OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-226

TITLE ARIZONA, Petitioner v. DENNIS WAYNE RUMSEY

PLACE Washington, D. C.

DATE April 23, 1984

PAGES 1 thru 35

ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

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ARIZONA :

Petitioner, :

v. : No. 83-226

DENNIS WAYNE RUMSEY :

- -x

Washington, D.C.

Monday, April 23, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:50-o'clock a.m.

APPEARANCES:

WILLIAM J. SCHAEFER, III, ESQ., Phoenix, Arizona; on behalf of the Petitioner.

JAMES R. RUMMAGE, EDQ., Deputy Public Defender, Phoenix, Arizona; appointed by this Court; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Schafer, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF WILLIAM J. SCHAFER, III

ON BEHALF OF THE PETITIONER

MR. SCHAFER: Mr. Chief Justice and may it please the Court, this case questions the propriety under the double jeopardy clause of the Arizona Supreme Court ordering a resentencing, following a life sentence that was imposed after the sentencer erroneously concluded as a matter of law that one of the statutory aggravating factors was not applicable to this case.

Now, the facts are rather simple. Dennis Rumsey decided to rob the motorist who picked him up. To accomplish that, he shot him. Rumsey was convicted of both murder and robbery. At the separate hearing to determine the sentence for murder, the State offered no new evidence to the sentencer, which by statute in Arizona is the trial judge. The State simply referred to the facts that had already been proved at the trial.

One of the aggravating factors, the State felt had been shown by the evidence that was introduced at the trial, was that the killing had been done for pecuniary gain. Now, without deciding whether that had

been shown or not, the trial judge said that that aggravating factor -- pecuniary gain -- applied to only a very narrow class of killers, hired killers, and it had no application to a robbery murder such as occurred here.

The State at the initial hearing also argued two other aggravating factors, claimed that they had been shown by the evidence, but the trial judge disagreed. In the special verdict where the trial judge is required by statute to list his findings on each of the aggravating factors under the statute, the judge found that there were none present, and he imposed a life sentence which the statute requires where no aggravation has been shown. The judge at that time also imposed a consecutive sentence for the robbery.

Now, both sides appealed to the Arizona Supreme Court; Mr. Rumsey from the consecutive sentences that had been imposed, and the State from the judge's legal ruling that the pecuniary gain circumstance applied only to hired killers.

QUESTION: Mr. Schafer, may I ask right there, would the State have had the right to appeal if the defendant had not appealed?

MR. SCHAFER: We would not have under the appeal statute, Your Honor.

QUESTION: So that, had he not appealed, we never could have reached this issue.

MR. SCHAFER: No. I don't below the second follows from the first. It is conceivable, and I believe still an open question in Arizona as to whether the State could have sought a special action. That has not been tested in the state court yet on this kind of a point.

There are -- I answered your first question directly to appeal. Under the appeal statute, we could not have. And that was discussed in the second Rumsey opinion.

QUESTION: There is some other statutory method of review in Arizona by which the prosecution can get a review of the sentences?

MR. SCHAFER: There is an action, which is called in the rules "Special Action," which permits the State or the defense, either part, to gain a hurry-up decision from the Supreme Court where it is claimed and is shown that there has been abusive discretion. And in this case, that may well have been sought, had the opportunity arisen.

QUESTION: And that's available in a case where there would be no appellate review otherwise.

MR. SCHAFER: Normally it is, Your Honor,

yes. It is a discretionary procedure.

We, as well as Rumsey appealed, and ours was only from this one point, the legal ruling that the trial judge made that the pecuniary gain factor didn't apply to this case. The Supreme Court held that the trial judge did make a legal error. They concluded that he erred as a matter of law in concluding that he could not decide that particular circumstance. And they sent the case back to the trial court for resentencing.

Now, without either side offering any evidence at the resentencing, the trial judge then found that the pecuniary gain circumstance had been shown.

