
2 of factual elements of the offense.

3 QUESTION: You're the one who is asking for the  
4 second bite, the State didn't ask for the second bite.

5 MR. SINDEL: Well, I asked for the second play,  
6 but I do not believe that by asking for the second trial I  
7 waive my rights to protection under the Double Jeopardy Clause.

8 QUESTION: Counsel, doesn't your argument really get  
9 down, as so many of these cases do, to the proposition that  
10 death is different?

11 MR. SINDEL: That is one part of the argument.  
12 There is no question that because death is different, this case  
13 has the two elements. One is the death, and one is the pro-  
14 cedures and the specific statutory guidelines that had been  
15 set up.

16 QUESTION: Well, as Justice Rehnquist pointed out,  
17 the authorities seem to be against you on most of the proce-  
18 dural points.

19 MR. SINDEL: But the authorities have never dealt  
20 with the situation in what's been a bifurcated trial. The jury  
21 is given specific guidelines, given instructions, submitted  
22 evidence to them, and then asked to make a determination as to  
23 whether or not that evidence is sufficient beyond a reasonable  
24 doubt to establish the elements of the State's case. And I  
25 think that that is the distinguishing characteristic that



1 cannot be ignored. I think also the fact that this is a death  
2 case makes it unique, perhaps the bifurcation.

3 The State argues that it is the bifurcation that we  
4 say is the unique part, but it's not really that. The bifur-  
5 cation serves the purpose both of the State and of the defen-  
6 dant. It precludes the defendant from having to be subject  
7 to evidence that would not be relevant to his guilt, but  
8 it also allows a State the opportunity to present that evi-  
9 dence in an effort to persuade a jury that in fact they should  
10 return a verdict of guilt.

11 In fact, under the statutory provisions in Missouri,  
12 the one in which it says it's outrageously or wantonly vile,  
13 horrible, or inhuman, I assume that at that they could present  
14 inflammatory photographs that would not be relevant to guilt  
15 or innocence and would be precluded from the trial. Under  
16 this particular circumstance they certainly could not come  
17 back into court after the jury had rendered a verdict of life  
18 imprisonment and say, wait a minute, I have some new photo-  
19 graphs, and these photographs absolutely will convince that  
20 jury they should return a verdict of death. Can I have  
21 another opportunity at it? It's precluded from that.

22 QUESTION: Well, what about the situation where you  
23 have another panel of 12 jurors and this panel of 12 jurors  
24 happens to believe three or four prosecution witnesses that  
25 the earlier panel did not believe?

1 MR. SINDEL: I don't believe it's a question of  
2 belief or not belief in this particular case, but I don't  
3 think that the prosecution is allowed the opportunity to again  
4 present their case to either strengthen it or to present the  
5 same case. He could not come back in and say, after a verdict  
6 of acquittal at a guilt phase, I'm sorry, the police officer  
7 just told me that he got a confession from this man. Can I  
8 come back in and resubmit the case to you? And some juror  
9 says, well, if I heard that, I would have convicted; you  
10 can't reimpanel that juror, once they have come back with  
11 acquittal.

12 QUESTION: You don't disagree, do you, that as to  
13 your double jeopardy contention, your client can be retried  
14 on the same charge, but the death penalty not sought?

15 MR. SINDEL: Absolutely not. I believe he can be  
16 retried. In fact, I think that Justice Harlan in the Tateo  
17 decision specifically points, and I think that is the point  
18 that perhaps the Double Jeopardy Clause hinges on. There has  
19 been the talk of the continuing waiver theory and whether or  
20 not he waives his right to the protection of the double jeo-  
21 pardy clause. But Harlan talks, Justice Harlan talks in terms  
22 of the balancing of society's interests as against the defen-  
23 dants' interest, and in this particular case society's  
24 interest has been vindicated, it has been properly represented  
25 as well as the defendants'. And at that time society through

1 this jury spoke and they spoke and said, this man does not  
2 deserve to die. I wish to reserve the balance of my time.

3 QUESTION: Just before you sit down, your argument  
4 would require us to directly overrule Stroud v. United States  
5 and to overrule what was said, at least, in North Carolina v.  
6 Pearce and other cases, wouldn't it?