QUESTION: Mr. Schafer, could the State and the defense offered evidence that there be sentencing?

MR. SCHAFER: Yes, Your Honor, we could have.

And with that finding, the judge then set the sentence at death. Rumsey's appeal was then automatic to the Arizona Supreme Court, and the Arizona Supreme Court reversed itself on the basis of Bullington v. Missouri.

The State sought certiorari because of its belief that Bullington is not implicated in this case, because there has been no acquittal in the trial court. And I believe that's the question that this Court must decide: Was there a resolution of the factual issue

against the State? We contend the record shows that there was not, that there was no rejection of our position that the murder was for monetary or pecuniary gain.

The reason for the holding in Bullington was that the State of Missouri had a full and a fair opportunity to muster its forces and to present its case to the sentencer. And in that case, the sentencer rejected the case of the State. The resolution of those factual issues against Missouri operated as an acquittal. Because the double jeopardy clause gives absolute finality to acquittal, Missouri could not be given another opportunity to present its case when it had failed to make its case the first time.

There was no such acquittal here. The trial judge did not decide the factual issue of pecuniary gain against the State. The only thing he decided in regard to that murder was that he was not going to reach the factual issue, because it simply didn't apply in the case.

Now, unlike Missouri's appeal --

QUESTION: This means, I suppose, Mr. Schafer, that further proceedings are necessary then?

MR. SCHAFER: I do not believe further proceedings are necessary at this point, Your Honor.

The relief we would ask for is that you overturn the Arizona Supreme Court opinion and allow them to go forward with the appeal.

The appeal from the death sentence has never been held.

QUESTION: In your brief, on page 19, you say that the trial court found that Rumsey committed the crime for pecuniary gain.

MR. SCHAFER: Yes.

QUESTION: You do not cite to the record on that. Is there a place in the record that you can support that statement?

MR. SCHAFER: I do at a further point in the brief, I believe, Your Honor, which is page 66 of the Joint Appendix.

Now, specifically, what I'm referring to in the brief -- and I pointed it out perhaps in a footnote in the brief -- is that in regard to the robbery, the trial judge made what I considered a finding as to pecuniary gain, a finding that the robbery and the murder were actually one act. The same force was used to accomplish both. And if you read what the trial judge did at 66, and especially -- page 66 of the Joint Appendix -- if you combine it with other things that were before the trial judge, I believe the conclusion is

inescapable that in his mind he had concluded that the murder was for pecuniary gain, that the case of the murder was the robbery, which our Supreme Court has defined under the murder statute as the definition of pecuniary gain.

Now, a little earlier when I spoke, I -- I believe made the statement that the trial judge did not make a factual determination in regard to the murder. I tried to be clear in the brief to show that his conclusion was really stated when he was sentencing for the robbery and not for the murder.

My point is that I believe the entire record shows that there was no question in his mind that he believed, if he could have considered that circumstance, that the murder was for pecuniary gain.

QUESTION: Mr. Schafer, what do you -- how do you distinguish the language of this Court in United States v. Scott when it said that the fact that the acquittal in a criminal case may result from an erroneous evidentiary ruling or erroneous interpretation of governing legal principals affects the accuracy of the determination, but it doesn't alter its character?

In other words, even though an acquittal might be based on an erroneous interpretation of law, it's binding for double jeopardy purposes. Now, to the

extent that the death sentencing curing is given similar characteristics, how do you distinguish that?

MR. SCHAFER: I distinguish it like this, Your Honor. I believe that there was no acquittal here. In Scott and other cases from this Court, there was an actual acquittal. There was nothing in this case that terminated the proceedings against the State, as this Court said last week in Lydon. There was nothing to show there but termination.

The only thing that could approach being an acquittal here was the trial judge's statement that "I am not even going to consider this," although I am paraphrasing, of course. And he went ahead, then, and finished with the sentencing, as he is required to do by statute, without even getting to that aggravating factor.

My point is that --

QUESTION: Well, the problem, of course, is that Bullington has treated the sentencing hearing as much like a trial for purposes of acquittal.

MR. SCHAFER: Yes, that is true.

QUESTION: So that's why, when you combine Bullington with Scott, you have a problem, don't you?

MR. SCHAFER: I think I have a problem, but i think the answer to that is, Your Honor, that even with Bullington and all of the language in Bullington, we can

argue, reasonably so, that there was no acquittal. Bullington does require an acquittal. There was an acquittal in Bullington of death, of course, but we have no such acquittal here. We have no such termination of the case against the State, and I think that's the distinction.

QUESTION: Mr. Schafer, doesn't that argument depend on your being right about the special action being a method of reveiw? Because if you could not have appealed independently, could it not be said that the case on sentencing was over against the State?

MR. SCHAFER: If we had no method of appeal, Your Honor, I think I would have to --

QUESTION: Wouldn't that have been equivalent to an acquittal?

MR. SCHAFER: At the State -- well, I would --

QUESTION: So that doesn't the case under your approach really require us to decide whether you did have this method of review otherwise?

MR. SCHAFER: I would not like to concede that, but logically, Your Honor, I believe I'd have to say that there would be a termination in our favor because we could go nowhere from that.

QUESTION: Well, try this one. Assuming that the Court finds that you're guilty of second degree

murder but not first degree murder, is that an acquittal of first degree murder?

MR. SCHAFER: I think it would be under your Greene opinion. Yes, Your Honor.

QUESTION: Well, suppose the statute says of the state of Podunk that people guilty of second degree murder are sentenced to life automatically, and people guilty of first degree murder are sentenced to death automatically, and the Court finds him guilty of second degree murder? Could he later be found guilty, and death?

MR. SCHAFER: I believe under Greene, he could not be. He would have been acquitted of first degree murder, which would --

QUESTION: And the difference between that and this case is that the statute doesn't say it specifically.

MR. SCHAFER: Or the statute does not say that at all, Your Honor, yes.

QUESTION: Any other reason?

MR. SCHAFER: There is no acquittal in this case. There is no acquittal as there would be in the hypothetical you've asked me. There is a decision by the trial judge to avoid any termination of proceedings on this particular point on pecuniary damage.

Unlike Missouri's appeal, the State's appeal here and the relief given by the Arizona Supreme Court did not involve the State proving its case all over again. In Bullington, Missouri said it was going to do that. That's exactly what it said: We are going to prove the case that we presented before.

But Arizona did not have to represent its case. The facts of its case had already been presented and proved at the trial. What Arizona asked for in its appeal was to correct the error that had been made, and in that sense it was much like the appeal the government took in the DiFrancesco case. That appeal was to correct an error by the sentencer, and that appeal was upon the record that was made in the sentencing court. That's the same thing that was done here by the State of Arizona.

If the controlling consideration behind the double jeopardy clause where there is an acquittal, is to prevent the government oppression that would come with repeated efforts to convict and to make up its deficiencies in the State's case with each new effort of reprosecution, then applying the double jeopardy clause here would not accomplish that. Once jeopardy attaches, before a defendant can claim that there has been a second jeopardy to which he has been put, he just show

that the first jeopardy was terminated.

But it was not terminated here. And I believe, absent that, Bullington really does not apply to this fact situation.

If my argument has been unpersuasive, if the Court feels that Bullington must be applied to this case, then I urge the Court to reconsider its holding in Bullington. In DiFrancesco, this Court recognized that, historically, double jeopardy principals had not been applied to sentencing proceedings. There is a fundamental difference, said the Court, between the two procedures that required that. And we have the Pearce, Chaffin, and the Stroud decisions that recognize that distinction. And Stroud involved a death sentence after a life sentence. Bullington did not overrule Stroud. It was felt that there was no need to overrule Stroud, that what distinguished the two cases were the number of trial protections given in Bullington that were not present in Stroud.