7 MR. SINDEL: I don't believe so. I think it only  
8 required that they be reconsidered in light of this Court's  
9 decision in Gregg v. Georgia, recognizing --

10 QUESTION: Well, Stroud was a decision directly on  
11 this issue, wasn't it?

12 MR. SINDEL: It was a decision in which the jury was  
13 not presented with evidence as to why, in fact, a verdict or  
14 a particular sentence was proper. And it did not involve  
15 this either-or decision similar to the guilt or innocence de-  
16 cision in a trial, at the particular trial phase, at the  
17 guilt phase of the trial. Stroud does not, and I believe that  
18 the Gregg decision requires that Stroud be reconsidered in  
19 light of that. Stroud, individually, at that time, did not  
20 have the entitlement to finality that this petitioner deserves.  
21 And I think that it's only a reconsideration of Stroud rather  
22 than an overruling of the general principle there.

23 QUESTION: Well, I won't take any more of your time.

24 MR. CHIEF JUSTICE BURGER: Mr. Cook.

25 ORAL ARGUMENT OF JAMES J. COOK, ESQ.,

ON BEHALF OF THE RESPONDENT



1 MR. COOK: Mr. Chief Justice, and may it please the  
2 Court:

3 Petitioner in this case -- excuse me. My name is  
4 James Cook, Assistant Prosecuting Attorney for St. Louis County  
5 and I represent the respondent, the State of Missouri.

6 Petitioner in this Court has asked this Court to  
7 do certain things, but it is our position that if the death  
8 penalty is a legitimate state interest, and if jury sentencing  
9 is a legitimate State interest, and if as a general principle  
10 increased sentences on retrial does not go against the Consti-  
11 tution as long as we protect against vindictiveness, then  
12 there should be no prohibition against a State seeking the  
13 death penalty in this particular case.

14 We believe that what the petitioner asks this Court  
15 to do basically is to overrule Stroud, Pearce, Chaffin, and  
16 Di Francesco, at the very least.

17 First position is that the procedure that we now  
18 have for death penalty cases, that being the bifurcation,  
19 makes the sentencing like a decision of guilt or innocence.

20 QUESTION: Well, Mr. Cook, in Missouri is the jury  
21 ever asked to specifically determine what aggravating circum-  
22 stances and what mitigating circumstances they find present  
23 in the case?

24 MR. COOK: If they come back with the death penalty,  
25 they must state which of the aggravating circumstances they

1 have found beyond a reasonable doubt. If they come back with  
2 life, we don't know if they found that aggravating circum-  
3 stances existed, so as to ignore --

4 QUESTION: They may have found no aggravating cir-  
5 cumstances or they may have found that there were mitigating  
6 circumstances that outweighed the aggravating circumstances,  
7 or they just may have been merciful.

8 MR. COOK: Right. We don't know.

9 QUESTION: Suppose you did? Suppose there was a jury  
10 came in and said, we find, we impose life because the miti-  
11 gating circumstances outweigh the aggravating ones?

12 MR. COOK: I don't think that that would be a prob-  
13 lem here. I think you'd have a problem --

14 QUESTION: Well, would it -- could you then retry  
15 him?

16 MR. COOK: I think so.

17 QUESTION: And ask for death penalty?

18 MR. COOK: I believe so. Particularly in light of --

19 QUESTION: Well, what if they said, we find that  
20 aggravating circumstance A was not present? Could you then  
21 on retrial press that same aggravating circumstance?

22 MR. COOK: I'm not sure. I think that on one hand  
23 you could say res judicata.

24 QUESTION: Yes.

25 MR. COOK: On the other hand, though, this Court has

1 approved the statutory theory of Florida which is that even if  
2 the jury doesn't find the aggravating circumstances, the  
3 judge can. So I think that --

4 QUESTION: So you're relying mostly, then, on the  
5 fact this is a general verdict, and the jury just might have  
6 been merciful?