The effect of that recognition is that the more trial attributes a state builds into its sentencing procedure, the more likely it is to lose the ability to eliminate aberrant sentences like that given to Dennis Rumsey.

Since 1972 and the Furman case, we, the states

who have dealth penalties, have been dcing what we can to eliminate aberrant death sentences. Bullington, I believe, impedes that progress. If a state today were to draft a new death penalty statute, and it wanted to do the most that it could tc produce an informed and a rational final sentence, it would want to retain scme kind of review flexibility. The only way that it could cope with Bullingtcn in that regard would be to write intc its prccedures as few trial attributes as possible to take it away from the holding in Bullington, and perhaps return it to a case like DiFrancesco or Strcud. And that would not be the signal that should be sent to such a state.

Our argument is that Bullingtcn dces not apply because there has been no final termination factually against the State's point.

And with that, I would like to reserve the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Rummage.

ORAL ARGUMENT OF JAMES R. RUMMAGE, ESQ.

ON BEHALF OF THE RESPONDENT

MR. RUMMAGE: Mr. Chief Justice, and may it please the Ccurt, the matter that's presently before this Ccurt is actuallya classic case of double jeopardy and it falls within none of the recognized exceptions to

the double jeopardy clause.

After the sentencing hearing before the trial court in this matter, a hearing which amounts to a trial, there was a final verdict of acquittal as to those facts which were at issue. On his appeal, on his direct appeal, respondent won nothing. He certainly did not win a retrial, as was the case in Chaffin, Pearce, Stroud, and even Bullington.

There is no justification under the double jeopardy clause for reviewing respondent's acquittal at that sentencing trial and allowing the State to retry those factual issues which were already resolved against it.

At the sentencing hearing or --

QUESTION: Which of our cases would you think makes this certainty that you've just asserted?

MR. RUMMAGE: I'm sorry, Your Honor. Which certainty are you referring to?

QUESTION: Well, the certainty that this was an acquittal, that it was the functional equivalent, take it you said, of an aquittal.

MR. RUMMAGE: Yes, Your Honor.

Well, first of all, of course, Bullington essentially states that. In Bullington, when the defendant was sentenced to life, this Court stated that

that was an acquittal as to the death penalty. Here, we have even more certainty that there was an acquittal. The Court made the finding -- and I think this is important, Your Honor -- the Court made the finding that the defendant did not commit this offense in consideration for the receipt or in expectation of the receipt of anything of pecuniary value.

That, to respondent, Your Honor, seems to be about as direct as an acquittal -- an acquittal as there can be.

At the sentencing hearing or trial following his conviction for first degree murder, Dennis Wayne Rumsey was put in jeopardy of his life. Depending on the factual determinations made by the trial court, he would either be subject to the death penalty or not subject to it. Either he would be guilty beyond a reasonable doubt of whatever is necessary to receive the death penalty, or he would be not guilty.

In its special verdict, the trial court announced, as required by Arizona law, its factual findings as to each individual aggravating circumstance. The Court found that no aggravating circumstance had been proven, and specifically found, as I just mentioned, that the offense was not committed for pecuniary gain as described by the statute.

Respondent appealed, the State cross-appealed. The only issues raised by respondent on his direct appeal involved the consecutive nature of his sentences. He did not even seek to have his convictions overturned.

QUESTION: What do you say about the statements of the trial judge at page 66 of the Joint Appendix that your friend alluded to earlier?

MR. RUMMAGE: Well, Your Honor, those statements --

QUESTION: Seems to be somewhat in conflict with what he said elsewhere, and --

MR. RUMMAGE: With what the judge had said elsewhere?

I don't believe there is a conflict, Your Honor, and this is the reason. On page 66, he essentially was stating what the evidence at trial was. He was essentially restating that, saying that Mr. Rumsey planned a robbery; the robbery ended up with this guy being killed.

QUESTION: Well, he was a little more specific than that, wasn't he? I don't have it at hand. You might read that. It's in the lower part of the page.

MR. RUMMAGE: Yes, Your Honor.

"The defendant planned this robbery, which

resulted in the needless death of an individual who befriended the defendant and girlfriend, in order to obtain what the defendant knew was only a few hundered dollars, to possibly obtain the victim's car, although the Court is satisfied the primary motive was to receive something in the approximate sum of a few hundred dollars."

QUESTION: That sounds like a homocide for gain, doesn't it?

MR. RUMMAGE: Well, Your Honor, obviously there is a gain or an intent to gain. First of all, the Court did not state that the purpose of the murder was to gain. The Court stated, that it resulted in the needless death of the individual, but not that the purpose of the murder was to gain.

QUESTION: Mr. Rummage, how about -- take the paragraph right after the one where you were reading, at the top of page 67. There, he does say it was an aggravating circumstance, doesn't it?

MR. RUMMAGE: An aggravating circumstance as to the armed robbery. And I need to answer your questions and finish the Chief Justice's answer at the same time.

As far as finding it is an aggravating circumstance for the robbery, as I pointed out in my

brief, Your Honor, he found that as an aggravating circumstance under the subsection that permits finding anything that is appropriate as an aggravating circumstance for a non-capital crime. He did not find that as an aggravating circumstance under the statute which provides that the crime was committed for pecuniary gain.

That leads me to the second part of my answer to the Chief Justice's question, which is the judge at trial interpreted the statute, and I think subsections 4 and 5 are read together by him. He interpreted the statute which uses that pecuniary gain language as meaning a murder for hire.

And again, as I pointed out in my brief, this is not some sort of off-the-wall interpretation. It's an interpretation that was shared by one of the justices of the Arizona Supreme Court at the time the issue was decided, and it's an interpretation that has since apparently been shared by another one of the members of the Arizona Supreme Court.

So it is not a totally absurd construction of the statute. This is the construction that he applied. There was no direct interpretation of the statute at the time. He determined that factually, these facts do not fit into that aggravating circumstance.

QUESTION: Well, your argument would be the same, even if it was absurd.

MR. RUMMAGE: Well, it really would, Your Honor. I think it perhaps --

QUESTION: Even if the Supreme Court had already construed the statute, and the trial judge just didn't know about it and construed it himself, contrary to the --

MR. RUMMAGE: That would be correct, Your Honor.

QUESTION: And you would still be here, taking the same position.

MR. RUMMAGE: Pardon me, Your Honor?

QUESTION: You would still be taking the same position.

MR. RUMMAGE: Yes, Your Honor. I think, though, that the fact that it is not an absurd construction, or at least was not considered absurd by two members of the Arizona Supreme Court does lend some strength to the argument.

On direct appeal or on the State's cross-appeal, the State sought review of the trial court's failure to find the pecuniary gain aggravating circumstance. Respondent did not prevail, obviously, on appeal the first time. The State did prevail. And as a

result, the State was allowed to conduct a new presentence hearing at the which the State attempted once again to prove several aggravating circumstances to the trial court. An entirely new special verdict was issued in which the trial court, essentially citing the Arizona Supreme Court's first opinion in this matter, found that the pecuniary gain aggravating circumstance existed.

In essence, the chronology of this case, as far as the sentencing is concerned, was this: Respondent was acquitted of those things necessary for the death penalty. The State appealed from that acquittal, and respondent was retried and then convicted. This is a clear violation of the guarantees of the double jeopardy clause, whether analyzed in terms of traditional double jeopardy law or in terms of the particular application of the double jeopardy clause described in Bullington v. Missouri.

Upon his conviction for first degree murder alone, respondent could not be given the death penalty. Without more, life was the only possible sentence. Before the death penalty could be imposed, the State was required at the presentence hearing to prove beyond a reasonable doubt the existence of one or more aggravating factors.