7 MR. COOK: I don't want to say I'm relying on that  
8 but I do assume that. What I'm relying on is that the proce-  
9 dure alone does not make this into a decision like --

10 QUESTION: Well, if you assume that the jury imposed  
11 life because they found there were no aggravating circumstances  
12 you have a problem about pressing the same aggravating circum-  
13 stances, if you just assumed that that's what the jury did.  
14 I would take your case as not so clear either if the jury said  
15 there are both aggravating and mitigating circumstances, but  
16 the mitigating circumstances outweigh the aggravating circum-  
17 stances and the State on retrial says, we're going to present  
18 precisely the same evidence.

19 MR. COOK: Right. I believe my position is easier  
20 because of the way the jury system is set up, the instructions  
21 under the general verdict type of approach to the specific  
22 verdicts. But I think that you still need to look at the  
23 policy behind why we apply double jeopardy. We apply double  
24 jeopardy not really because of the finality, or repose,  
25 or the other things that we've talked about. I submit that



1 this Court has suggested or found that we apply double jeopardy  
2 in order basically to protect the individual against  
3 government oppression. The Double Jeopardy Clause is in a  
4 way an exception to our basic legal system, which is to find  
5 the truth by having your day in court and making sure on  
6 appeal that that day in court was done properly. And under  
7 that system you would say, well, the State should be able to  
8 check and have an appeal to make sure that was done properly.

9 But we cannot protect against government oppression  
10 and still do that so we make a blanket exception to that and  
11 put it in the Bill of Rights and say, okay, the State only  
12 gets one shot. But we do give exceptions to that by saying,  
13 if the defendant appeals, the slate is wiped clean. We don't  
14 say that in a way of vindictiveness. We say that to emphasize  
15 the fact that it is only the defendant that can set aside a  
16 conviction. And of course he wouldn't be interested in setting  
17 aside an acquittal. So that when you would take this policy  
18 and you try to apply it to the sentencing procedures, or sen-  
19 tencing at all, as was recognized in several of the recent  
20 cases, it doesn't apply. Because you have said, or this Court  
21 has said that there's no absolute bar against increasing a  
22 sentence. The only concern we have against increasing a sen-  
23 tence is to protect against vindictiveness. And we say, in  
24 a judge sentencing situation, we have to do that by adding  
25 the Pearce limitations, but in the jury sentencing situation

1 we don't have that concern. There is not that concern about  
2 vindictiveness, so we don't need to have the double jeopardy  
3 applying to sentences.

4 Therefore, I think this procedure does not make  
5 this into an acquittal. Bifurcation is for the protection of  
6 the defendant, it is not meant to give the sentencing a greater  
7 finality than it ever had before.

8 QUESTION: Mr. Cook, suppose the statute said that  
9 you can be guilty of first degree murder and second degree  
10 murder, which I assume you have in Missouri.

11 MR. COOK: Yes, sir.

12 QUESTION: And if you're convicted of second degree  
13 murder, you're acquitted on first.

14 MR. COOK: Yes, sir.

15 QUESTION: In Missouri?

16 MR. COOK: Yes, sir.

17 QUESTION: So why isn't it automatically true that if  
18 you are found guilty of life imprisonment you are acquitted  
19 as to death? When you boil it down, that's what they're argu-  
20 ing, isn't it?

21 MR. COOK: Yes, sir, I think so. It's -- that ar-  
22 gument certainly has been made by members of this Court here  
23 and I just think that it is, when you look beyond that argu-  
24 ment, behind it, you see that there is a distinction between  
25 differences in sentencing and differences in offenses --

1 QUESTION: Well, what would be the difference if  
2 they said that you can get life for one or 100 years for the  
3 other, and it was the degree was used? It still would be --  
4 you'd go with the first, wouldn't you?

5 MR. COOK: I think you have to look at what that is  
6 entitled and what is --

7 QUESTION: But is the language really important or  
8 what happens is important?

9 MR. COOK: What happens.

10 QUESTION: The jury said, this man shall not be  
11 killed.

12 MR. COOK: That's right.

13 QUESTION: In the first hearings?

14 MR. COOK: Yes, sir.

15 QUESTION: And, but he was again put in jeopardy as  
16 to whether he should be killed or not.

17 MR. COOK: Because --

18 QUESTION: Right?

19 MR. COOK: That's correct.

20 QUESTION: That's correct, so.

21 MR. COOK: If -- well, that's not correct. You see  
22 he was not put in jeopardy about being killed again. He is  
23 put in jeopardy -- he's never lost jeopardy or he was put in  
24 jeopardy again when his case was --

25 QUESTION: What do you mean, he never lost jeopardy



1 when the jury came in?