The trial judge's conclusion in his special verdict that none of those aggravating factors existed represented a resolution in respondent's favor, correct or not, of some or all of the factual elements charged.

Thus, as this Court has stated more than once, there was an acquittal. As this Court has stated repeatedly since 1896, one of the most fundamental rules of double jeopardy jurisprudence is that a verdict of acquittal may not be reviewed without putting the defendant twice in jeopardy.

QUESTION: Mr. Rummage, in Arizona there is a separate verdict returned by the jury, is there, on the guilt, nonguilt phase?

MR. RUMMAGE: That is correct, Your Honor.

QUESTION: And then it simply goes to the trial judge and he alone does the sentencing?

MR. RUMMAGE: Yes, Your Honor. That is correct.

QUESTION: And it's the acquittal on the sentencing issue that you're talking about here. There was no acquittal on the guilt.

MR. RUMMAGE: There was no acquittal by the jury in the guilt phase of the trial; that is correct.

QUESTION: And you say this is different from DiFrancesco because it's a capital case, and therefore

it comes under Bullington?

MR. RUMMAGE: It is different from DiFrancesco for a number of reasons, I believe, Your Honor. First of all, one that is significant is that in DiFrancesco, there is a statute that particularly provided for appeal.

No. 2, the burden of proof in DiFrancesco was not the burden beyond a reasonable doubt.

QUESTION: Whether there's a statute that provides for appeal is basically a question of state law, isn't it, or federal law? How would that affect the constitutional issue?

MR. RUMMAGE: Well, Your Honor, that's really correct. Obviously, there can't be a provision for appeal if it violates the Constitution.

QUESTION: No. If Congress provides tomorrow that the Government can appeal from any jury verdict of not guilty, that doesn't mean it's okay.

MR. RUMMAGE: That's absolutely correct, Your Honor.

In any event, DiFrancesco is distinguishable from the present case, for several different reasons. First of all, the burden of proof in DiFrancesco was not beyond a reasonable doubt. I believe it's by preponderance of the evidence.

Secondly, the choice of sentencing, the range

of sentence that was provided to the sentencer was quite large. As I believe was the case in DiFrancesco, the effect of the sentence that he received for being a dangerous special offender was an additional year beyond the sentence that he was already serving. And given the possibility of making concurrent sentences as they were in DiFrancesco, presumably the sentence could have been zero, a range from zero, I believe, to 25 years.

In this case, there is no such range of sentence. It is one or the other, life or death, just as it would be guilty or innocent at a trial on the question of guilt or innocence.

Beyond that, in DiFrancesco, the defendant was found to be a dangerous special offender. And the appeal that the government took was essentially an appeal from the length of the sentence that was imposed. In this case, when -- in this case, Mr. Rumsey was not found to be guilty of those things, the aggravating circumstances, which would allow the imposition of the death penalty.

So that, I believe, too, is a significant distinguishing characteristic.

As this Court has said, the law attaches a particular significance to an acquittal. An acquittal absolutely shields the defendant from a retrial. To

permit a second trial after an acquittal, however mistaken, would present an unacceptably high risk, as this Court has stated, that the innocent may ultimately be found guilty.

These considerations all apply directly to the case before this Court.

In addition to those general double jeopardy considerations, the particular considerations, the particular analysis that was presented by this Court in the Bullington v. Missouri decision applies to this case as well.

The sentencing here, as the sentencing in Bullington, was not a traditional sentencing. It was not merely a decision by the sentencer, in his discretion meting out what he felt justice required. The sentencer here, as in Bullington, had the choice of life or death, essentially guilty or not guilty of those things that could result in the death penalty.

There are specific standards that are provided to the sentencer in determining whether the sentence of death may be imposed or, in Arizona, must be imposed.

And finally, the burden of proof regarding those aggravating circumstances is on the State, a burden of proof beyond a reasonable doubt. So under traditional notions of double jeopardy law, as well as

this Court's holding in Bullington v. Missouri, the State should not have been allowed to retry the respondent a second time on the issue of whether his first degree murder was a first degree murder with aggravating circumstances subject tc the death penalty.