2 MR. COOK: Well, that is true if you assume, Mr.  
3 Justice Marshall, that jeopardy applies to sentencing. And I  
4 don't think that that is what this Court has said in the past.

5 QUESTION: I didn't -- mine was just hypothetical,  
6 was that it had -- it wasn't sentencing, it was degree of  
7 crime.

8 MR. COOK: I see. Well, if the degree of the crime  
9 is different, then, yes, jeopardy would have attached and he  
10 would not be able to be charged with that. But then after he --

11 QUESTION: Well, if Missouri says, if you killed  
12 somebody with aggravating circumstances, you are subject to  
13 conviction of first degree murder and death. If you are  
14 guilty of homicide without those problems, you are guilty of  
15 second degree murder and sentenced to life. Right? Are you  
16 with me?

17 MR. COOK: Yes.

18 QUESTION: And the jury brings in a second degree  
19 verdict, life. Can you try him again on first degree?

20 MR. COOK: No.

21 QUESTION: So the only difference is words?

22 MR. COOK: No. I see what you're saying and I  
23 think that this Court has rejected that argument. There is a  
24 difference between sentencing and the offense, and although  
25 death is unique, certainly, and the fact that the death penalty

1 is available on one case certainly makes it unique, I think  
2 that there has been this historic distinction made between  
3 what you call an offense and what you call a sentencing.

4 QUESTION: I hope you realize that my hypothetical  
5 didn't say anything about limited to death.

6 MR. COOK: I understand.

7 QUESTION: Right?

8 MR. COOK: Yes.

9 QUESTION: We're together that far.

10 MR. COOK: Petitioner mentions that death is unique  
11 and therefore that is one of the reasons why this Court can  
12 distinguish this case from Stroud, or certainly, Pearce and  
13 Chaffin, and Di Francesco, even. I would suggest that, and  
14 agree, that that is unique, that the death penalty is very  
15 unique and this Court has bent over backwards, perhaps, to  
16 put out extra special procedures for making extra care that  
17 the death penalty is only imposed in certain specific situa-  
18 tions. But the uniqueness of death does not allow it to change  
19 the basic rules of law called double jeopardy and due process  
20 and equal protection, and that is what petitioner asks you to  
21 do, and asks you to say as far as Stroud and Chaffin and  
22 Pearce that in all cases except death penalty cases double  
23 jeopardy means thus-and-such, but in death penalty cases it  
24 means something else.

25 I don't think you can do that, because I think that

1 whittles away at the underpinnings of the whole legal system,  
2 which is the Due Process Clause, Double Jeopardy Clause. The  
3 other matter that --

4 QUESTION: Incidentally, I gather your colleague  
5 argues not only the Double Jeopardy Clause but Due Process,  
6 doesn't he?

7 MR. COOK: I think so; yes.

8 QUESTION: And what's your response to that argument?

9 MR. COOK: I think the Due Process Clause comes in  
10 here under the vindictiveness issue. Certainly that was the  
11 understanding in the Pearce case.

12 QUESTION: Only?

13 MR. COOK: I believe so. But we worry about vindic-  
14 tiveness as it applies to the sentencing by the jury --

15 QUESTION: And sentencing by jury doesn't apply then  
16 sometimes? I mean, Pearce doesn't apply to --

17 QUESTION: That's Chaffin v. Stynchcombe.

18 MR. COOK: Yes, Pearce does not apply because it's  
19 a jury sentencing and that's Chaffin and that's indicated  
20 that the concern that caused us to set the limits.

21 QUESTION: And you don't think the concept of death  
22 being unique makes this a different kind of due process  
23 claim?