Petitioner argues that the Arizona sentencing procedure does not resemble a trial sufficiently to call the double jeopardy clause intc play. Cbviously, respondent disagrees with that. There are certain objective factual issues which must be resclved at the Arizona sentencing hearing, just as there are at a trial. The State must carry the burden of proof beycnd a reasonable doubt as to thcse factual issues, just as at a trial. If the State prevails at the hearing, the authorized punishment cf death must be imposed. If the State does not prevail, the authorized punishment cannot be impcsed, just as at a trial.

At the Arizona sentencing hearing, it is truly an issue of guilty or not guilty of thcse things fcr which the penalty of death is authorized.

Petitioner recites in his brief a litany of mincr differences between the Arizona and Misscuri capital sentencing procedures, in the hope of convincing the Court that the dcuble jeopardy clause does nct apply in the present case, as it does in Bullington. In fact,

those differences that do exist either are insignificant to the double jeopardy issue or they make Arizona's procedure even more like a trial than is Missouri's.

First of all, the fact that a judge is a fact finder in Arizona makes no difference, as double jeopardy law does not discriminate between bench and jury trials. Contrary to petitioner's assertion, Arizona procedure does not provide -- does provide for an argument to the court -- essentially a closing argument.

Third, the fact that the rules of evidence do not apply to mitigation in Arizona is not significant. What is significant is that the rules of evidence apply to aggravating circumstances, those things which must be proven in order to result in the imposition of the death penalty. This implies that the risk of error at that hearing is on the State.

Another distinction that petitioner has set forth is that aggravating circumstances that are found in Missouri must separately be found to be sufficient to -- for the imposition of the death penalty. The fact that this is not the case in Arizona, this separate proof of sufficiency for imposition of the death penalty, really does not make Arizona's procedure less like a trial. At a regular trial, the State does not

have to prove, once it's proven the elements of the crime beyond a reasonable doubt, does not have to prove separately that they are sufficient for a conviction. Once they are proven, that results in conviction.

Finally, the fact that Arizona's procedure does not allow the Court to exercise compassion and sentence a defendant to life, even though the State has proven its case, makes the Arizona procedure more like a trial than Missouri's. Never at a trial on guilt or innocence is the jury ever instructed that even though they find the State has proven their case beyond a reasonable doubt, that they can still acquit the defendant.

The petitioner also attempts to fit the present case into the mold of United States v. DiFrancesco, rather than the mold of Bullington. All the similarities that this case shares with DiFrancesco are also shared with Bullington, and mean nothing with regard to the double jeopardy clause.

I've already recited in my answer to Justice Rehnquist the differences between the Arizona proceeding and the proceeding in DiFrancesco which are significant to this issue.

Petitioner argues that the Arizona sentencing procedure is not the final step. This, of course, is

true only when the death penalty is imposed. It is not true when a life sentence is imposed, as was made abundantly clear in the Arizona Supreme Court's second Rumsey opinion.

I believe this touches on a question that was asked by Justice Stevens of petitioner regarding -- well, which was answered by petitioner by referring to the Arizona procedures known as "Special Action" to the Supreme Court. Petitioner has stated that this is an open question in Arizona as to whether the State could have proceeded by means of special action.

I would submit to this Court that, given the fact that the double jeopardy clause is called into play, it does not matter whether the special action law could be used or not. It could not, under double jeopardy considerations, be used.

Petitioner also has argued that the Arizona death sentencing procedure is no different from the procedure for imposing a sentence less than death. In fact, respondent would submit that from beginning to end, the procedures are totally different. There is notice required of aggravating circumstances in a death penalty proceeding, but in a non-death penalty sentencing proceeding there is no notice required.

In death proceedings, there is a required

hearing that must take place. In non-death penalty proceedings, there is no required hearing. The Court can impose an aggravated sentence in Arizona on a non-death penalty case without holding any hearing at all.