24 MR. COOK: No. I think that this Court has histori-  
25 cally in applying due process made sure that certain procedures



1 are followed, that certain laws not be allowed to take away  
2 the defendant's due process, but it did not change due process,  
3 which is what I think you have to do to make an exception for  
4 the uniqueness of death.

5 QUESTION: Mr. Cook, hasn't the State of Missouri  
6 itself taken the view that death is different by setting  
7 up a special procedure for imposing the death penalty?

8 MR. COOK: Yes. I think so.

9 QUESTION: So, would it be necessarily undermining  
10 the entire legal system to say that the rules with respect to  
11 capital sentencing are somewhat different as a constitutional  
12 matter from the rules for lesser sentences? And that's cer-  
13 tainly implicit in the Gardner holding, isn't it?

14 MR. COOK: Yes, sir, I think that raises it perhaps  
15 too high, that it raises it above the constitutional proce-  
16 dures.

17 QUESTION: Do you think it's perfectly clear that  
18 the Di Francesco holding will apply to death cases -- to death?

19 MR. COOK: I think that the underlying assumptions  
20 and findings in the Di Francesco can apply too, yes; recog-  
21 nizing that sentencing is different, and whether that be a  
22 sentencing concerning death or not does not make any differ-  
23 ence here. Certainly in other situations and in the proce-  
24 dures that we follow and the safeguards that we set up, it  
25 does make a difference.

1 QUESTION: To put the question more directly, sup-  
2 posing Missouri had a procedure that if the jury does what it  
3 did in this case, find no death penalty is appropriate, would  
4 it be constitutionally permissible for the State to say, well,  
5 there shall be an appeal to an appellate court which could  
6 reverse that determination and decide that, well, we think  
7 there should be a death penalty, evidence of aggravating  
8 circumstances are pretty strong, and so forth?

9 MR. COOK: I think so, because I think that's what  
10 you have in Florida, where you have what is called an advisory  
11 jury opinion. But certainly I wouldn't think that this Court  
12 would allow a state legislature to just call something advisory  
13 when in fact it is a jury determination of finding of death or  
14 life. And certainly, in that situation, the judge can over-  
15 rule it. Now, there are certain procedural safeguards.

16 QUESTION: What about a procedure that said, we'll  
17 have a bifurcated hearing except that if the jury finds no  
18 death penalty we'll have a second jury empaneled and have them  
19 take another look at it and have a trial? I suppose that'd  
20 be permissible too. To just specifically say, the State shall  
21 have two chances to persuade someone that the death penalty  
22 is appropriate? That's, I guess, what they have in Florida.

23 MR. COOK: Well, sort of.

24 QUESTION: Would you think that would be permissible  
25 constitutionally?

1 MR. COOK: It doesn't sound good, but I don't know  
2 the details.

3 QUESTION: It's consistent with your position.

4 QUESTION: You would have exactly the same issue as  
5 you have in this case, wouldn't you?

6 MR. COOK: Well, then, you could -- I don't think so.  
7 It really doesn't sound very good, though, because, you see,  
8 the difference, the difference, I think, is that in this  
9 case -- in that case it is the government saying, aha, we want  
10 two shots at --

11 QUESTION: Well, here it's the prosecutor.

12 MR. COOK: No, it's the defendant. It's the  
13 defendant's --

14 QUESTION: No, it's the prosecutor who's filed  
15 these aggravating circumstances --

16 MR. COOK: That's correct.

17 QUESTION: And is going to ask for the death penalty  
18 again, wants to.

19 MR. COOK: That is correct. But it is the defendant  
20 who has at his own behest wiped the slate clean and allowed  
21 the sentencing to again come before the jury. And I think  
22 that's an important distinction again, not because of being  
23 vindictive to the defendant and saying, you can't have your  
24 cake and eat it too, and by golly, you asked for it.

25 QUESTION: Well, isn't that true in the case



1 I told you where you were acquitted on first degree, but con-  
2 victed on second degree? You can't try to rescind it on first  
3 degree, can you?

4 MR. COOK: That's correct.

5 QUESTION: So, I mean, it's the same thing here.

6 QUESTION: Even though the defendant wiped the slate  
7 clean, you couldn't try him again.

8 QUESTION: That's right. Only wipe the slate clean.

9 MR. COOK: But, again, I think that assumes a --

10 QUESTION: Well, there you mandate  
11 a distinction between offense and sen-  
12 tencing?

13 MR. COOK: Yes.

14 QUESTION: That's your only answer?

15 MR. COOK: Yes.

16 QUESTION: Well, that's a pretty good answer because  
17 you have authority to support you.

18 MR. COOK: I think so; yes. The other issues pre-  
19 sented by the petitioner include the disproportionate and  
20 excessiveness, which I'd like to address briefly.

21 It's argued that on one hand a sentence at the  
22 second trial of death would be automatically disproportionate,  
23 and the Georgia Supreme Court has so held. I argue that  
24 that is just, I don't feel logical, in that I don't think it  
25 was what was anticipated by the drafters of this legislation

1 nor by this Court when it approved the comparison of one case  
2 with other similar cases. I think that was authorized or man-  
3 dated, one, to protect against prejudicial imposing of the  
4 death sentence, let us say, only on minorities, or only on  
5 poor people; or, to protect against the aberrant jury.

6           Where we take one case and compare it with itself,  
7 though, how do you know which is the right decision? How  
8 do you know which one is aberrant? That's just, I don't  
9 think, logical. What this has anticipated here is looking at  
10 this case in light of other typical, shall I say, kidnap  
11 murder cases, or looking at a holdup murder case. And if in  
12 several holdup murder cases or kidnap murder cases similar  
13 to this the death penalty was not imposed, then this is the  
14 aberrant jury. Also --

15           QUESTION: What were the statutory aggravating cir-  
16 cumstances?

17           MR. COOK: Be wantonly vile, cruel, inhuman, and  
18 the substantial history of serious assaultive criminal con-  
19 victions.

20           QUESTION: Not a record of another capital offense?

21           MR. COOK: No. It was a prior kidnapping while  
22 armed offense, and a prior armed robbery offense. And there  
23 were other nonassaultive offenses also.

24           QUESTION: And it's conceded that the aggravating  
25 circumstances that will be filed will be identical this time,

1 and that the evidence will be virtually identical, isn't it?

2 MR. COOK: It's conceded that the aggravating circum-  
3 stances are identical. The State will attempt to present more  
4 evidence on this issue than it was allowed to the first time  
5 in that we were only allowed to read to the jury the stated  
6 offense, as opposed to giving the jury any of the facts of that  
7 case which would allow it to make a determination of whether  
8 it was a serious assaultive conviction or not. But that's a  
9 trial court decision that we're going to try to change the  
10 trial court's mind on.

11 I don't think disproportionateness applies, and  
12 excessiveness is also mentioned. I don't think that applies  
13 either, again for the same reason as I've indicated in the  
14 Proffitt decision where a death sentence following a life  
15 cannot per se be excessive. It may be, but you have to look  
16 at more than just the one other case.

17 There's a concern here that this decision would  
18 chill the right of the defendant to seek a jury trial in his  
19 second case, and of course the petitioner relies on the Jackson  
20 decision. It's our position that this Court has cited that  
21 issue in respondent's favor in Chaffin where, although it is  
22 concerned about that, it felt that those difficult decisions  
23 sometimes have to be made. And it distinguished Jackson, in  
24 that in Jackson it was stated that there was no other purpose  
25 or result of that procedure than to chill the defendant's



1 right to a jury trial. It's our position that there is another  
2 purpose or result in this procedure, and that is the stated  
3 and approved government, or State interest, in having jury  
4 sentencing, and that as long as you have jury sentencing, and  
5 as long as that is considered a legitimate State interest,  
6 then that is a legitimate State purpose or result.

7 Also, I would indicate that although Petitioner indi-  
8 cates that the defendant would be absolutely precluded from  
9 getting the death penalty if he waives his jury, that is not  
10 necessarily so, because he relies on the fact that he would  
11 then come under the Pearce provisions and the judge could not  
12 give death unless something new had arisen. But I don't  
13 think that we would ever be absolutely sure of that until the  
14 moment of sentencing. I'm not implying that anything new has  
15 arisen which would cause the judge in this particular case  
16 to give the death penalty but for the Court to find that  
17 this chilled his right because he would be absolutely precluded  
18 from getting the death penalty by the judge would not be  
19 accurate, because there may be those cases where the judge  
20 could in fact give the death penalty. So the decision is not  
21 the decision as it was in Jackson.