The burden of proof on the State is on the State at a death penalty sentencing proceeding in Arizona to prove beyond a reasonable doubt those aggravating factors which would justify the death penalty. With non-death penalty sentencing procedures, thereis no burden on the State to prove anything. The Court can merely find the aggravating circumstances. There is no proof beyond a reasonable doubt requirement.

The choice at sentencings other than death penalty sentencings in Arizona is not a choice between life and death. It's a broad choice, a broad range of sentences from which the sentencer can select. The aggravating factors in a death penalty sentencing proceeding are limited to those set forth in the statute, but in a non-dealth penalty sentencing proceeding, they can include anything that the Court deems to be appropriate.

Finally, in a death penalty sentencing proceeding, a special verdict is required at which the sentencing judge must set forth his findings as to each

and every aggravating circumstance. This, of course, is not required in a non-death penalty sentencing procedure.

Petitioner states that if the Arizona procedure does amount to a trial, then the State of Arizona proved its case at the first hearing and that the judge found that the State proved its case, but refused to find it to be an aggravating circumstance. Respondent, again, disagrees. The Court specifically found that the State did not prove its case; that the facts -- the facts proven did not constitute the conduct prescribed by the statute.

Petitioner further claims that the State's appeal herein was the same as an appeal from an erroneous directed verdict after a guilty verdict, which would merely require reinstatement of the verdict.

Well, respondent is at a loss as to which verdict is to be reinstated: the verdict which stated that the defendant did not commit the offense, in the expectation as consideration for the receipt or in expectation of the receipt of anything of pecuniary value; or the verdict which said there are no aggravating circumstances; or the verdict which said the defendant shall be sentenced to life rather than death.

Clearly, the analogy does not hold up. There is no verdict to be reinstated, no verdict in favor of

the State that can be reinstated. The only verdict is a verdict in favor of the respondent.

Petitioner has asked this Court to, if all else fails, reconsider the Bullington rule. Respondent would submit that that is not appropriate. It is particularly not appropriate in this case, which respondent believes presents a much stronger double jeopardy case than even Bullington did.

In any event, respondent submits that Bullington does not blur the distinctions between trials and sentencings, as petitioner has argued. There is a clear line drawn in Bullington. Bullington says that when the sentencing -- when the factual findings that lead up to that sentencing constitute a trial, when there are particular facts that must be proven by the State in order to reach the determination that the death penalty is to be imposed, and when those factors must be proven beyond a reasonable doubt, when there is a choice between only two alternatives, then you don't have a sentencing, you don't have the mere imposition of a sentence, you have a trial, you have a factual determination by the finder of fact.

Petitioner made a very noteworthy comment in his brief. In attempting to distinguish this sentencing procedure from a trial, petitioner stated that the

reason the rules of evidence apply to aggravating circumstances and the reason those circumstances must be proven beyond a reasonable doubt is to -- and I quote -- "require more credibility and reliability of the facts upon which the death sentence may rest."

No doubt this last statement that I quoted from petitioner's brief is true. The intent here was to require more credibility and more reliability of the facts upon which the death penalty may rest. This, respondent would submit to the Court, is why the Arizona sentencing procedure resembles a trial. These are the same things that are required at a trial, because the determination has been made that society, the State, will impose upon itself almost the entire risk of error.

This certainly must even be more true when the death penalty is the final verdict. When the verdict of guilty is the death penalty, it must be more true than in any other criminal trial. The double jeopardy clause, therefore, must be applied to this case and it absolutely shields the respondent from the retrial which resulted in the imposition of the death penalty.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, counsel?

MR. SCHAFER: No, I have not.

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

We'll hear arguments next in Thigpen against Roberts.

(Whereupon, at 11:37 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
#83-226 - ARIZONA, Petitioner v. DENNIS WAYNE RUMSEY

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BY _____
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