22 Petitioner also asked this Court basically to rule  
23 that the two aggravating circumstances here are too vague and  
24 overbroad. And the Missouri court has ignored this Court's  
25 rulings about the narrowing of the aggravating circumstance

1 that was decided in Godfrey. And certainly that is one of the  
2 circumstances we're using in this case. I would merely point  
3 out that the decision below in the Missouri Supreme Court  
4 was handed down before your decision in Godfrey, that the  
5 Missouri Supreme Court has not had the opportunity to decide  
6 any death penalty cases yet and has not had the opportunity  
7 to follow this Court's decision, and so we would ask that this  
8 Court give the Missouri Supreme Court the opportunity to  
9 constitutionally narrow those aggravating circumstances.

10 Thank you.

11 MR. CHIEF JUSTICE BURGER: Anything further,  
12 Mr. Sindel?

13 ORAL ARGUMENT OF RICHARD H. SINDEL, ESQ.,  
14 ON BEHALF OF THE PETITIONER -- REBUTTAL

15 QUESTION: Suppose, counsel, that you had gone for a  
16 new trial on the grounds that through some mistaken inad-  
17 vertence one of the 12 jurors that had rendered the verdict  
18 was not a citizen of the United States and therefore there was  
19 not a duly constituted jury. Then your claim would be there  
20 was no verdict at all, wouldn't you?

21 MR. SINDEL: Well, Your Honor, I still believe under  
22 those circumstances, especially under the circumstances where  
23 the State themselves had not complained about the composure  
24 of the jury, that the defendant after undergoing the ordeal of  
25 trial has a right to rely on that verdict if it is in fact

1 an acquittal. Regardless of whether or not the jury is pro-  
2 perly composed, if it goes to trial --

3 QUESTION: He doesn't rely very much on the verdict  
4 finding him guilty, does he?

5 MR. SINDEL: He relies on the verdict of acquittal.  
6 He does not rely on the verdict of guilty, because he needn't  
7 under this Court's decisions.

8 QUESTION: Well, you're using the term acquittal  
9 to describe the failure to return a death verdict?

10 MR. SINDEL: That's correct, Your Honor. I believe  
11 that it is functionally equivalent to acquittal.

12 I wish if I may respond to several points that were  
13 made by my brother.

14 QUESTION: Of course, that happened in Stroud too.

15 MR. SINDEL: But Stroud was prior to this Court's  
16 decision in Gregg recognizing how unique the death penalty was  
17 and did not have the same equivalency to a verdict of  
18 acquittal.

19 QUESTION: Well, then you're getting back to the  
20 basic proposition which I think is yours, that death is  
21 different.

22 MR. SINDEL: That is one part of it, and that the  
23 procedure used to obtain the sentence of death is different  
24 as well. I think that this is one of the reasons that  
25 Di Francesco needs to be overruled and this Court needn't



1 concern itself with overruling the Di Francesco case.

2 In fact, in oral arguments in that case, Mr. Frey  
3 who so ably represented the U.S. Government indicated that  
4 this was a question of legal air. We're not talking here  
5 about whether or not there's legal air. He also indicated  
6 that under certain circumstances -- in response to Justice  
7 Stevens' questions -- under certain circumstances, especially  
8 the death penalty, there are certain probative problems of  
9 procedural fairness that would have to be considered. So  
10 obviously Di Francesco does not apply to this particular case.  
11 Di Francesco did not have the adversarial proceeding  
12 that is contained and is mandated by Gardner v. Florida.

13 QUESTION: Well, it still isn't the case, I gather,  
14 Mr. Sindel, that your due process argument as distinguished  
15 from your double jeopardy argument is key to the concept  
16 that death is unique.

17 MR. SINDEL: I'd like to correct that point. If you  
18 read the brief -- well, excuse me -- but if the State would  
19 have properly read the brief, he'll see that nowhere do I  
20 raise the point that any sentence of death would be vindictive.  
21 That is not the point that we raise.

22 QUESTION: No, but is it central to your due process  
23 argument that death is unique?

24 MR. SINDEL: I believe so. I think Beck v. Alabama  
25 specifically says that. They say that because death is

1 unique, there is a higher requirement, and that Beck v.  
2 Alabama recognizes, although no other case recognizes, that  
3 lesser included offenses in a death case must be submit-  
4 ted, and that is because of the necessity for that higher re-  
5 quirement of due process.

6 I also believe that in applying death, it says that  
7 to apply the death penalty in the Beck case, there must be  
8 this elevated procedure that is followed, and there's no  
9 question that it has to be followed under the Eighth Amendment  
10 prescriptions.

11 I think that in Di Francesco the argument that was  
12 presented is consistent somewhat with Professor Westen's  
13 argument in his article that's quoted there, "The Triptych  
14 of Double Jeopardy," the idea that there are three things  
15 that Double Jeopardy Clause is to protect, the finality of  
16 jury verdicts of acquittal, the lawful administration of  
17 sentence, and third, the expectation of finality or repose  
18 that exists in the defendant after he has undergone the ordeal  
19 of trial.

20 I would suggest that if you use the Wayne technique  
21 that Professor Westen suggests, and also we cite to a new  
22 article that he has written in our supplemental brief,  
23 distinguishing Di Francesco, in which he talked specifically  
24 about this case, that argument would hold water, and that  
25 Di Francesco needn't be distinguished as well as Stroud and

1 Pearce needn't be overruled to sustain a decision in this  
2 particular case that Mr. Bullington need not undergo the or-  
3 deal of a trial again.

4 The prosecutor has indicated --

5 QUESTION: You mean the death sentencing procedure?

6 MR. SINDEL: That's correct. The prosecutor has  
7 indicated that at the second phase of the trial he looks to  
8 go into perhaps the facts surrounding the alleged serious  
9 assaultive convictions. These are 13-year-old convictions  
10 that the defendant had prior to this trial. I think that this  
11 is somewhat indicative of the problems --

12 QUESTION: If -- if we agree with you on the retrial  
13 which will go forward, will the jury do the sentencing?

14 MR. SINDEL: Yes.

15 QUESTION: And is there more than one --

16 MR. SINDEL: Yes.

17 QUESTION: Is there only one sentence it could  
18 give if it finds him guilty?

19 MR. SINDEL: Of capital murder; right.

20 QUESTION: So it has no -- there's no discretion?  
21 If you win on retrial and if he's found guilty, there can only  
22 be one sentence? Right?

23 MR. SINDEL: But if there were a mandatory sentence  
24 -- yes, that's right -- if there are mandatory sentences, it  
25 would be the same result.



1 QUESTION: Well, at the first trial they imposed a  
2 life sentence but then something about a 50 years?

3 MR. SINDEL: The provision under the statute is that  
4 he is to be sentenced to life without provision for probation  
5 and parole for a period of 50 years.

6 QUESTION: But that's statutory, that wasn't the  
7 jury's verdict?

8 MR. SINDEL: In essence he's buried.

9 QUESTION: So on retrial, if you win, there will be  
10 no need to present to the jury any evidence whatsoever with  
11 respect to sentencing?

12 MR. SINDEL: If I win here there will be no need.  
13 If I win there there will be no need either.

14 QUESTION: No, no, but if you win here on retrial?

15 MR. SINDEL: If he were to be found guilty of  
16 capital murder, then there would be only one available sen-  
17 tence.

18 QUESTION: Well, there wouldn't be a separate sen-  
19 tencing proceeding at all?

20 MR. SINDEL: There would be no need to because  
21 there would be only the one available sentence.

22 QUESTION: Exactly.

23 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.  
24 The case is submitted.

25 (Whereupon, at 10:55 o'clock a.m. the case in the  
above-entitled matter was submitted.)

CERTIFICATE

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-6740

ROBERT BULLINGTON

V.

STATE OF MISSOURI

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